

**THE  
SALE OF GOODS ACT, 1930  
(ACT III OF 1930)**





*Commercial Laws of India (Volume I)*

# **THE SALE OF GOODS ACT, 1930**

**(ACT III OF 1930)**

*(With an exhaustive, critical and analytical commentary,  
up-to-date Indian & Foreign case-law, Index, Table  
of Cases, and several useful Appendices)*

*by*  
**OM PRAKASH AGGARAWALA**  
*Formerly of the Punjab Civil Service*

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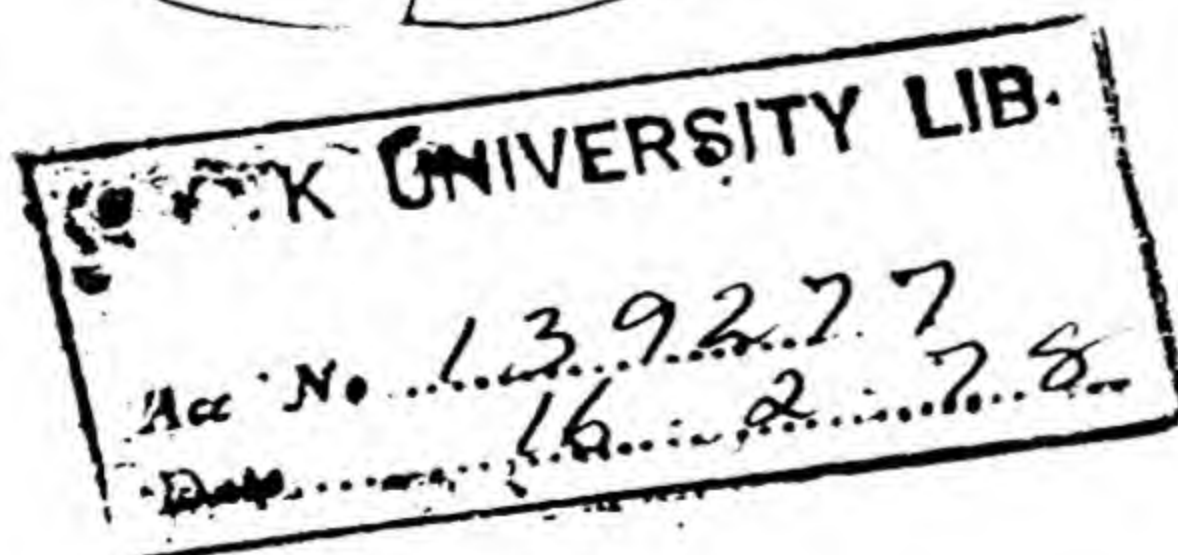
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## **PREFACE TO THE TENTH EDITION**

It is my proud privilege to thank most heartily once again my esteemed readers for affording me a rare and perhaps unique opportunity to revise during my life-time my book on 'The Sale of Goods Act', for its tenth edition. At the same time, it gives me great pleasure to find that my work on this important branch of commercial law has been highly appreciated by those who have to deal with it in one capacity or the other. This is evident from the record sale of the book, demand for which is still unabated ; rather is growing more and more everyday. I acknowledge with gratefulness this patronage of my work on the part of my worthy readers who have abundantly recognised its merit and usefulness.

For a book which is going in its tenth edition, there is not much to write by way of preface except to point out that, as before, the book has been thoroughly revised, authorities rechecked and case-law, both Indian and foreign, and references to text-books, as far as practicable and necessary, brought up to date.

I acknowledge once again my debt to the various Law Reports, Law Journals, Text-books and other sources which I have consulted in writing my book, and which I have already acknowledged with gratitude in my previous editions of the book. For the present edition of the book, as before, I have, in particular, taken considerable help from All India Reporter, Yearly Digest and English Law Reports, to the learned editors of which I most gratefully acknowledge my indebtedness. To Shri B. Vira Gupta, Managing Director of the publishers, I offer my thanks for seeing the book through the press, for clear printing and excellent get up of the book, and for pricing, when the cost of production is extremely high, comparatively low in spite of the volume consisting of about one thousand pages.

**OM PRAKASH AGGARAWALA**





## PREFACE TO THE NINTH EDITION

I am highly grateful to my esteemed readers for affording me opportunity to revise during my life-time, my book on 'The Sale of Goods Act, 1930', for its ninth edition. It is indeed most gratifying to note that the book has served its purpose well and is quite popular both with the Bench and the Bar and all commercial establishments which have to deal with the sale of goods and must necessarily be conversant with the law relating to it. I feel with a sense of gratitude that a little service that I have done to the legal public in this field has been amply rewarded by this being the only book on the subject in India which has undergone nine editions in a comparatively short period, and has stood the test of time well. There can be no greater satisfaction to an author than to find that his book has been well appreciated by those for whom it is meant and demand for which is ever on the increase. I once again express my heart-felt thanks to one and all for the encouragement that I have received at their hands, and which I regard as my great asset.

For its present edition the book has been thoroughly revised and completely overhauled. As those who have had occasion to use the book know fully well, that the basic feature of this book is that (i) propositions of law on the subject have been lucidly enunciated in a clear, precise and accurate language, as far as possible in the words of the learned Judges themselves in their judgments delivered from time to time in the relevant cases coming before them for decision, (ii) citation of the authorities in support of the propositions of law enunciated herein, and (iii) giving the facts of the cases to serve as a back ground for the correct appreciation of the propositions of law in their applicability to the facts of any case which comes up for decision. This to my mind is the most logical way of treating a legal subject for all practical purposes, and it is this unique feature of this book which has made it so popular and of recognised utility as it has come to be. While revising the book I have therefore carefully rechecked all the authorities cited in it as well as facts of all the cases stated herein, and this is the reason why publication of this new edition has been delayed though it was long overdue. I hope my generous readers will forgive me for the same. They are, however, sure to be compensated for it by getting a new book rather than a new edition, as some important portions of the book have been re-written with a view to improving the same in the light of the latest case-law on the subject.

A book which is undergoing its ninth edition does not require much by way of preface. I have only to add that **the case law, both Indian and foreign, quoted in this book, is complete up to date.** References to the text-books on the subject cited are, as far as practicable, to their latest editions. The current edition of the celebrated book of Chalmers on the (English) Sale of Goods Act, 1893, is the **16th**, and references in the present edition of my book are to this latest edition.

I shall be failing in my duty if I do not acknowledge once again my debt to the various law Reports, Law Journals, Text-books and other



sources which I have consulted in writing my book, and which I have already acknowledged with gratitude in my previous editions of the book. For the present edition of the book, I have in particular taken considerable help from All India Reporter, Yearly Digest, All England Law Reports and Chalmers' Sale of Goods Act, 16th Edn., to the learned editors of which I most gratefully acknowledge my indebtedness. To Shri B. Vira Gupta, Managing Director of the publishers, Metropolitan Book Co. Private, Ltd., I offer my thanks for seeing the book through the press and for clear printing and excellent get up of the same.

OM PRAKASH AGGARAWALA



## PREFACE TO THE SIXTH EDITION

The fifth edition of this book was published in September, 1959, and like the previous editions, was warmly received by the Bench and the Bar, and commercial houses. In fact, sale of goods covers a much larger range than probably any other commercial transaction and need for a comprehensive book on the subject is bound to continue to be heavy and persistent. It is gratifying to find that the present book well meets the requirements of the legal profession as well as of the commercial community, as this is the only book, which has now been printed for the sixth time during a comparatively short period. Demand for it is still unabated.

In preparing the book for the present edition full opportunity has been taken to revise it thoroughly and even to re-write some portions of it for better appreciation of the subject. References in this edition are now to the third (Viscount Simonds') edition of *Halsbury's Laws of England*. In the previous edition of my book there were a number of references to the well-known book *Williston on Sales* (Revised Edn.) dealing with the law of sale of goods in the U.S.A. In the present edition text of the U.S.A. Uniform Sales Act has also been given in Appendix N for better understanding of the principles of laws relating to this subject as laid down in that country, and the utility of those precedents for interpreting the corresponding law in our own country. At the same time, some useful extracts have been added in the present edition from two celebrated books of legal reference, *Corpus Juris Secundum* and *American Jurisprudence*. This will further abundantly increase the utility of this book.

As in the previous editions of this book, the subject has been carefully analysed and principles of law stated in clear and concise language, as far as possible in the words of the learned Judges themselves. And principles of law stated have been further illustrated by instances carefully selected from reported decisions, both Indian and foreign. This is a special feature of all the books written by me on legal subjects and it gives me great satisfaction to find that it has been greatly appreciated by the legal public and found to be of great practical utility. About fifty more pages of new matter including many new points have been added in preparing the book for the present edition. Case-law quoted in this book, both Indian and foreign, is complete up to August, 1962.

I once again acknowledge my indebtedness to the learned authors of all the text books on the subject, to the All India Reporter, the All England Law Reports and various other Law Reports which I have consulted in the preparation of this book. In fact, my task mainly has been to put down together in a logical form the best of all the available material on the subject from all available sources which I have duly acknowledged in the book and do so with great pleasure more particularly now. My object has been to produce a fairly comprehensive reference book on the subject to meet the requirements of my readers, and the fact that the book is running its sixth edition now can legitimately lead me to conclude that I have been successful in my object. Once again, I offer my grateful



thanks to my kind readers for their appreciation of my books on legal subjects.

I am highly grateful to my Publishers also for superior paper, clear printing and nice get-up of the book, and am glad to find that in spite of heavy cost of production of the book and appreciable increase in its volume, the price fixed is the same as for its previous edition. To Shri B. Vira Gupta Director and Manager of Metropolitan Book Co. Private Ltd., I am specially indebted for seeing the book through the press.

OM PRAKASH AGGARAWALA



## **PREFACE TO THE FIRST EDITION**

The law of sale of goods as contained in Chapter VII of the Indian Contract Act represented generally the English law on the subject as it then stood, except in regard to the rule as to market overt. The rules of English law relating to the sale of goods had in turn grown up mainly out of judicial decisions, and along with the general law of contract, they were the product of many generations and were adapted to the circumstances and exigencies of the times and the dealings of the people. These had undergone drastic changes since 1872 and were finally codified in 1893 as the (English) Sale of Goods Act, 1893 (56 and 57 Vict. C. 71), which discards many of the old common law rules upon which chapter VII of the Indian Act was based in favour of provisions more suited to modern conditions or more convenient in actual practice. Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time revealed defects the removal of which became necessary in order to keep the law abreast of the development of modern business relations. Opportunity was therefore taken in 1929 to frame a Bill mainly based on the English Sale of Goods Act, 1893. It was examined in detail by a Special Committee appointed by the Government of India for the purpose and was found generally suitable with some modifications, and ultimately resulted in the Indian Sale of Goods Act, 1930.

In preparing this treatise on the Indian Sale of Goods Act, 1930, it has been my object to provide a book which should deal with the subject exhaustively and serve as a reference book for those who have to administer this Act. I have tried to elucidate all the principles underlying the rules formulated in its several sections, and to illustrate those by instances carefully selected from reported decisions. In an Act based on an English Act of 1893 references to English case-law on the subject must necessarily be frequent, as the Table of Cases will show, and some confusion is likely to be caused if the background of these decisions is not pointed out and it is not explained to what extent the provisions of the Indian Act differ from the English Act. It has been my endeavour to avoid the possibility of such confusion in this work.

The subject has been properly analysed and treated under appropriate heads and sub-heads. Case-law, both English and Indian, quoted is complete up to December, 1940. Nine useful Appendices have been added to add to the utility of the book. The two Appendices on C.I.F., F.O.B., and Ex-ship Contracts and 'Conflict of Laws' will be found specially useful in actual practice. I have also not been unmindful of the persistent demand of the legal profession for an exhaustive and complete Index in all books on law, and I have tried to meet it in this work to the best of my ability.

It is my pleasant duty to acknowledge the abundant assistance I have derived in the preparation of this book from standard treatises on the subject, both in England and in India, Such as "Benjamin's Sale of



Personal Property;" Chalmers' (English) Sale of Goods Act, 1893 : "Pollock and Mulla's Indian Sale of Goods Act, 1930 ;" and the various law reports and journals (published in this country as well as in England) to which references have been made at appropriate places.

I owe a deep debt of gratitude to Sir B. L. Mitter, K. C. S. I., Bar-at-law, (formerly) Advocate-General of India, the author of this Act as Law-Member of the Council of the Governor-General and as President of the Special Committee, for his very generously contributing a *Foreword* to this book. He was kind enough to spare most willingly even amidst his pressing engagements to go through the pages of this book and his encouraging words I regard as my valuable asset as an humble student of law.

I am grateful to Mr. N. K. Iyer, M. A., B. L. for his valuable assistance in various ways in the preparation of this book.

OM PRAKASH AGGARAWALA

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## ADDITIONAL NOTES (DAMAGES)

(Ss. 73, 74, *Indian Contract Act, 1872*).<sup>1</sup>

The following cases may be noted with advantage :

(1) In *Union of India v. S.S.H. Syndicate Poona*, A.I.R. 1976 S.C. 879, there was delay in delivery of goods consigned due to negligence of railway. There was suit for damages for breach of contract. Damages were calculated by way of interest on locked up capital. No interest attracting interest Act, 1839 was claimed.

(2) In *Union of India v. K.H. Rao*, A.I.R. 1976 S.C. 626, there was breach of contract. The term of the contract gave discretion to the government to forfeit security deposit. It was held that forfeit operated as a penalty in the circumstances of the case, but the court could not directly relieve the party of the hardship on that score.

(3) In *Mohanlal v. Dayaldas & Co.*, A.I.R. 1976 Raj. 68, there was agreement entitling the vendor to forfeit advance money as his damages. There was breach of contract by the vendee. The gain incurred thereby to vendor exceeded loss suffered by him. It was held that the vendor was not entitled to get any compensation. It was observed that there must be reasonable compensation.

(4) In *Union of India v. M/s. B. Prahlad and Co.*, A.I.R. 1976 Delhi 236 it was held : In case of delay by railway in delivering perishable articles, measure of damages will be as follows : (a) If total loss is caused by such delay, the measure of damages will be the market value of the goods at the time and place at which the goods have been delivered (b) If damage had been caused to the goods by the delay the measure of the plaintiff's loss will be the amount by which the value of the goods has diminished. The plaintiff must do all that he reasonably can to mitigate his loss, and if, for example, the damaged goods are still saleable though at a lower price, the measure of damages will be the market price of the goods minus what they would have fetched in their damaged state if the plaintiff had sold them.

(5) In *M. Nanjapa v. Muthuswamy*, A.I.R. 1975 Knt. 146, it was held : Burden is not on defendant, to prove that there existed means of mitigating damages and that the plaintiff has not taken any steps to mitigate the changes, but it is on the plaintiff to prove that he has taken all reasonable steps to mitigate damages (A.I.R. 1938 Mad. 672 dissented from).

(6) In *R. J. Mohamed v. Indian Bank*, A.I.R. 1975 Mad. 220 it has been held : In a claim for damages, the plaintiff is only required to act reasonably in the adoption of remedial measures. Standard of reasonableness is not high when the defendant is admitted wrong-doer. The plaintiff is not disentitled to cost of such measures merely because the wrong doer can suggest other less burdensome measures.

1. See also 65 of the Indian Contract Act, 1872, which relates to the 'obligation of person who has received advantage

under void agreement or contract that becomes void.'



The seller of goods negotiated documents through I Bank. I Bank acted through S Bank in negotiating documents. 'C' form was delivered by the buyer and received by S Bank was not delivered through the seller. The seller suffered damages. It was held in the above case that as there was no privity of contract between the seller and S Bank, only I Bank was liable for damages to the seller.

(7) In *Union of India v. A. Venkataiah* A.I.R. 1975 Mad. 119 it was held : In contracts of affreightment and carriage, the market price which prevails at the place of destination where the damage occurred is the measure of damages. The plaintiff can adduce acceptable evidence such as the market price of similar commodity at or near the place in question to prove his claim for damages.

(8) Where claim for payment of damages is disputed, it cannot be treated as an actionable claim (*Marwar Tent Factory v. Union of India*, A.I.R. 1975 Delhi 27).

(9) Contract of sale—Breach by purchaser—claim for recovery of advance made by purchaser to vendor—Sustainability—Principles—Advance paid—If earnest money or security for due performance—Tests [*Bhramarbar Sahu v. Narayan Prasad Das*, (1974) (1) C.W.R. 104—See Yearly Digest, 1974, columns 543, 544].

(10) Difference between liquidated damages and unliquidated damages—Indian and English law—Distinction. (*Union of India v. Raman Iron Foundry*, A.I.R. 1974 S.C. 1265).

(11) 'Reasonable compensation'—Liquidated damage—Penalty—Distinction. (*Anand Construction Traders v. State of Behar*, A.I.R. 1973 Cal. 550).

(12) Security—Forfeiture—Grounds—Burden of proof—Principles. (*M/s. Variety Body Builders v. Union of India*, A.I.R. 1973 Guj. 256.)

(13) Where an agreement for sale has been broken due to the fault of both the parties, neither party is entitled to claim damages from the other. But under Ss. 64 and 65 of the Contract Act, the buyer is entitled to get back from the seller the amount paid by him as part payment of the purchase price [*G. Gopala Chettiar v. N. Geriappa Gowder*, (1971) 2 Mad. L.J. 481].

(14) In *M.P. Industries v. M/s. Shriram Durga Parsad*, A.I.R. 1971 S.C. 1983, the Supreme Court held : "It is clear from the terms of the contract that the parties considered the quality of the ore to be supplied as one of the essential conditions of the contract. When M/s. J.S. Williams refused to analyse the samples, the sellers did not even call upon the buyers to nominate someone else in the place of M/s. J.S. Williams. On the other hand the sellers intimated to the buyers that they were willing to send the samples for analysis to a particular company at Calcutta and if the buyers did not accept that offer, the analysis made by M/s. Hughes and Davies would become final. The buyers rejected that ultimatum. Under the circumstances we are of the opinion that the offers made in May and June were not in accordance with the terms of the contract."

(15) In *P. M. Ali v. A.P.R. Marudappam*, A.I.R. 1972 Mad. 152 it was held : In the present case, the defence to the suit is a repudiation of the agreement altogether retaining with them the bicycles which are the



subject of the hire purchase agreement and the measure of damages in such a case is the total hire agreement amount less the amounts already paid.

(16) In *Union of India v. M/s. Tribhuwan Dass Lalji Patel*, A.I.R. 1971 Delhi 120, a contract for sale of goods to Government *inter alia* provided that in case of breach of contract by the contractor, "the Secretary, Department of Supply shall be entitled at his option either :— (a) to recover from the contractor as 'liquidated damages,' and not by way of penalty, a sum of 2% of the price of any stores which the contractor has failed to deliver as aforesaid, for each month or part of a month during which the delivery of such stores may be in arrears ; (b) to purchase elsewhere, without notice to the contractor on the account and at the risk of the contractor, the stores not delivered or others of a similar description (where others exactly complying with the particulars are not in the opinion of the Secretary, Department of Supply which shall be final, readily procurable) without cancelling the contract in respect of the consignment not yet due for delivery ; or (c) to cancel the contract. In the event of action being taken under (b) or (c) above the contractor shall be liable for any loss which the purchaser may sustain on that account but the contractor shall not be entitled to any gain on repurchases made against default." On breach of contract by the contractor, it was held : (i) It is apparent that the Government can recover only loss sustained by it and cannot claim damages from the contractor if no loss is sustained. (ii) It is specifically provided in the second clause of Section 73 that that compensation is not to be given for any remote or indirect loss or damage. If even indirect loss or damage is excluded it cannot be conceived how compensation can be awarded when there has been no loss or damage. If the contrary view is to be taken the provision of Section 73 will become nugatory and a party would be penalised though the other party has suffered no loss.<sup>1</sup> (iii) The principle is well settled that the measure of damages, normally, in case of breach of contract for sale of goods, is a difference between the contract price and the market price on the date of the breach. It is, however, open to the parties to the contract to create for themselves any special rights and obligations that they may please, such as providing therein measure of damages in case of breach of contract and specifically exclude the conditions which law generally attaches to contract of sale of goods. In fact Section 62 of the Sale of Goods Act is a statutory recognition of this right in the parties.

(17) In *Kulsekapatnam, Hand Match Workers' Co-operative Cottage Industrial Society Ltd. v. Radhelal, Lailoolal*, A.I.R. 1971 M.P. 191, goods supplied by the seller were not of the description contracted for. It was held that it was a failure on the part of the seller to perform the contract.

(18) In *M/s. Sahu and Co. v. M/s. Sriram Vijay Kumar*, (1971) 2 C.W.R. 86, it was held : One principle on which damages in case of breach of contract are to be calculated is that, as far as possible, the person who has proved a breach of bargain to supply what he contracted to get, is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.<sup>2</sup>

1. A.I.R. 1958 A.P. 533, A.I.R. 1958 Bom. 291 and A.I.R. 1946 Pat. 263 relied on ; A.I.R. 1957 M.B. 190 and A.I.R. 1919 Mad. 1053 dissented

from ; A.I.R. 1932 P.C. 196 explained.  
2. A.I.R. 1962 S.C. 366 relied on.



(19) In *Rama Shanker Agarwal v. Firm Mathura Prasad Kanta Prasad*, 1969 All. L.J. 127, there was a contract for supply of sugar, of particular mill, at Rs. 2916/-per maund, which was ex-mill rate when the contract took place. Under the contract the delivery was to be made at place C. There was breach of contract. It was held : The fact that the contract was for particular quality of sugar which was to be supplied by the defendant after he got delivery from the mill and the rate under contract was ex-mill rate coupled with the situation that there was nothing to show that ex-mill rate for the kind of sugar varied from place to place, would show that the measure of damages would be the difference between ex-mill rate on the date of breach and the date of contract. The fact that delivery was to be made at place C was immaterial on the question of measure of damages.

(20) In *Maula Bux v. Union of India*, A.I.R. 1970 S.C. 1955, the Supreme Court held : (i) "In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and will then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. **Such deposits cannot be regarded as earnest-money.**" (ii) Forfeiture of earnest money under a contract for sale of property—movable or immovable—if the amount is reasonable, does not fall within Section 74. Forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of penalty. (iii) For compensation for breach of contract where penalty is stipulated for, where loss in terms of money can be determined, as in the present case, the party claiming compensation must prove the loss suffered by him.

*Fateh Chand v. Balkishan Dass*, A.I.R. 1963 S.C. 1405 was referred to in the above case. In that case it was observed : "In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

It was further held : The application of section 74 of the contract Act, 1872, is not restricted to cases where aggrieved party claims relief as plaintiff. The jurisdiction of the Court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit [*Abdul Gani and Co., v. Trustees of the Port of Bombay*, A.I.R. 1952 Bom. 310 and *Natesa Aiyar v. Appavir Padayachi*, I.L.R. 38 Mad. 178 (F.B.) : A.I.R. 1915 Mad. 896 **overruled**].

(21) In *M/s. Murlidhar Chiranjilal v. M/s. Harishchandra Dwarkadas*, A.I.R. 1962 S.C. 366, there was a contract for the sale of goods to be made through railway receipt for Calcutta F.O.R. Kanpur. There was breach of contract for supply of the goods contracted for. It was held that the rate of goods in Kanpur and not in Calcutta in or about the date of breach determined the quantum of damages, *M/S. H.D.C. Market v.*



*Firm Murlidhar*, A.I.R. 1957 M.B. 53 was **reversed** (See notes on p. 744 post).

(22) In *Chunilal V. Mehta v. C.S. & M.Co. Ltd.*, A.I.R. 1962 S.C. 1314, 1419 it was observed : When parties name a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim an unascertained sum of money as damages. The right to claim liquidated damages is enforceable under S. 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.

(23) In *Naihati Jute Mills Ltd. v. Khyaliram*, A.I.R. 1968 S.C. 522, there was a breach of contract to purchase Pakistan jute. To arbitrators awarded damages according to the rates prevailing in the Calcutta market. It was held that the export price fixed by Pakistan Government needed not to be taken into consideration in adjudicating damages.

(24) The word "compensation" used in Article 115 of the Limitation Act, 1908 (corresponding to Article 55 of the Limitation Act, 1963) has the same meaning as it has under Section 73 of the Contract Act, 1872, and it denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of contract. (*Dhapai v. Dalla*, A.I.R. 1970 All. 206 F.B.)

(25) In *C.C. of India v. S.S. Corporation*, A.I.R. 1970 S.C. 321, 327, it was observed : "When price is paid in advance against goods to the supplier then the seller cannot claim a right to forfeit such money paid as advance price because I consider such advance payment of price as in the nature of a trust or quasi-trust ear-marked for the purpose of price for the goods to be supplied and cannot be diverted or forfeited for other purposes or on the ground that there was an alleged breach on the part of the buyer."

(26) In *Matanhella Bros. v. Mahabir Industries*, A.I.R. 1970 Pat. 91, it was held : "Nowhere in the plaint it is stated as to how, according to the plaintiff, this time of despatch, or in other words, the time of the delivery of the goods was extended. The unilaterally repeated demand on the part of the plaintiff could not extend the time for delivery until the defendants, either expressly or impliedly, had agreed to extend it."

(27) "The essential characteristics of earnest money are well-known. Earnest money, although taken as part payment of the consideration, is also a guarantee for the due performance of the contract." (*Jaykumar Jain v. Om Prakash*, A.I.R. 1970 M.P. 119, 122).

(28) In *Mudaliar v. Subramaniam*, A.I.R. 1969 Mad. 317. *Rattamma v. Krishnamurthi*, A.I.R. 1928 Mad. 326 was relied upon. In that case it was observed : Advances made by a purchaser to a vendor in respect of a sale are recoverable, even if the transaction falls through owing to the fault of the purchaser. To resist such a claim, the vendor must prove a contract, express or implied, between the parties, that the money paid in advance was agreed to be treated as security for the fulfilment by the purchaser of the bargain. In this case it is liable to be forfeited, for the



fault of the purchaser. Where the vendor does not allege or prove this, the amount is merely an advance, and it is recoverable as such.

In the former case, it was observed : "But I am willing to assume, on the authorities placed before me, that mere nomenclature in the document, or the absence of any forfeiture clause, may not be decisive and that the character of a deposit or earnest money could be spelt out from the circumstances and the evidence."

(29) In *Thawardas Pherumal v. Union of India* [A.I.R. 1955 S.C. 468], A entered into a contract with the Dominion of India for supply of crores of pucca bricks according to a schedule. Delivery was to be at the site of the kiln. Owing to the default of the Government in not removing the burnt bricks which were ready for delivery and removal from the kilns according to the contract delay occurred with the result that several lakhs kachcha bricks were destroyed by rains. The agreement between the parties contained an express stipulation that the Government "will not entertain any claim for damages to unburnt bricks due to any cause whatsoever." It was *held* that in the face of the express stipulation Government was not liable for the loss, that all it could be held responsible for was for damages occasioned by the breach of its contract to remove the pucca bricks which it had undertaken to remove, that the contractor had a duty under S. 73 of the Contract Act to minimise the loss and accordingly he would have had the right to remove the bricks himself and stock them elsewhere and claim compensation for the loss so occasioned, and that alternatively, he could have sold the bricks in the market and claimed the difference in the price.

(30) In *Mrs. M. Preston v. J.S. Humphreys* [A.I.R. 1955 Cal. 314], A agreed to purchase from B a soda water plant on certain terms and conditions and paid some advance towards its price. Subsequently, on 23rd February, 1952, the contract was modified in some respects, and the original date of delivery of the plant, viz. 26th December, 1951 was changed, and delivery and installation of the plant was to be completed by 6th March, 1952, and in the event of failure to give delivery on or before that date, the defendant would pay compensation at the rate of Rs. 50 per day after 6th March, 1952. On failure to carry out contract by B, A cancelled it on 25th April, 1952. It was *held*: (1) The sum of Rs. 50 per day was liquidated damages and not penalty. (2) In the circumstances of the case Rs. 25 per day should be awarded as a reasonable compensation. (3) As A cancelled the contract on 25th April, 1952, and put it out of the power of B to fulfil his obligation under the contract, A was entitled to Rs. 25 per day for the period between 7th March, 1952 to 25th April, 1952. (4) The effect of the clause for compensation was that in case the defendant failed to complete the delivery of the plant by 6th March, 1952, the plaintiff would accept the performance of the contract after the stipulated time subject to the payment of damages which were fixed. Mere extension of time was only a waiver to the extent of substituting the extended time for the original time but this did not amount to a waiver of the provision for compensation. To deprive the plaintiff of the right of compensation, it must be shown that there has been express waiver of this particular provision by the plaintiff.

(31) **Breach of contract.**—Non-existence of any condition in the license or in the Control Orders that defendant was liable to pay damages



to the plaintiff on non-acceptance of the goods—Plaintiff has no cause of action for recovery of any damages from the defendant.

[*Dharam Das v. Manik Lal*, A.I.R. 1955 V.P. 33].

(32) In *Sampatraj v. Pokar* [A.I.R. 1955 Raj. 70] it was held : The amount of damages to which the plaintiffs are entitled in a suit for damages for breach of contract for the sale must be the difference between the contract price and the actual price. In such cases the dictates of law are reasonably met by proving the loss with reasonable approximation to the date of breach.

(33) Section 73 of the Indian Contract Act, 1872, lays down the general principle of law where there is no provision in the deed of contract regarding re-sale. The re-sale in such circumstances must take place within a reasonable time. The purchaser can, however, agree to give uncontrolled direction regarding the time of the re-sale to the sellers and they can also agree that they will not raise any objection regarding a re-sale taking place after an unreasonable lapse of time. Such a clause though harsh is not unconscionable or illegal in mercantile contracts. There can be no question in a mercantile contract of one party being able to dominate the will of the other party or to over-reach it. In such circumstances the Court cannot relieve the purchaser on equitable grounds of the effect of a harsh or onerous term to which he has agreed by means of a solemn written contract.

Ordinarily no interest is allowed on the amount of damages arising out of contract. But interest may be allowed if there is an agreement for payment of interest at a fixed rate or is payable by usage of trade having the force of law or under the provisions of any substantive law entitling the plaintiff to recover interest.

Unreasonable delay in the re-sale of goods disentitles the vendor to the grant of interest from the date of the institution of the suit till the date of realization.

[*Messrs. Ralli Brothers Limited v. Firm Messrs. Bhagwandas Parmeshri Das*, A.I.R. 1945 Lah. 35].

(34) S had dealings with a merchant in Australia to whom it sold cotton fabrics, described as tapestries made by P, resident in Calicut. In October, 1941, the parties, i.e. S and P entered into correspondence with regard to the making of tapestries by P for S, who made it clear that he intended to sell them in Australia. After some correspondence terms were fixed and contract entered into between the parties for the supply to the specification given by S, of certain qualities of goods. S had taken delivery of many pieces under previous orders and had apparently sold them in Melbourne ; but the Australian Government passed an order prohibiting the import of such goods after 1st April, 1942, except under certain conditions. The result was that the market on which S had relied for the sale of the goods purchased from P under the contract was lost. S wrote to P on 28th April, 1941, informing P of the circumstances and asking them to cancel their order. As a result of the cancellation of the contract, P ceased to manufacture the goods ordered, but claimed as damages 15 per cent. of the contract price, which they alleged were the profits they would have made had it not been for the breach of contract committed by S.

*Held*, that the Courts should not read into a contract an implied term that the enforceability of the contract was to be dependent upon



the ability of the vendee to find customers for the goods. It was not the foundation of the contract that these goods should be re-sold by S to their clients in Australia and hence the contract had not become impossible but could be fulfilled. It would have been foolish of P to have continued with the contract, manufactured the goods, and then to have attempted to sell them in the open market : for the goods were made to order to the specifications furnished by S, and there was no guarantee that P would be able to realise even the cost price of manufacture had they made them and attempted to sell them. It was therefore impossible to calculate the damages by any means other than that suggested by P. There was no fixed date of delivery. Damages should be awarded under the circumstances at  $7\frac{1}{2}$  per cent. on the net value of the goods.

[*Samuel Fitz & Co. v. Calcutta Standard Cotton and Silk Weaving Co., Calicut*, A.I.R. 1945 Mad. 29].

(35) The principle of sections 64 and 65 of the Indian Contract Act is that where a person at whose instance a contract is voidable rescinds the same or where a contract becomes void, then the person who has received any advantage under such contract is bound to restore it to the party from whom it was received.

In a suit for recovery of the amount advanced and for damages filed by the plaintiff against the defendant on the footing that the defendant has committed breach of contract and the time for performance under the contract has come to an end, it is not open to the defendant to contend that so far as he is concerned the contract is still alive and that he has not rescinded it. The principle of keeping alive can have application only when the contract is executory or where there is still something to be performed under the contract. It can have no application where time for performance has arrived and there has been a breach. Even if the defendant contends that the plaintiff is in breach, his only remedy is to counter-claim for damages and he cannot avoid the application of section 64 of the Contract Act. In the absence of any specific agreement to pay interest the plaintiff in such cases can claim interest on the amount due only under the Interest Act or section 34 of the Civil Procedure Code and not as damages [*Raj Films Circuit v. M. H. M. Munus*, (1965) 1 Mad. L.J. 438 : I.L.R. (1965) 1 Mad. 167].

(36) Interest as damages—Suit against defendant for goods supplied on credit at defendant's instance—No agreement to pay interest—Plaintiff allowed interest at 6 per cent. from the date when the account was closed and the balance due was ascertained (which date was held to be the date on which the amount became due) till the date of the suit (*M/s. Himat-singka Motor Works Ltd., Gauhati v. Haranath Barua*, A.I.R. 1965 Assam 10).

(37) Nominal damages do not necessarily connote that only trifling amount is to be assessed (*Brahmdeo Narain Singh v. Members of the Notified Area Committee*, A.I.R. 1965 Pat. 179).

(38) Hire-purchase contract—Stipulation for payment of unpaid instalments without any set-off of price of goods sold, after seizing, is not by way of penalty (*Enayatullah Khan v. Jalan Trading Co.*, A.I.R. 1965 Pat. 314).

(39) A plaintiff in a suit for specific performance, should always treat the contract as still subsisting ; he has to prove his continuous



readiness and willingness, from the date of the contract to the time of the hearing of the suit, to perform his part of the contract and a failure to make good that case would undoubtedly lead to a rejection of his claim for specific performance.

Where a purchaser to a contract of sale made a claim for damages, on the footing of its breach by the vendor, it would amount to definite election on his part to treat the contract as at an end and thereafter no suit for specific performance can be maintained by him, for, by such election, he has disabled himself from making the assessment that he had always been ready and willing to perform his part of the contract (*K.S. Sundaramayyar v. D.K. Jagadeesan*, A.I.R. 1965 Mad. 85).

(40) The market price at the time of the damages is the measure of damages to be awarded ; the contract price is no measure of damages to be awarded ; (*Union of India v. West Punjab Factories, Ltd.*, A.I.R. 1966 S.C. 395).

(41) On a breach of contract by one party the other party is entitled to receive compensation for any loss by the damages caused to him which naturally arose in the natural course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Remote and indirect loss or damage sustained by reason of the breach will not entitle the party to any compensation. According to illustration (k) to S. 73 the person guilty of the breach has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party ; the first party has not, however, to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties.

The defendant entered into contract with plaintiff in July 1952 for sale of certain quantity of scrap iron for which controlled price had been fixed. The contract price included incidental charges. The defendant did not know nor was he told that the scrap was required for sale to Export Corporation for purposes of export. The plaintiff also had no knowledge that he would subsequently contract with export corporation to sell the scrap iron purchased from the defendant. Subsequently on 30.1.1953 the plaintiff contracted with the Export Corporation to sell them the scrap iron. The defendant failed to supply the scrap and the plaintiff sued him for damages for the breach. **Held :** The loss which could have naturally arisen in the usual course of things from the breach of contract by the defendant would be nil as upon non-delivery of scrap iron the plaintiff could have purchased the scrap iron from the market at the same controlled price and similar incidental charges. The actual loss, which, according to the plaintiff, he suffered on account of the breach of contract by the defendant, was the result of his contracting to sell scrap iron for export to the Export Corporation. As the parties did not know and could not have known when the contract was made in July 1952 that the scrap iron would be ultimately sold by the plaintiff to the Export Corporation, the parties could not have known of the likelihood of the loss actually suffered by the plaintiff, according to him, on account of the failure of the defendant to fulfil the contract.

(*Karsandas v. Saran Engineering Co.*, A.I.R. 1965 S.C. 1981).



(42) Damages by way of interest—Court cannot grant damages by way of interest in the absence of contract, usage or custom (*Sagar Mal Poddar v. Amir*, A.I.R. 1966 All. 103).

(43) Non-payment is part of cause of action only in suit for breach of contract [*Zilla Parishad (District Board) v. Smt. Shanti Devi*, A.I.R. 1965 All. 590 (F.B.)]

(44) Liability of Railway in respect of loss of or damage to goods—Damages for loss of profit—Those will be special damages and unless and until notice is given to that effect such damages would not be recoverable (*obiter*) *Jagnath Chetram v. Union of India*, A.I.R. 1966 Cal. 540.

(45) Party not entitled to claim open delivery from Railway Administration—Right of party is to take delivery and claim damages (*Union of India v. Ibrahim Gulaba Tobacco Merchant*, A.I.R. 1966 M.P. 52).

### INDIAN DECISIONS

**(1) Sections 6(3), 57—Contract for sale of coal-ash that might accumulate during period of contract by running contract—Contract amounts to agreement to sell—On breach of the Railway Administration contractor can sue for damages under Section 57 of the Act—Claim for conversion does not lie.**

See under Section 57 of the Act, at pp. 738, 739 *post*.

(*Union of India v. Tarachand*, A.I.R. 1976 M.P. 101).

**(2) Section 20—Passing of property in goods—Financial guarantee for opening letter of credit—Agreement to sell goods to guarantor—Guarantor whether becomes owner of goods.** In *Collector, Customs v. Pednekar & Co.*, A.I.R. 1976 S.C. 1408, in 1958 the Company A prior to its liquidation was granted an import licence to import certain industrial sewing machines and spare parts. A placed orders for the same with two Japanese firms and the goods were shipped to Calcutta by two ships in January 1959. A had some financial difficulties and therefore approached B (a partnership firm) for help. B agreed to guarantee the letter of credit. While goods were at the high seas there was an agreement between A and B in February 1959, under which A agreed to sell the major part of the goods to B. The goods were to be delivered in B's godown at Bombay. B was to pay the balance of the consideration thereafter. The question was whether property in the goods had passed to B when the contract had been entered into by A with B that is to say, prior to the arrival of the goods at Calcutta Port for clearance. It was **held**: It could not be said that the property in goods passed to B at the time of agreement *i.e.* in February 1959. It did not pass to the buyer till the time of delivery of the goods in Bombay. No specific goods in a deliverable state were attached to the contract when it was made. "In many genuine commercial transactions guarantee can be arranged by a party importing or exporting goods under a valid licence. The mere fact of financial guarantee to a Banker for the purpose of opening a letter of credit without anything more, would not convert the guarantor to be the owner of the property the moment the contract was entered into if the terms therein pointed to the contrary" (p. 1413).



## ENGLISH DECISIONS

(1) **Conditions and warranties—delivery delayed—whether sellers entitled to treat contract as repudiated—specific performance** [Sale of Goods Act 1893 (c. 71), S. 52.]—In September 1973, S contracted to sell machinery to B, a Tunisian company. The terms of delivery were that the machinery should be ready for despatch nine months after receipt of the order. The date of despatch was June 9, 1974. S were unable to effect delivery until September 1974. Difficulties arose with vessel which was to carry the machinery to Tunisia; also by the time S were ready to deliver, B's import licence had expired. On December 20, 1974, S informed B that they were treating the contract as repudiated as they have found a Canadian buyer. B applied for and got an ex parte injunction preventing S from taking the goods outside the jurisdiction. Mr Justice Boreham refused to continue the ex parte injunction until the trial of the action for breach of contract. On appeal, held that (1) an assumption would be made in B's favour that they would succeed in showing at the trial a breach of contract by S. Therefore the issue was whether a decree of specific performance of the contract would be granted at the trial: (2) On the evidence the machine was readily obtainable in the market upon placing an order and damages were a sufficient remedy and B were not entitled to a decree of specific performance. (Re wait [1927] 1 Ch. 606 applied, *Behnke v. Bede Shipping Co.* [1972] 1 K.B. 649 and *Whiteley v. Hilt.* [1918] 2 K.B. 808 referred to):

[*Societe Des Industries Metallurgiques S.A. v. Bronx Engineering Co.*, (1975) 1 Lloyd's Rep. 465, C.A.]

(2) **Delivery—substitution of vessel for loading barley—breach of contract**—S and B agreed to sell and buy 1,000 tons of barley under a contract which provided for delivery at a named port between January 1 and 20, 1973. S nominated a port and B nominated a vessel but she was delayed and B substituted a second vessel expected ready to load on January 19, 1973. S protested that there would be insufficient time to load the cargo within the shipment period. In the event only 110 tons of barley were loaded and the remainder was never shipped. The arbitrators stated their award in the form of a special case, the question to be decided by the court being whether S were in breach of contract by not causing the full quantity of barley to be shipped on the vessel. Held, S had the obligation to ship only during the shipment period: Award in favour of S upheld: [*Bunge & Co. v. Tradax England*, (1975) 2 Lloyd's Rep. 235, Donaldson J.].

(3) **Sale of goods—Conditions and warranties—merchantability—secondhand car**—[Sale of Goods Act 1893 (c. 71), S. 14 (2): Supply of Goods (Implied Terms) Act 1973 (c. 13).]—Under S. 14 (2) of the Sale of Goods Act 1893, there is no general rule that a car is sold by description simply because it is sold as a second hand car; nor, at any rate under that subsection before its amendment by the supply of Goods Act 1973, is a second hand car unmerchantable simply because it is unroad-worthy: [*Mc Donald v. Empire Garage (Blackburn)*, *The Times*, October 8, 1975, C.A., Lord Denning M.R. dissenting. [G.H.]

(4) **Sale of Goods—delivery—non-compliance of vessel with contractual description**—Upon the true construction of a charter of October 1973 between the plaintiff and defendants, it was held that the plaintiffs were not-entitled to refuse to take delivery of a tanker because



she had been built at Oshima, Japan, by the Oshima Shipbuilding Co., and not at Osaka by the Osaka Shipbuilding Co., and because she bore the yard number 004 and not 354. Although the vessel tendered did not comply with the contractual description, that non-compliance was not such as to entitle the charterers to reject delivery. [Bowes v. Shand (1877) 2 App. Cas. 455, Arcos v. Ronaasen & Son [1933] A.C. 470 and Christopher Hill v. Ashington Piggeries [1971] C.L.Y. 10517 referred to]: [Reardon Smith Line v. Yngvar Hansen-Tangen, Sanko Steamship Co. (Third Party), The Times, March 30, 1976, C.A.]

(5) **Contract—breach—burglar alarm system—implied term as to fitness for purpose** [Misrepresentation Act 1967 (c.7.), s. 2 (1)]—On November 15, 1971, Z on behalf of P Co., entered into negotiations with R, on behalf of D Co., for the installation of a burglar alarm at P's premises. R informed Z that the alarm bell would be caused to ring by any broken wire and would continue to do so until the batteries were exhausted. However, in fact, the bell would stop ringing if the wire from the control panel were severed or if the control panel was wrenched off. The system was fitted by December 1. On December 6, Z found that the premises had been burgled, damage had been done and stock removed. The control panel had been wrenched off and the wires leading from it had been severed. In an action by P on the ground of (i) negligent breach of contract; (ii) breach of an implied term of the contract that installation would be reasonably fit for the purpose; and (iii) innocent misrepresentation under the 1967 Act, held, (1) the system had been properly installed; (2) no implied term had been broken and in the absence of an express term there could be no contractual undertaking that all possible safeguards were provided; (3) the statement by R to Z was an innocent misrepresentation and the D Co. were liable for consequential damage; (4) with regard to the damage caused, D Co. were only liable in respect of the loss of stock to the extent of £ 1,000 which was all that P had been able to prove. (Jarvis v. Swan's Tours [1973] C.L.Y. 723 referred to): [Davis & Co. (Wines) v. Afa-Minerva (E.M.I.), [1974] 2 Lloyd's Rep. 27, Judge Faye.]

(6) **C.I.F. contract—non-delivery of Chinese rabbits.—Force majeure clause**—By two contracts S agreed to supply to B with two shipment of frozen Chinese rabbits C.I.F. Rotterdam. The contract contained clauses exempting S from liability for non-delivery by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control but provided that S must provide a certificate attesting such events. S failed to supply all but 65 metric tons of the first shipment and all the second shipment. Thereafter solicitors for S wrote to B a letter in lieu of a certificate "in terms of the contract that they have not been supplied with the goods and cannot supply you and that such failure to supply is for reasons beyond their control." The arbitrator award was by way of special case stated which posed the question as to whether on the facts found S were liable to B in respect of the non fulfilment. Held, (1) that S has failed to prove that it was impossible for them to fulfil the contract; (2) that if the solicitors' letter was a sufficient certificate, it failed to show what steps S had taken to obtain an alternative source of supply; (3) S were liable to B. (Anderson v. Anderson [1895] 1 Q., B. 749 and Chandris v. Isbrandtsen-Moller Co. Inc. (1950) C.L.C. 9500 referred to): [P.J. Van Der Zijden Wildhandel N.V. v. Tucker Cross, [1975] 9 Lloyd's Rep. 240 Donaldson J.]



(7) **C.I.F. contract—intermediate terms “merchantable quality” of goods—rights of rejection.** [Sale of Goods Act 1893 (c. 71), S. 14(1)(2)]. A term of a contract may be an intermediate stipulation rather than strictly either a condition or a warranty, breach of which gives no right to repudiate unless it goes to the root of the contract.

C agreed to purchase for £ 100,000 from B a quantity of citrus pulp pellets C.I.F. Rotterdam for use as animal feed. A term of the contract was “shipment to be made in good condition.” When the cargo arrived at Rotterdam the market price of the goods had fallen and it was found that part of it was damaged. C rejected the whole cargo on grounds that shipment was not made in good condition. B rejected the claim. The whole cargo was bought by an importer for £30,000 and resold on the same day for the same sum to C who used it for animal feed. Mocatta J. upheld the finding of the arbitration tribunal in favour of C holding that the term “shipment to be made in good condition” was a condition of the contract breach of which justified rejection and that the goods were not of “merchantable quality” within S. 14 (2) of the Act. B appealed. Held, allowing the appeal, that since the pellets were brought for use in cattle feed and the whole cargo was used for that purpose C’s only remedy was in damages because (1) the term was an intermediate stipulation and the breach did not go to the root of the contract ; (2) the goods were of “merchantable quality” within s. 14 (2) of the Act. (Decision of Mocatta J. [1974] C.L.Y. 3426 reversed ; *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] C.L.Y. 2838 applied).

[*Cehave N.V. v. Bremer Handelgesellschaft M.B.H. : The Hansa Nord*, [1975] 3 W.L.R. 477 ; [1975] 3 All E.R. 739, C.A.]

(8) **C. I. F. contract—bill of lading tendered—goods never shipped—whether sellers in breach of contract.**—Sellers of Siamese jute, grade A, sold c. & f., tendered a bill of lading, obtained from T from whom they bought the jute, which stated that grade A jute had been shipped. No jute of the contract description had been shipped in fact. Held, that sellers c. & f. were obliged to ship goods of the contract description and c. & f. contracts contain an implied term that material statements in the bill of lading should be true and accurate in fact. Accordingly the bill in this case was improper and the buyers were entitled to return of the price paid and damages. It was irrelevant that the buyers could have sued the carriers : [*Hindley & Co. v. East Indian Produce Co.*, (1973) 2 Lloyd’s Rep. 515, Kerr J.]

(9) **Sale of goods—c.i.f. contract—intermediate terms—“merchantable quality” of goods—right of rejection.**—In a sale of goods, as in any other contract, the terms are not necessarily either conditions or warranties. Many terms are “intermediate” and the question whether a breach entitles the innocent party to repudiate depends on whether it goes to the root of the contract. Thus the fact that goods have been damaged and cannot be used without some modifications for the purchaser’s purpose does not necessarily entitle him to reject them ; if such goods are of merchantable quality the purchaser will be restricted to his remedy in damages. (Decision of Mocatta J. [1974] C.L.Y. 3426 reversed ; *Hong Kong Fir Shipping Co. v. Kowasaki Kisen Kaisha* [1962] C.L.Y. 2838 applied) : *Cehave N.V. v. Bremer Handelgesellschaft GmbH*, The Times, July 22, 1975, C.A. [G.H.]

[Leave to appeal to the H.L.]



(10) **Carriage by sea—charterparty—freight—“right and true delivery”** [Singapore].—A voyage charterparty provided : (4) The freight...to be paid in 80 per cent. in five working days after signing Bills of Lading...balance on right and true delivery of cargo at ports of discharge ; (5) Charterers to procure and pay...men on shore or on board...to the work there ; (20) Vessel to give free use of derricks, winches, gins and falls...Held, that (i) “right and true delivery” did not mean of the whole cargo shipped, and the balance of freight was due when cargo which had arrived was completely delivered, and (ii) construing clauses (5) and (20), heaving was also the charterer’s responsibility, the vessel providing equipment described in clause (20). Accordingly the charterers could not deduct the cost of slings bought for loading. (*Dakin v. Oxley* (1864) 15 C.B.N.S. 646 referred to ; *Williams & Co. v. Conton Insurance Office* [1901] A.C. 462, *Norway (Owners) v. Ashburner* (The Norway) (1865) 3 Moo. P.C.C.N.S. 245 and *Merchant Shipping Co. v. Armitage* (1873) L.R 9 Q.B. 99 applied) : [*Skibs A/s Trolle and Skibs A/s Tautra v. United Enterprises & Shipping (Pte)* ; *The Tarva* [1973] 2 Lloyd’s Rep. 385, Singapore High Ct.]



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# THE SALE OF GOODS ACT, 1930<sup>1</sup>

(Act No. III of 1930)

[Passed by the Indian Legislature]

(Received the assent of the Governor-General on the 15th March, 1930)

## An Act to define and amend the law relating to the Sale of Goods

Whereas it is expedient to define and amend the law relating to the sale of goods ; it is hereby enacted as follows:—

### CHAPTER I PRELIMINARY

<sup>1</sup>Short title, extent and commencement. 1. This Act may be called the <sup>2</sup>[Indian] Sale of Goods Act, 1930.

<sup>3</sup>2. It extends to the whole of India <sup>4</sup>[except the State of Jammu and Kashmir].

3. It shall come into force on the first day of July, 1930.

### Synopsis

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| (1) "To define and amend the law relating to the sale of goods"—<br>history of the Act—previous law. | (4) Conflict of laws.   |
| (2) Scope of the Act—principles of construction.   | (5) Act not retrospective.  |
| (3) English and American law how far helpful in interpreting the                                     | (6) Chief differences between the Act and Chapter VII of the Indian Contract Act. |
|  | (7) Extent of the Act.  |

(1) "To define and amend the law relating to the sale of goods"—history of the Act—previous law.

Before the passing of the Indian Contract Act, 1872, Chapter VII of which contained the law relating to the sale of goods or moveables, the law on this subject was not only not uniform throughout British India but was also, outside the limits of the original jurisdiction of the High Courts, extremely uncertain in its application. Within the limits of the Presidency

1. For Statement of Objects and Reasons and for Report of Special Committee, see Gazette of India, 1929, Pt. V., p. 163 ; for Report of Select Committee, see *ibid*, 1930, Pt. V., p. 1.
2. In India the word "Indian" has been omitted by the Indian Sale of Goods

- (Amendment) Act, 1963 (Act 33 of 1963), S. 2,
3. Substituted for the former sub-section by the Adaptation of Laws Order, 1950
4. Substituted by the Part B States (Laws) Act, 1951 (III of 1951) for "except Part B States."



towns, the rules of English law, including those in the Statute of Frauds, were applied, while in the mofussil it was doubtful whether the Statute of Frauds was applicable, and as observed by the Indian Law Commissioners in their second Report, the Judge was to a great extent without the guidance of any positive law beyond the rule that his decision should be such as deemed to be in accordance with "justice, equity and good conscience". To remedy this unsatisfactory state of affairs, the Indian Law Commissioners framed, in their second Report, dated the 28th July, 1866, a set of rules relating to the general law of contracts including therein provisions relating to the sale of moveables. The draft of the Law Commissioners underwent several changes at the hands of the Law Members Sir Henry Maine and Sir James Stephen, and also in the Select Committee of the Indian Legislature. But as stated by Sir James Stephen himself while presenting the Report of the Select Committee on the Indian Contract Bill, the chapter on the sale of goods, except in regard to the rule as to market overt represented generally the English law on the subject as it then stood.<sup>1</sup>

The rules of English Law relating to the sale of goods had grown up mainly out of judicial decisions. Along with the general law of contract, they were the product of many generations and were adapted to the circumstances and exigencies of the times and the dealings of the people. They were, however, largely dominated by the provisions of the Statute of Frauds which was passed in the reign of Charles the Second. The Law Commissioners, as well those who were ultimately responsible for framing the Indian Contract Act, at once realized that the provisions of the Statute of Frauds, although followed in the Presidency towns, were not suitable to the conditions prevailing in this country, and that "any law relating to this important subject must at any rate be free from the inexpressible confusion and intricacy which is thrown over every part of that statute in consequence of its vague language."<sup>2</sup>

In 1870, various branches of law were being codified in British India. The main object in view was, in the words of Sir James Stephen, "that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Native Government Servants without extrinsic help from the English law libraries." The Indian Contract Act, 1872, thus codified the branch of law relating to contract, and Chapter VII of the Act (sections 76 to 123) specifically related to sale of goods, and was admittedly based on the English law relating to that subject. Prior to the passing of the Sale of Goods Act, 1893 (56 & 57 Vict. C. 71), the English law as to the sale of goods was governed almost entirely by the common law, including the law merchant. There were, however, a very few limited statutory enactments affecting the subject and restricting the freedom of contract.<sup>3</sup> Thus the principles of Chapter VII of the Indian Contract Act, 1872, were based mainly on the English common law on the subject.

1. Report of the Special Committee, para. 3 (Appendix C).
2. Report of the Special Committee, para. 4 (Appendix C).
3. See e.g., (1601-4) Jac. I.C. 21; Statute of Frauds, 1677 (29 Car. 2 C. 3) sections 15, 16 (sections 15, 16, Ruff).

Statute of Frauds Amendment Act, 1828 (9 Geo. 4 C. 14) section 7; Mercantile Law Amendment Act, 1856 (19 and 20 Vict. C. 97) sections 1, 2. All these enactments were replaced by the Sale of Goods Act, 1893.



Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time revealed defects the removal of which became necessary in order to keep the law abreast of the developments of modern business relations. As observed by the Special Committee, "the law relating to the sale of goods appertains mainly to mercantile transactions. There can be no doubt that during the last half-century conditions in this country relating to trade and business have undergone material changes. Methods of business have largely altered and new relations have arisen between man and man. In dealing with these relations, it has been necessary to give recognition to new principles, and the Indian Courts have found that a law enacted more than fifty years ago is entirely inadequate to enable them to deal with these new relations or give effect to the new principles. The result has been that on various occasions the Courts have had to hold that Chapter VII of the Indian Contract Act is not exhaustive and to import therein analogies from the decisions of the English Courts."<sup>1</sup>

The English law relating to the sale of goods which was admittedly the basis of Chapter VII of the Indian Contract Act has itself since 1872 undergone drastic changes and was finally codified in 1893 (56 & 57, Vict. C. 71), which discards many of the old common law rules upon which Chapter VII of the Indian Act was based, in favour of provisions more suited to modern conditions or more convenient in actual practice. As again observed by the Special Committee, this Act has stood the test of nearly thirty-five years of practical application, and in the words of Lord Parke in *re Parchim* (1918) A. C. 157 at pages 160-61, "is a very successful and correct codification of this branch of the mercantile law."<sup>2</sup> That this Act is strikingly complete and its provisions are of universal suitability is further clear from the fact that most of the Colonies and Overseas Dominions have adopted and re-enacted this Act with only such small variations as have been found necessary to adopt its provisions to local circumstances.<sup>3</sup> Even the Uniform Sales Act, passed in the United States of America and adopted in twenty out of fifty-three States and territories, is based very largely on the English Act.

In India, by 1920 it was found that the law relating to the sale of goods contained in Chapter VII of the Indian Contract Act was not adequate to meet the needs of the community and that some of the provisions of this branch of the law required alterations in the light of new developments in mercantile transactions. The accretions to the law made by judicial decisions in England which were embodied in the Sale of Goods Act of 1893 were not to be found in the analogous provisions contained in the Indian Contract Act. It was also considered necessary to embody the law relating to sale of goods in a separate enactment. Hence, in 1926-27 an exhaustive examination of the case-law bearing on the portions of the Contract Act dealing with the sale of goods was made by the Legislative Department. As a result of this examination, a draft Bill was prepared in

1. Report of the Special Committee, para. 6 (Appendix C).  
2. Report of the Special Committee,

para. 9 (Appendix C).  
3. See Appendix D.



1928, and it was examined by a Special Committee consisting of eminent lawyers.

The Indian Sale of Goods Bill which ultimately resulted in the Indian Sale of Goods Act, 1930, was consequently also based on the English Sale of Goods Act, 1893. "In mercantile transactions a conflict of laws should, as far as possible, be avoided. Uniformity of law in various countries, particularly in those which have business or trade dealings with one another is highly convenient and desirable. We, therefore, approve of the proposal to adopt the provisions of the English Sale of Goods Act *so far as they are suitable to Indian conditions* as the basis for the present Bill, and thus to make the Indian Law relating to the sale of goods as nearly as possible uniform with the law in force in other parts of the British Empire."<sup>1</sup>

The scheme followed in codifying the law for India has been thus explained by the Special Committee: "In adopting the provisions of the English Act we have not been unmindful of the needs and exigencies of this country. Wherever it has been found that a rule obtaining in England, such as that relating to market overt, is not suitable to Indian conditions, the rule has been rejected. We have moreover carefully scrutinized the provisions of the English Act in the light of the decisions of English Courts since 1893, and where their decisions have shown the provisions of the English Act to be defective and ambiguous, we have attempted to improve upon them. We have also retained several of the provisions of the Indian Contract Act which we consider necessary or useful to meet special conditions existing in India."<sup>2</sup>

The following observations of the Select Committee on the Bill may also be found instructive :

"After considering the opinions received, we find ourselves in agreement with almost all the provisions contained in the Bill. We entirely approve the scheme followed in the Bill in adopting as far as possible the provisions of the English Sale of Goods Act, 1893, in arrangement as well as wording. As pointed out in paragraph 9 of the Committee's report referred to above (Report of the Special Committee), that Act has met with uniform approval and has stood the test for more than a third of a century. It has been adopted in most of the Overseas Dominions and Colonies and also in the United States of America. We feel that in commercial transactions there ought to be as far as possible uniformity of law in countries which have dealings with one another."<sup>3</sup>

## (2) Scope of the Act—principles of construction.

The preamble to the Indian Contract Act, 1872, states that that Act defines and amends *certain parts* of the law relating to contracts. The preamble to the Indian Sale of Goods Act, 1930, on the other hand, states that this Act defines and amends the law relating to the sale of goods. It would therefore appear that the present Act is intended to deal exhaustively

1. Report of the Special Committee,  
para. 10 (Appendix C).  
2. Report of the Special Committee,

para. 12 (Appendix C.)  
3. Report of the Select Committee,  
(Appendix D).



with the law as to sale of goods, except to the extent to which its provisions are made to depend on other enactments for the time being in force. Thus, section 66 of the Act saves the provisions of such enactments as the Indian Merchant Shipping Act, 1923, and the Code of Civil Procedure, 1908, which contain special provisions relating to the sale of goods. Again, section 3 of the Act states that "the unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods."

The Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. No doubt it treats of particular contracts in separate chapters but there is nothing to show that the legislature intended to deal exhaustively with any particular Chapter or sub-division of the law relating to contracts.<sup>1</sup> In *Ram Das v. Amar Chand & Co.*<sup>2</sup> the point of decision was whether a railway receipt could be termed as "instrument of title" within the meaning of section 103 of the Indian Contract Act, and it was argued that the Act having been passed at a time, when the English Law did not recognize railway receipts as instruments of title, the Legislature could not possibly have intended to include railway receipts in the term "instrument of title". The Judicial Committee observed :—

"The Indian Contract Act is *amending* as well as a *consolidating* Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law...Their Lordships do not see any improbability in the Indian Legislature having taken the lead in a legal reform."

Chapter VII of the Indian Contract Act, 1872, relating to "sale of goods" is repealed by section 65 of the Indian Sale of Goods Act, 1930. The Indian Sale of Goods Act is an amending as well as a consolidating Act. The English Act, on which the present Indian Act is based, is also a codifying Act, and the rules for construing such an Act are thus stated by Lord Herschell in *Bank of England v. Vagliano*<sup>3</sup> : The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear interpretation in conformity with this view...I am of course far from asserting that resort may never be had to the previous state of the law for the

1. *Irrawaddy Flotilla Co. v. Bhagwandas*, 18 Cal. 620, 628 cited in *Jwaladutt R. Pilani v. Bansilal Motilal*, 56 I.A. (1929) at p. 178 : A.I.R. 1929 P.C. 132. "The Act so far as it goes is exhaustive and imperative" ; *Promotha v. Prodymno*, 26 C.W.N. 772 ; *Gajanan Moreshwar v. Moreshwar Madan*, A.I.R. 1942 Bom. 302 ; *Mohammad Bux v. Zahurul Haq*, A.I.R. 1945 Pat. 196.

2. (1916) 43 I.A. 164, 170 : 40 Bom. 630, 636 ; 35 I.C. 951 ; see also *Hari Lal v.*

*Pehladrai* 1929 Bom. 260 : 120 I.C. 337 : 31 Bom. L.R. 508.

3. (1891) A.C. 107, 144-45 ; *Hem Raj v. Krishan*, 1928 Lah. 361 ; *Ganpat v. Sopana*, 1928 Bom. 35 ; *Alfred Wilkinson v. Grace Wilkinson*, 1923 Bom. 321 ; *Satish Chandra v. Ram Dayal*, 1921 Cal. 1 ; *Rahimbux v. C.B. of India*, 1929 Cal. 497 ; *Raghunath v. Official Assignee*, 1924 Cal. 424 ; *Narendra v. Kamalbasini*, 23 Cal. 563, 571, 572.



purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relating to such instruments, the same interpretation might well be put upon them in the Code. I give these as examples merely; they, of course, do not exhaust the category. What I am venturing to insist upon is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special grounds."

As to repealed provisions, it has been said that it is hazardous to refer to such provisions as have been absolutely repealed to ascertain what the Legislature meant to enact in their room and stead, and if the words of the new statute are capable of being interpreted without such foreign aid, it is not proper to examine the enactments of statutes no longer existing for the purpose of imposing upon those words a meaning which taken by themselves they do not bear.<sup>1</sup> As observed by Jessel M. R. in *Ex parte Blaiberg, in Toomer*<sup>2</sup>, "I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act." Cozens Hardy M. R., while referring to the English Sale of Goods Act, 1893, said: "I rather deprecate the citation of earlier decisions. The object and intent of the statute was no doubt simply to codify the unwritten law applicable to the sale of goods; but in so far as there is an express statutory enactment, that alone must be looked at and must govern the right of the parties, even though the section may, to some extent, have altered the prior Common law."<sup>3</sup>

The provisions of the repealed Chapter of the Indian Contract Act, 1872, and the construction which they have authoritatively received may, however, be taken into account for certain purposes. When it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended.<sup>4</sup>

Thus, if words have received authoritative interpretation and are repeated without alteration, it may be presumed that the Legislature had adopted that interpretation<sup>5</sup>; for speaking generally, it may be taken that the legislature uses the same language in the same sense when dealing at different times with the subject. A change of language, therefore, is some indication of a change of intention, but this is by no means a necessary conclusion.<sup>6</sup> Where, however, a limited interpretation has been placed upon the repealed provisions, and the words have been

1. *Bradlaugh v. Clarke* (1833) 8 App. Cas. 354, 380, per Lord Watson.

2. (1883) 23 Ch. D. 254, 258.

3. *Bristol Tramways Co. v. Fiat Motors* (1910) 2 K. B. 831; 79 L.J.K.B. 1109. "The statute was passed to declare the law. We are bound by it, and can look to nothing else"; *Abbot v. Wolsey* (1895) 2 R. 97. See Maxwell on the Interpretation of Statutes, 12th Edi-

tion, p. 26.

4. *Mansell v. The Queen* (1857) 8 E. & B. 54, 73.

5. See *Holliday & Greenwood Ltd. v. District Surveyors' Association*, (1914) 2 K. B. 803, 814, 815.

6. *Hurlbutt v. Barnett & Co.* (1893) 1 Q. B. 77, 78, 79, C. A. per Lord Esher, M. R.



enlarged, it is a legitimate inference that that enlargement was intended by the Legislature<sup>1</sup>; conversely, where the words of the repealing Act appear to be narrower than those of the repealed Act, the change may be presumed to be intentional.

*See also notes under sections 3 and 65 of the Act.*

**(3) English and American law how far helpful in interpreting the law of sale of goods in India.**

As the Indian Sale of Goods Act, 1930, is based primarily on the English Sale of Goods Act, 1893, the decisions of the English courts under the Act will be quite relevant as far as applicable to interpret the provisions of the former Act. It was observed by the Special Committee on this point: "The adoption of the English Act as the basis of the present Bill will enable Indian Courts to interpret its provisions in the light of the decisions of the English courts."<sup>2</sup>

It has been repeatedly laid down by the Privy Council that in interpreting the provisions of an Act the court should examine the language of the Act uninfluenced by any consideration derived from the English law upon which it may be founded. Where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law of the English law upon which it may be founded.<sup>3</sup> Where a case is governed by any section of the Act, the rule of interpretation is that the court must in the first instance examine the language of the section and ask what is its natural meaning.<sup>4</sup>

In *Municipal Board, Gonda v. Bachchu*<sup>5</sup>, it was observed: It is dangerous to apply the decision of an English court construing an English Act of Parliament not in *pari materia* with the Indian statute and not even forming the foundation of those statutes and allow it to prevail over Indian decisions, interpreting very similar enactments.

This, however, does not mean that authorities under the English Law are in no case to be resorted to or relied upon in interpreting an Indian Act. In the case of *Mallwo March & Co. v. Court of Wards*<sup>6</sup> their Lordships of the Privy Council held that in the absence of any law or well established custom existing in India on the subject of the law of partnership, English law would properly be resorted to in mercantile affairs for principles and rules to guide the court in this country to a right decision; but although

1. *Abdur Rahim v Syed Abu*, 55 I.A. 96; 55 Cal. 519; A.I.R. 928 P.C. 16; 108 I.C. 361.

2. Report of the Special Committee, para. 11 (Appendix C).

3. *Mst. Ramanandi Kuer v. Mst. Kalawati Kuer*, A.I.R. 1928 P.C. 2: 55 I.A. 18; 7 Pat. 221; 107 I.C. 14. See also *Firm Chuna Mal-Ram Nath v. Firm Mool Chand-Ram Bhagat*, A.I.R. 1928 P.C. 99; 9 Lah. 510; 108 I.C. 678; *Mohri Bibee v. Dharmodas*, 30 Cal. 539 P.C.; *Diwan Chand v. Manak Chand*, A.I.R. 1934 Lah.

809; *Diwan Singh Maftoon v. Emperor*, A.I.R. 1935 Nag. 90 (101).

4. *Bank of England v. Vagliano*, (1891) A.C. 107 (114); *Ramdas v. S. Amer Chand & Co.*, 40 Bom. 630; *Narendra Nath v. Kamal Casimi*, 23 Cal. 563.

5. A.I.R. 1951 All. 736. See also *Rakhal Das Mukherjee v. S.P. Ghose*, A.I.R. 1952 Cal. 175; see too *Lakshmi Devi v. Veerappa Chettiar*, (1952) 1 Mad. L.J. 709.

6. 18 W.R. 334 P.C.; (1872) L.R. 4 P.C. 419.



this is so, it should be observed that in applying these principles and rules, the usages of trade and habit of business of the people of India, so far as they may be peculiar and differ from those in England ought to be borne in mind. These remarks appear to be equally applicable to branches of the law other than that of partnership.

In *Shiam Lal v. Official Liquidator*<sup>1</sup>, Sulaiman C.J. observed that where the language of the sections of English and Indian Acts are almost identical, Indian courts would very much hesitate to depart from the view expressed by eminent Judges in England who have had great experience of Company law unless there is something internal in the section itself which would justify its interpretation in a different way. This was a case under the Indian Companies Act, 1913.<sup>2</sup> In *Tirathdas v. Parmeshwaribai*<sup>3</sup> Davis C.J. observed : "The Indian Trusts Act is clearly based upon and generally follows the English law on the subject. For instance, S. 41 of the English Act of 1925 is akin to S. 74 of the Indian Act of 1882. Bearing in mind the caution always required in interpreting an Indian Statute in the light of the English authority and practice, it does appear that in the case of the Indian Trusts Act, it would be proper to interpret the scope and purpose of the Indian Act in the light of the English authority and practice."

It has, however, been observed that to construe an Indian Act in the light of cases decided under an English Act differently worded is much likely to cause confusion than to render assistance. The analogous English law should therefore be carefully studied and compared with the Indian law before using English case-law for interpreting the Indian law.

As already noted, the law relating to the sale of goods was codified in England in 1893, the statute being designated as the Sale of Goods Act, 1893. Subsequently, the statute has been adopted in most of Canada and in other parts of the British Dominions. The American Sales Act, based on the English Statute, was recommended in 1906 by the Commissioners on Uniform Statute Laws for enactment by the several States and has now been enacted in thirty-four States, two territories, and the District of Columbia.<sup>4</sup>

#### (4) Conflict of laws

Sometimes in commercial transactions between persons residing in different countries, points of dispute arise and it is to be ascertained what is the rule by which the validity, obligations and interpretation of contracts are to be governed. There are, however, certain principles of universal application, admitted by the whole world ; for instance, to make a contract valid it is a universal principle that it should be upon a sufficient consideration, that it should be lawful in its nature and that it should in its terms be reasonably certain. But on matters in detail on these points there may be diversity in the positive and customary laws of different

1. A.I.R. 1933 All. 789 ; 145 I.C. 893 (F.B.).

2. See also *Malik Dost Mohammad Khan v. Mokand Lal*, A.I.R. 1931 Lah. 756 (757) ; 134 I.C. 812 ; *Bhimaji v. Chunilal*, A.I.R. 1932 Bom. 344 (350) ; 34 Bom. L.R. 683 ; 138 I.C.

824, and notes on pages 25 to 28 of Author's 'Specific Relief Act', 7th Edition.

3. A.I.R. 1943 Sind 223 : I.L.R. 1943 (Kar.) 213.

4. See Williston on Sales (Revised Edition) Vol. I, p. 2,



countries and nations. Persons capable in one country are incapable by the laws of another ; considerations good in one country, are insufficient or invalid in another ; the public policy of one country permits or favours certain agreements which are prohibited in another ; the forms prescribed by the law in one country to ensure validity and obligation of contract are unknown to another and the rights acknowledged by one country are not commensurate with those obtaining in another.<sup>1</sup>

Again, a person sometimes contracts in one, is domiciled in another and is to pay in a third, and the property which is the subject-matter of the contract may be situated in a fourth ; and each of these countries may have different and even opposite laws affecting the subject matter. What is the position when there is such a conflict of laws ? What law is to regulate the contract, either to determine the rights, or the remedies or the defences growing out of it, or the consequences flowing from it ? What law is to interpret its items and ascertain the nature, character and extent of its stipulations?<sup>2</sup>

As in the case of other contracts, the parties are at liberty to subject the contract of sale to any law they like, so long as they act *bona fide* and legally.<sup>3</sup> The proper law of the contract, as the law governing the contract is called, is the law which the parties intend to apply to it. They may have expressed their intention in the contract by providing that its construction and performance shall be governed by a particular law, or they may have failed to do so in which case their intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.<sup>4</sup> The Courts have evolved certain rebuttable presumptions intended to assist in the difficult task of ascertaining the presumed intention of the parties : the two most important of them are the presumption in favour of the law of the place where the contract is made (*lex loci contractus*) and that in favour of the law of the place where the contract is to be performed (*lex loci solutionis*). The former is often applied where the place of performance is the same as the place where the contract is made ;<sup>5</sup> the latter might be invoked where those two localities are different ; in that case the parties might intend that the whole contract,<sup>6</sup> or at least the part pertaining to its performance,<sup>7</sup> shall be governed by the *lex loci solutionis*. Another important presumption might apply where the parties have inserted an arbitration clause into their agreement ; the English courts have evolved the rule that such clause supports the conclusion that they intend the law of the stipulated arbitration to govern their contract.<sup>8</sup>

The transfer of the property in goods under sales made in foreign countries is in general regulated by the law of the place where the goods are situate at the time of the sale, the rule being that, if personal property be disposed of in a manner binding according to the *lex situs*, that is, the law of the country where it is at the time, the disposition is binding

1. See Tagore Law Lectures, 1910, on Commercial Law in British India by Mr. C.O. Remfry, Chapter II. p. 11.  
2. Story, Conflict of Laws, S. 232.  
3. Vita Food Products Inc. v. Unus Shipping Co. (1939) A.C. 277, 290.  
4. Per Lord Atkin in R. v. International Trustee (1937) A.C. 500, 529,

5. Jacobs v. Credit Iyonnnais (1884) 12 Q.B.D. 589 ; Zivnosenska Banka National v. Frankman (1950) A.C. 57.  
6. Benaim v. Debono (1924) A.C. 514.  
7. Lord Mac Dermott and Reid in Kahler v. Midland Bank Ltd., (1950) A.C. 24.  
8. Schmitthoff "Sale of Goods", 2nd (1966) Edn., pp. 27, 28,



everywhere,<sup>1</sup> whether the transfer be by way of sale,<sup>2</sup> gift,<sup>3</sup> or pledge.<sup>4</sup> *Locus regit actum* is a rule of wide application.

But the construction of a contract of sale, in so far as it creates mutual rights *in personam*, is determined by the proper law of the contract, that is to say, the law which the parties contemplate as law governing the contracts; *prima facie*, this law is the law of the place where the contract is made, the *lex loci contractus*.<sup>5</sup> When the contract is made in one country, but is to be performed in another, it may be presumed that the law of the place in which it is to be performed is the law which is to be applied.<sup>6</sup> But these are mere presumptions subject to the intention of the parties<sup>7</sup> and may be rebutted by the facts of any particular case in which a different intention is either expressed or may be inferred, the *lex contractus*.

Questions as to the admissibility of evidence, the enforceability of the contract by action, and other matters of procedure belong in general to the *lex fori*, that is, the law of the country in which the action is brought.<sup>8</sup>

#### (5) Act not retrospective.

*Omnis nova constitutio futuris formam imponere debet, non praeteritis*,<sup>9</sup> *prima facie* a new law affects the future transactions not the past. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.<sup>10</sup> Section 66 of the Act clearly shows it is not retrospective. Its provisions, therefore, do not apply to contracts of sale of goods made before the Act came into force.

The natural and ordinary way to regard statutes is as affecting something in the future and as not affecting what has gone before. "*Prima facie*", said Scrutton L.J.<sup>11</sup>, "an Act deals with future and not with past events. If this were not so, the Act might annul rights already acquired, while the presumption is against the intention."

1. Halsbury, Laws of England, 3rd ed., Vol. 34, p. 17; Dicey, Conflict of Laws, 9th Edition, pp. 728 & 923; see *Cammell v. Sewell* (1860), 5 H. & N. 728, 29 L.J. Ex. 350; *Todd v. Arnsur* (1882), 9 R. (Ct. of Sess.) 901.
2. *Cammell v. Sewell* (1860) 5 H. & N. 728, 120 R.R. 769; *Embiricos v. Anglo-Australian Bank* (1905) 1 K.B. 667, 683, C.A.
3. *Re Karvine's Trust* (1921) 1 Ch. 343, 348.
4. *City Bank v. Barrow* (1880) 5 App. Cas. 664, 667.
5. Halsbury, Laws of England, 3rd Ed., Vol. 34, p. 17; Dicey, Conflict of Laws, 9th Ed., p. 728; *Re Missouri Steamship Co.* (1859) 42 Ch. D. 321 at p. 328 C.A.; Cf. *Daulton & Co. v. Corporation of Medias* (1920) W.N. p. 221 (goods to be made in England and delivered in India).
6. Dicey, Conflict of Laws, 9th Ed., p. 742;

- Cox v. The Governors of Bishop Cotton's School*, (1874) P.R. No. 85.
7. *Abdul Aziz v. Appayasami* (1903) 27 Mad. 3; 8 C.W.N. 86; 6 Bom. L.R. 7 (P.C.) citing *Lloyd v. Guiber*, [1865] Q.B. 115; Cf. *Benaim v. Dabono* [1954] A.C. 514.
8. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 17; Dicey, Conflict of Laws, 9th Ed., pp. 777 to 787; *Lerroux v. Brown* (1852) 138 E.R. 1; 19; 92 R.R. 889.
9. 2 Inst. 292.
10. Maxwell, Interpretation of Statutes, 10th Ed., p. 5; see also *Lal Mohan v. Jogendra*, (1887) 19 Cal. 636; *Sham Singh v. Vir Bhan*, 1942 Lah. 102 F.B.; *Jagmohan Singh v. Ramanandan Parsad Narayan Singh*, 1941 Pat. 253; *Bhai Kirpa Singh v. Rasaldar Ajaipal Singh*, 128 Lah. 627 (F.B.).
11. *Ward v. British Oak Insurance Co. Ltd.* (1932) 1 K.B. 392, at p. 397,



So Wright J., in *Re Athlumney*<sup>1</sup> said : "Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language that is fairly capable of either interpretation, it ought to be construed as prospective only." Under the Indian law also the Privy Council laid down in *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi*<sup>2</sup> that provisions in a statute which touch a right in existence at the passing of the same are not to be applied retrospectively in the absence of express enactment or necessary intendment of the same. An exception is made in cases of provisions dealing with matters of procedure which may properly be retrospective in effect but even here an exception is made in cases where such construction would be textually inadmissible.<sup>3</sup>

Similarly, it has been held<sup>4</sup> that no litigant has any right to have this litigation decided by any particular procedure and all procedural laws are therefore retrospective in their character and affect even suits filed prior to the passing of such legislation. But a right of appeal which a suitor has in a pending action is not merely a matter of procedure. It is a vested right and the Legislature cannot take away right retrospectively unless it does so by express words or necessary intendment.<sup>5</sup>

The following principles may be taken as established :

1. Legislative enactments have no retrospective effect unless explicitly stated to be so in the enactment themselves.
2. Amending statutes should not be constructed as having retrospective effect if they affect vested rights.
3. Statutes which are declaratory or explanatory are to be construed as having retrospective effect as they give an authoritative explanation of the words, phrases or clauses used in a statute, and whenever the statute has to be applied, the explanation also should be applied.
4. No recital in a declaratory or amending statute can render void which has been declared by the Court to have been done rightly under the law.
5. Statutes which affect a mere procedure are retrospective in their nature.<sup>6</sup>

1. (1898) 2 Q.B.D. 547 at p. 551.

2. A.I.R. 1927 P.C. 242; L.R. 54 I.A. 421; 53 M.L.J. 819 (P.C.). See also *Syenna Taher Saituddin v. Tyebhai Mcosoji Koicha*, (19.3) 55 Bom. L.R. 1.—If the intention of the Legislature was to prevent a particular act or a particular transaction, then the very language used by the Legislature could only apply to acts or transactions in the future. It could not possibly apply to acts or transactions in the past.

3. A.I.R. 1927 P.C. 242.

4. *Kavasji Pestonji Dalal v. Rustomji*

*Sorabji*, A.I.R. 1940 Bom. 42 : 56 Bom. L.R. 450.

5. See also to same effect *Chandra Shekar Tewari v. Sri Bhagwan Radha Krishan*, A.I.R. 1947 Oudh 171 : I.L.R. 22 Luck. 141 : 219 I.C. 134 and *Mohammad Amir Khan v. Mohammad Khalil*, A.I.R. 1947 Lah. 110 : 226 I.C. 437 ; *Paras Ram v. Emperor*, A.I.R. 1931 Lah. 145 : 131 I.C. 353.

6. *Balaji Singh v. Gangamma*, A.I.R. 1927 Mad. 85, 86 : 99 I.C. 143 ; 51 M.L.J. 641.



A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure unless the effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.<sup>1</sup>

Where the law is altered during the pendency of an action, the rights of the parties are generally decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights.<sup>2</sup>

#### **(6) Chief differences between the Act and Chapter VII of the Indian Contract Act**

(1) The present Act embodies the principle that the question whether a contract for the sale of goods does not pass the property in the goods from the seller to the buyer must in all cases be determined by the intention of the parties to the contract. The provisions of Chapter VII of the Indian Contract Act were vague and conflicting on this point.

“The Bill codifies the rules by which that intention may be ascertained but the operation of these rules will be displayed by any terms of the contract defining the intention or by any attendant circumstances, including the conduct of the parties, rendering it ascertainable. In following the principle, we have borne in mind that in mercantile matters the certainty of the rule is often of more importance than the substance. If the parties know beforehand what their legal position is, they can provide for their particular wants by express stipulations. Sale after all is a consensual contract, and the Bill does not prevent the parties from making any bargain they please. Its object is to lay down clear rules for the case where the parties have either formed no intention or failed to express it.”<sup>3</sup>

(2) The distinction between a sale and an agreement to sell, which was not clear in Chapter VII of the Indian Contract Act has been clearly brought out. This distinction is very necessary to determine the rights and liabilities of the parties to the contract.

(3) It is made clear that a contract of sale can be made by mere offer and acceptance. Neither payment nor delivery is necessary for the purpose.

(4) In the Indian Contract Act, the word “warranty” had been used in a very vague sense. In some provisions it denoted a condition which would enable a party aggrieved by its breach to repudiate the contract, while in others it enabled him to claim damages only. In the Act, this ambiguity has been removed.

(5) Section 108 of the Indian Contract Act was obscure in phraseology and this led to conflict in decisions. Sections 27 to 30 of the Act aim at removing this obscurity and simplifying the law on the subject.

1. Per Mitter J. in *Jiban Krishna v. Abdul Kadar*, A.I.R. 1933 Cal. 435 : I.L.R. 60 Cal. 1037 : 143 I.C. 164 : 37 C.W.N. 689 : 57 Cal. L.J. 477.

2. *Mohammad Amir Khan v. Moham-*

*mad Khalil*, A.I.R. 1947 Lah. 180 : 226 I.C. 477.

3. Report of the Special Committee (Appendix G).



(6) The rules relating to delivery to carrier, stoppage in transit and auction sales, have been elaborated in the Act.

(7) The Act is without illustrations; and the courts are left to construe sections as they stand.

### (7) Extent of the Act.

The Act extends to the whole of India except the State of Jammu and Kashmir. Sub-section (2) of S. 1 when enacted read : "It extends to the whole of British India including British Baluchistan and the Santhal Parganas". The expression "British India" was not defined in the Act and therefore the definition thereof in the General Clauses Act, 1897<sup>1</sup> (Act No. X of 1897) was to apply. It was defined in that Act as follows :

<sup>2</sup>["British India" shall mean, as respects the period before the commencement of part III of the Government of India Act, 1935,<sup>3</sup> all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respect any period after that date and before the date of the establishment of the Dominion of India means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar.]

By the Indian Independence Act, 1947, two independent Dominions have been set up in India from the 15th day of August, 1947. These are known respectively as India and Pakistan.

The territories of Pakistan are : (a) the territories which, on the 15th August, 1947, were included in the provinces of East Bengal and West Punjab, as constituted under sections 3 and 4 of the Indian Independence Act, 1947 ; (b) the territories which on the said date were included in the Province of Sind and the Chief Commissioner's Province of British Baluchistan ; and (c) the North West Frontier Province [*Vide* section 2 (2) of the Indian Independence Act, 1947].

The territories of the Dominion of India are the territories under the sovereignty of His Majesty which, immediately before the 15th August, 1947, were included in British India except the territories which were to be the territories of Pakistan as explained above [*Vide* section 2(1) of the Indian Independence Act, 1947].

The Dominion of India established by the Indian Independence Act, 1947, as from the fifteenth day of August, 1947, was a Union comprising :—

(a) the provinces called Governors' Provinces ;

- |   |   |
|---|---|
| 1. As adapted by the Indian (Adaptation of Existing Indian Laws) Order, 1947.                                     | as subsequently adapted by the Indian (Adaptation of Existing Indian Laws) Order, 1947. |
| 2. Substituted for the original clause (7) by the Government of India (Adaptation of Indian Laws) Order 1937, and | 3. i.e. the 1st April, 1937.  |



(b) the Provinces called Chief Commissioners' Provinces ;

(c) the Indian States acceding to the Dominion in the manner provided in the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947 ;

(d) any other areas that may with the consent of the Dominion be included in the Dominion.<sup>1</sup>

Section 46(1) of the Government of India Act, 1935, as adapted by the Indian (Provisional Constitution) Order, 1947, defined Governors' Provinces as follows :

"Subject to the provisions of the next succeeding section with respect to Berar, the following shall be Governors' Provinces, that is to say, Madras, Bombay, West Bengal, the United Provinces, East Punjab, Bihar, the Central Provinces and Berar, Assam and Orissa and such other Governors' Provinces as may be created under this Act."

Berar. As to Berar, section 47 of the same Act, as adapted by the said Order, provided :

"Berar shall continue to be governed together with the Central Provinces as one Governor's Province under this Act by the name of the Central Provinces and Berar and in the manner as immediately before the establishment of the Dominion ; and any reference in this Act to the Dominion of India shall be construed as including a reference to Berar."

Section 94(1) of the Government of India Act, 1935, as adapted by the Indian (Provisional Constitution) Order, 1947, ran as follows :

"The following shall be the Chief Commissioners' Provinces, that is to say, the heretofore existing Chief Commissioners' Provinces of Delhi, Ajmer-Merwara, Coorg and the Andaman and Nicobar Islands, the area known as Panth Piploda and such other Chief Commissioners' Provinces as may be created under this Act."

Application of existing laws to the new Dominion. Sub-section (3) of section 18 of the Indian Independence Act, 1947, provided :

"Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day (*i.e.*, 15th August, 1947) shall so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and of the several parts thereof until other provision is made by the laws of the Legislature or other authority having power in that behalf."

Sections 3 and 4 of the India (Adaptations of Existing Indian Laws) Order, 1947, provided as follows :

"3. As from the appointed day<sup>2</sup>, all existing Indian Laws shall until repealed or altered or amended by the competent Legislature or other

1. Section 5 of the Government of India Act, 1935, as adapted by the Indian (Provisional Constitution) Order, 1947.  
2. *i.e.* the 15th August, 1947.



competent authority, in their application to the Dominion of India and any other part or parts thereof, be subject to the adaptations directed in this order.

4. (1) Where an existing Indian law contains a provision defining the territories to which the law extends, or a provision referring to the territories which are within the scope of that provision, that provision shall be so adapted as to exclude any territories which on the appointed day are not to form part of the territories of the Dominion of India.

(2) Without prejudice to the general effect of the preceding paragraph, references in any existing Indian law to "the whole of British India," (or "British India," to "Bengal" and to "the Punjab" shall, except where the reference occurs in a title of or preamble or any citation or description of an Act, Ordinance or Regulation and except where the context otherwise requires, be replaced by reference to "all the Provinces of India" to "West Bengal" and to "East Punjab" respectively.

The Constitution  
of India.

Article 1 of the Constitution now provides :

(1) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be specified in the First Schedule.

(3) The territory of India shall comprise—

(a) the territories of the States ;

(b) the Union territories specified in the First Schedule ; and

(c) such other territories as may be acquired.

Article 372(1) of the Constitution provides :

"Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

By Adaptation of Laws Order 1950, passed by the President under Article 372(2) of the Constitution, sub-section (2) was substituted by the following ;

"(2) It extends to the whole of India except Part B States."

By the Part B States (Laws) Act, 1951 (III of 1951), the words "except the State of Jammu and Kashmir" were substituted for the words "except Part B States".

2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(1) "buyer" means a person who buys or agrees to buy goods ;



(2) "delivery" means voluntary transfer of possession from one person to another ;

(3) goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them ;

(4) document of title to goods" includes a bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof to the possession or control of goods, or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented ;

(5) "fault" means wrongful act or default ;

(6) "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale ;

(7) "goods" means every kind of movable property other than actionable claims and money, and includes stocks and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale ;

(8) a person is said to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not ;

(9) "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale or to buy goods, or to raise money on the security of goods ;

(10) "price" means the money consideration for a sale of goods ;

(11) "property" means the general property in goods, and not merely a special property ;

(12) "quality of goods" includes their state or condition ;

(13) "seller" means a person who sells or agrees to sell goods ;

(14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made ; and



(15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meaning assigned to them in that Act.

### Synopsis

- |   |   |
|---|---|
| (1) <i>Definitions.</i>   | (27) <i>Growing crops and grass—time of attachment to soil.</i>   |
| (1) <b>Buyer and seller.</b>  | (28) <i>Trees standing on the land if "goods".</i>  |
| (2) <i>Buyer and seller.</i>  | (29) <i>"Goods" means every kind of moveable property other than actionable claims and money.</i>           |
| (2) <b>Delivery.</b>  | (30) <i>A share in a partnership.</i>   |
| (3) <i>Delivery : definition.</i>   | (31) <i>Decree.</i>   |
| (4) <i>Mode of delivery.</i>  | (32) <i>Money.</i>  |
| (5) <i>Effect of transfer of possession.</i>  | (33) <i>Ships.</i>  |
| (3) <b>Goods in a deliverable state.</b>  | (34) <i>Sea Customs Act, 1878.</i>  |
| (6) <i>Goods in a "deliverable state."</i>  | (35) <i>Gas, water, electricity etc.</i>  |
| (4) <b>"Documents of title to goods."</b>   | (36) <i>Machinery.</i>  |
| (7) <i>Documents of title to goods : definition.</i>  | (37) <i>Shares in company ; shares and share scrips : Companies Act, 1913, S. 56.</i>                       |
| (8) <i>Conditions to be fulfilled by a "document of title to goods."</i>  | (38) <i>Miscellaneous.</i>  |
| (9) <i>Bill of lading.</i>  | (8) <b>Insolvent.</b>   |
| (10) <i>Indian Bills of Lading Act, 1856.</i>   | (39) <i>Insolvent.</i>  |
| (11) <i>Dock warrant.</i>   | (9) <b>Mercantile agent.</b>  |
| (12) <i>Warehouse-keeper's certificate.</i>   | (40) <i>Mercantile agent ; definition.</i>  |
| (13) <i>Wharfinger's certificate.</i>   | (41) <i>Use of the expression mercantile agent in the Act.</i>  |
| (14) <i>Delivery order.</i>   | (10) <b>Price.</b>  |
| (15) <i>Delivery chit—Sukkur Pass Go-down delivery terms contract.</i>  | (42) <i>Price means the money consideration for a sale of goods.</i>  |
| (16) <i>Railway Receipt.</i>  | (11) <b>Property.</b>   |
| (17) <i>Mate's receipt.</i>   | (43) <i>"Property" in the Act means the general property in goods and not merely a special property.</i>    |
| (18) <i>Cash receipt.</i>   | (12) <b>Quality of goods.</b>   |
| (19) <i>"Any other document. etc."—Way Bill—Registration book of motor car.</i>   | (44) <i>Quality of goods includes their state or condition.</i>   |
| (5) <b>Fault.</b>   | (13) <b>Seller.</b>   |
| (20) <i>"Fault means wrongful act or default."</i>  | (45) <i>Hire purchase agreement or agreement to purchase.</i>   |
| (6) <b>Future goods.</b>  | (14) <b>Specific goods.</b>   |
| (21) <i>"Future goods" defined.</i>   | (46) <i>"Specific goods" means goods identified and agreed upon at the time a contract of sale is made.</i> |
| (7) <b>Goods.</b>   | (15) <b>Expressions used but not defined in the Act.</b>  |
| (22) <i>Goods : definition.</i>   | (47) <i>Expressions used but not defined in the Act.</i>  |
| (23) <i>Moveable property—things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale of "goods."</i> |   |
| (24) <i>Fixtures and buildings sold as materials.</i>   |   |
| (25) <i>Things attached to land.</i>  |   |
| (26) <i>Coal, minerals, gravel sand, gittis, etc.</i>   |   |



**(1) Definitions.**

All these clauses of this section with the exception of clause (10) have been adopted from section 62 of the English Sale of Goods Act, 1893, with certain necessary modifications. Clause (10) is taken from S. 1 (1) of that Act. The definition of 'mercantile agent' has been taken from the English Factors Act, 1889, with a slight modification. Similarly, the definition of "document of title" has been adopted from the English Factors Act, 1889, with some additions. Of the other terms defined in section 62 of the English Act, the term 'warranty' has been defined in section 12 (3) of this Act.

Of the terms defined here the Indian Contract Act defined only those defined in clauses 7 & 8 i.e. "goods" and "insolvent". Sub-section (15) of section 2 of the Indian Sale of Goods Act states that 'expressions used but not defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act'.

The opening words of the section "unless there is anything repugnant in the subject or context" must also be kept in view in interpreting the terms defined for the purposes of this Act. Thus, in section 24 of the Act, the context shows that the term "buyer" is there used in the sense of a person having merely option to buy.<sup>1</sup>

An interpretation clause enacts that certain words found in the Act are to be understood in a specified sense and to include things which but for such a clause they would not normally include. It should be used only for the purpose of interpreting words which are ambiguous or equivocal but not to disturb the meaning of plain words.<sup>2</sup> It only applies to the Act where it finds a place but cannot apply to statutes prior or subsequent. According to Craies, another important rule with regard to the effect of an interpretation clause is that such a clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended.<sup>3</sup> Lord Cottenham observed in *Attorney-General v. Corporation of Worcester*<sup>4</sup> : "The object of these Acts being framed with these interpretation clauses is by the means and through the agency of the interpretation clause to avoid the necessity of frequent repetition in describing all the subject-matter to which the Act was intended to apply. It uses therefore one expression, and then, by the interpretation clause, declares that that expression shall have certain meanings other than the ordinary meaning of the word used ; and the way to apply that interpretation clause is, when you find the word used in other enactments, to follow the directions of the interpretation clause, and, according to the subject-matter to read it as if it contained the other words which, by the interpretation clause, it is meant to include."

1. See *Helby v. Matthews*, (1895) A.C. 471 : 64 L.J. Q.B. 465.

2. *Beal's Cardinal Rules of interpretation*, 3rd Edn. ; *R. v. Pearce*, 5 Q.B.D. at p. 389.

3. *Craies on Statute Law*, 6th Edn. (1963) at p. 215. See also *Partap Singh v. Gulzari Lal*, A.I.R. 1942 All. 50 (F.B.)

4. 15 L.J. Ch. at p. 399.



Where a word or phrase is defined in an Act to have a particular meaning that meaning alone should be given to it notwithstanding it may bear a different meaning in ordinary legal parlance.<sup>1</sup>

It is also an elementary rule of construction that a word must be given the same meaning wherever it occurs in the same enactment and *a fortiori* in the same section of an enactment, unless the context forbids it.<sup>2</sup>

In *Rampratap Jaidayal v. Dominion of India*<sup>3</sup> it has been held that when the Legislature uses different expressions in the same statute—and the more so in the same section—as far as possible the Court must attribute to the legislature the intention of conveying different meanings by the use of different expressions.

In *Tukiram Shaw v. R. C. Paul Ltd.*,<sup>4</sup> it has been observed that definitions given in statutes are limited to that particular statute and cannot be extended to define those words used in another statute, specially when those statutes are not *pari materia*.

A definition given in an Act must be substituted for the word defined wherever it occurs in the Act.<sup>5</sup> The definition given will not apply if the word appears in a subject or context which makes the application of the definition impossible and repugnant to the meaning of the context in which the word is found.<sup>6</sup>

In *R. v. Kershaw*, Erle J.<sup>7</sup> points out the distinction between the words 'include' and 'mean' in the interpretation section, the former having an extending and the latter an excluding significance. When in an interpretation clause it is stated that certain term *includes* so and so, the meaning is that the term retains its ordinary meaning and the clause enlarges that meaning of the term and makes it include matters which the ordinary meaning will not include.<sup>8</sup> The word "include" in the definition merely enlarges the meaning of the term and makes it include matters which ordinarily may not have been included. It does not confine the meaning of the term to what is stated to be included within it.<sup>9</sup> When the definition is intended to be exhaustive the legislature as a whole uses the word 'means' and not the word 'includes'.<sup>10</sup> 'Means' is thus used in the sense of definition or exhaustive definition while "includes" is used by way of extension.<sup>11</sup> It has, however, been observed that an interpretation clause which extended the meaning of a word does not take away its ordinary

1. *Dial Singh v. Gurdwara Sri Akal Takht*, 1928 Lah. 325 ; 9 Lah. 649.

2. *Ganpat Kinushet Sonar v. Vithal Bhikan*, 45 Bom. L.R. 976. See also *Shiv Nath v. Puran Mal*, 1942 All. 16 wherein Iqbal Ahmad C.J. observed that the Legislature is to be deemed to have used a particular word in an enactment in one and the same sense unless the contrary intention appears from the context. Also *Namdeo v. Kesheo*, I.L.R. 1937 Nag. 469.

3. A.I.R. 1953 Bom. 170.

4. (1952) 89 Cal. L.J. 127 ; *Jainarayan Ram Kishan v. Motiram Gangaram*, A.I.R. 1949 Nag. 34—It is not permissible in interpreting one Act to travel

beyond it and to apply definitions (except in the General Clauses Act) of other Acts.

5. *Jagatchandra N. Vora v. Province of Bombay*, A.I.R. 1950 Bom. 144.

6. *Ramabandhu Misra v. Brahmananda Laik*, A.I.R. 1950 Cal. 224.

7. 6 E. & B. 1007 ; 26 L.J.M.C. 23.

8. *Official Assignee, Bombay v. Firm of Chandu Lal Chiman Lal*, 76 I.C. 657.

9. *Ram Gopal v. P.K. Banerji*, A.I.R. 1949 All. 433 relying on *Rodger v. Harrison* (1893) 1 Q.B. 161.

10. *Emperor v. Ram Sarup*, 1933 Oudh 80.

11. See *R. v. Kershaw*, (1856) 6 El. & Bl. 999 ; *R. v. Hermann*, (1879) 4 Q.B.D. 28.



meaning, nor does it follow that the word is in every section of the statute to have such extended meaning irrespective of the context.<sup>1</sup>

### (1) "Buyer and seller"

#### (2) Buyer and seller.<sup>2</sup>

The essence of sale is the transfer of the property in a thing from one person to another for a price. A sale, therefore, necessarily involves the existence of two persons, the seller and the buyer. Hence it has been said that if a man purchases his own goods there is no sale. *Suae rei emptio non valet, sive sciens sive ignorans emerit.*<sup>3</sup>

"Buyer" means a person who buys or agrees to buy goods. "Seller" similarly means a person who sells or agrees to sell goods. This is consistent with section 4 of the Act according to which a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

There must be a consent to buy as well as consent to sell goods, otherwise the agreement, unless void for want of consideration, is a mere option to buy, and the Act is not applicable thereto until the option to buy is exercised and the contract of sale thus created.<sup>4</sup> A person who has merely an option to sell or buy is not a seller or buyer within the meaning of the definition.<sup>5</sup> Thus, where under a hire-purchase agreement the hirer was under no legal obligation to buy the goods, such an agreement was not a contract of sale, but one of hire, with in addition, an option of purchase and therefore the hirer had not "agreed to buy goods" within the meaning of section 9 of the English Factors Act, 1889, and is therefore not a buyer.<sup>6</sup> On the other hand, there may be a contract by which in return for the payment of a deposit and a promise to pay the balance by certain instalments by the so-called "hirer" the owner agrees to give the hirer possession of the goods and promises to transfer the property in the goods to the hirer when all instalments have been paid. This type of agreement contains no option to purchase and the so-called hirer has no right to return the goods to the owner. It is an agreement under which the so-called hirer promises to pay each instalment when it falls due; it is, therefore, an agreement to buy, and as such is within the Factors Act, 1889, and the Sale of Goods Act, 1893, and the hirer is a "buyer".<sup>7</sup> An agreement of hire-purchase in its true sense is essentially different from an "agreement to sell," as will be found explained under section 4.

1. See *Robinson v. Barton* Eccls. Local Board (1883), 8 Appl. Cas. 798.  
2. The definitions of "buyer" and "seller" in this Act are the same as in section 62 of the English Act.  
3. Chalmers, *Sale of Goods Act*, 16th Ed., p. 49; 2 B. Com. (1st ed.), p. 450; *Scotson v. Pegg*, (1851) 6 H. & N. 295, 298. An option to buy must be distinguished from a conditional agreement to buy; *Helby v. Matthews*, (1895) A.C. 471, 475; *Belsize Motor Supply*

*Co. v. Cox*, (1914) 1 K.B. 244.  
4. Halsbury, *Laws of England*, 3rd Edition, Vol. 34, p. 22.  
5. Sub-sections (1) and (13).  
6. *Helby v. Matthews*, (1895) A.C. 471; *Manders v. Williams*, (1849) 4 Ex. 339, 80 R.R. 588.  
7. *Lee v. Butler*, (1893) 2 Q.B. 318; *Felston Tile Co. Ltd. v. Winget Ltd.* (1936) 3 All E.R. 473; see also *Belsize Motor Supply Co. v. Cox*, (1914) 1 K.B. 244 (option to buy).



Buyer and seller must be different persons, but where one person has *by law* the right to sell another person's goods, that other person may purchase his own goods if allowed to do so under the law. Thus under the English law it has been held that one co-owner may sell to another, a partner may sell to his firm, and the firm may sell to a partner, and there are clearly certain *quasi exceptions* to the rule; for instance, when a man's goods are sold under an execution or distress he may himself become the purchaser. So, too, under that law a bankrupt may buy back his own goods from his trustee, "though the trustee, the auctioneer, or any one having a fiduciary character, is precluded from becoming a purchaser by the general policy of the law which prohibits an agent from selling to himself".<sup>1</sup> Under the English law, before the Married Women's Property Acts, a wife could not sell to, or buy from, her husband, for they were in contemplation of law but one person. Now she can do so.<sup>2</sup> A number of persons may sell to themselves as a company, for a company is a different person in the eye of law.<sup>3</sup>

Section 4 (1) of the Indian Sale of Goods Act, 1930, definitely states that there may be a contract of sale between one part-owner and another. For other cases where a seller may purchase his own goods, reference may be made to the relevant statutes in force in India.

As a rule, the owner<sup>4</sup> by himself or his mercantile agent alone can sell and give a good title.<sup>5</sup> In *Bishopsgate Motor Finance Corpn., Ltd. v. Transport Brakes Ltd.*,<sup>6</sup> Denning L.J. expressed the principle under English law thus :

"In the development of our law, two principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by common law itself and by statute so as to meet the needs of our times."

There are, however, cases where a man may confer a better title than he possesses, for instance, in the case of sales by the possessors of goods or documents of title to them,<sup>7</sup> sales under a process of law, or sale by auctioneers. Such cases will be found discussed at proper places.

1. Chalmers, *Sale of Goods Act*, 16th Ed., p. 49; Halsbury, *Laws of England*, 3rd Ed., Vol. 34, pp. 11, 12 & 13; *Ramsay v. Margrett*, (1894) 2 Q.B. 18, C.A.; *Kitson v. Hardwick*, (1872) L.R. 7 C.P. 475, at p. 478; *Moore-Nettlefold & Co v. Singer Manufacturing Co.* (1904) 1 K.B. 820 C.A.; 12 Digest 93; *Plasycod Collieries Co. Ltd., v. Partridge, Jones & Co. Ltd.*, (1912) 2 K.B. 345.
2. *Law Reform (Married Women and Tortfeasors) Act*, 1935, S. 1.
3. See *Tunstall v. Steigmann*, (1962) 2

- All E.R. 417 (where A sells his business to a limited company wholly owned and controlled by him, the business is no longer "carried on by" A for the purpose of the (English) *Landlord and Tenant Act*, 1954).
4. One part-owner may sell to another part-owner [Section 4(6) of the Act].
5. See section 27 of the Act.
6. (1949) 1 K.B. 322; (1949) 1 All E.R. 37, 46.
7. For example, see *Cahn v. Pockett's Bristol, etc. Co. Limited*, (1899) 1 Q.B. 643; 4 Com. Cas. 168.



It has been held in a Madras case :<sup>1</sup> Where an incorporated club provides refreshments to its members, there is no sale and assessment to sales tax or turnover relating to sales of refreshment supplied by club to its members is invalid.

## (2) "Delivery"

### (3) Delivery : definition.

Delivery as defined by section 2(2) of the Indian Sale of Goods Act, 1930, means 'voluntary transfer of possession from one person to another'. This is the same as in section 62 of the English Sale of Goods Act, 1893.

The essence of the delivery is *voluntary* transfer of possession from one person to another. If B steals goods from A, there is no delivery from A to B, though possession is transferred. When possession is voluntarily transferred from one person to another there is always a delivery which is either at once absolute or, if it be subject to a condition, absolute on the condition.

Where the buyer takes possession pursuant to the leave of the seller, whether concurrent or antecedent, there is a voluntary transfer of possession. Thus under the English law it has been held that where goods are taken possession of by the buyer under a licence to seize, the transaction is equivalent to a delivery by the seller<sup>2</sup> and should perhaps be regarded as a case of actual delivery.

Sir Frederick Pollock defines delivery as "voluntary dispossession in favour of another" and proceeds to say that "in all cases the essence of delivery is, that the deliverer, by some apt and manifest act, puts the deliverer in the same position of control over the thing, either directly or through a custodian, which he himself held immediately before the act."<sup>3</sup>

The Act makes no attempt to define the term "possession". Section 1(2) of the English Factors Act, 1889, however, defines "possession" as follows :—

"A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf."

The term "possession" is probably too elusive for the purpose of a statutory definition. Its meaning is more or less always relative. For instance, when goods are under the control of an agent or servant, they are for some purposes in the possession of the principal or master, while for other purposes are in the possession of the agent or servant.

"Custody" again is not the only test of possession although the definition of "possession" in the English Factors Act, 1889, proceeds on these lines. When goods are in the actual custody of a servant the master

1. Young Men's Indian Association (Regd.) Madras v. Commercial Tax Officer, Harbour Division, Madras, A.I.R. 1964 Mad. 63. This decision should, however, be read in the context of the law relating to levy of sales-tax in Madras,

2. Chalmers, Sale of Goods Act, 16th Ed., p. 225. Congreve v. Evetts, (1854) 10 Exch. 298, at p. 308 per Parke B.  
3. Pollock and Wright "Possession in the Common Law" pp. 43, 46 ; see further notes under section 33.



alone is legally in possession of them and the custody of the servant is not regarded by the law as the possession of the servant.<sup>1</sup> And possession may exist without actual custody, as for instance, an owner of goods is said to be in possession of them though they are in the actual custody of bailee at will, or a carrier.<sup>2</sup>

Where possession is ambiguous it must be attributed to the person having the title to the goods.<sup>3</sup>

**Possession**, says Sir Frederick Pollock,<sup>4</sup> has three distinct and separate elements. They are : (i) physical control, detention or *de facto* possession ; (ii) legal possession, the state of being a possessor in the eye of the law ; (iii) right to possess or to have legal possession. This includes the right to legal possession.

(1) *De facto possession*.—Alone physical control may have no incidence in law because a person may be in physical possession of a chattel over which he has and asserts no claims whatever. On the other hand, “possession in fact, with the manifest intent of sole and exclusive dominion always imports possession in law,”<sup>5</sup> that is, the legal possession mentioned below.

What amounts to control as an ingredient of legal possession is illustrated by a number of English cases.

In *Young v. Hickens*,<sup>6</sup> the plaintiff while fishing for pilchards had nearly encompassed the fish with his net when the defendant by rowing his boat into the opening of the net disturbed the fish and prevented the plaintiff capturing them. The plaintiff sued in trespass but it was held that he was not entitled to recover in the absence of proof of a special custom of the fishery. Lord Denman C.J. said :

“It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant ; but it is quite certain that he had not possession. Whatever interpretation may be put on such terms as ‘custody’ and ‘possession’, the question will be whether any custody or possession has been obtained here. I think it impossible to say that it had, until the party had actual power over the fish. It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power ; but that would only show a wrongful act, for which he might be liable in a proper form of action.”<sup>7</sup>

In *Great Eastern Rail Co. v. Lord's Trustee*,<sup>8</sup> a railway company by a “ledger agreement” opened a credit account with a coal merchant for the

1. See *Biddomoye v. Sittaram*, (1879) 4 Cal. 497.

2. *Gordon v. Harper* (1796) 7 T.R. 13 ; 4 R.R. 369. Aliter, if they are in the custody of a bailee when the contract of bailment cannot be terminated at the will of the bailor ; *ibid*.

3. *French v. Gething* (1921) 3 K.B. 380 at p. 390 (gift of furniture to wife) ; *Seager v. Hukma Kessa* (1900) 24 Bom. 458 (wife in charge of her husband's articles of jewellery as custodian on his behalf). For a full discus-

sion of the meaning of the term as used in the Indian Contract Act, see *Haji Rahimbux Ashan Karim v. Central Bank of India*, A.I.R. 1929 Cal. 497 ; (1928) 56 Cal. 367 ; 119 I.C. 23.

4. Pollock and Wright “*Possession in the Common Law*” pp. 26, 27.

5. *Ibid*, p. 29.

6. (1843) 6 Q.B. 606.

7. See also *Sutton v. Buck* (1810) 2 Taunt 302 ; *The Tubantia* (1924) p. 78—cases relating to wrecked ships,

8. (1909) A.C. 109.



carriage of his coal, the company to have a continual lien upon the coal conveyed on their lines or being at any time on ground rented of the company for all charges due to them, and to be at liberty to sell and dispose of any of coal to satisfy the lien, with the right to close the account by giving one day's notice. By separate agreements the company let to the merchants allotments within the railway yard for the purpose only of seeking and dealing with the coal. The company had the keys of the yard gates and kept them locked at certain times. The payments being in arrear, the company closed the account, locked the gates, and detained the coal. The House of Lords, by a majority of three to two held that the company had possession although the coal was actually on land demised to the merchant because they were in control of the coal and it was the intention of the parties that they should be until their charges in respect of the carriage of the coal and the rented ground were paid.

Lord Loreburn L.C. said :

"True there was a demise to Lord of an allotment in the yard whereon this coal was stacked. That entitled him to occupy the allotment. But did that occupation confer on him the exclusive possession of everything he placed upon the allotment? I cannot say why it should. An officer may be in possession of goods whether the debtor has a lease or even the freehold of the house in which the goods are placed. I cannot perceive any necessary dependency between the occupation of a piece of land and the exclusive possession of chattels which lie on it."

Lord Macnaghten said :

"But then it is said.....Lord had possession of the coal. So he had in a sense—in the sense in which the owner of dutiable goods has possession of them while they are stored in a bonded warehouse belonging to him as assessee or tenant. It is said that Lord not only had possession of the coal, but also an estate in the land on which the coal was deposited. I cannot see what tenure of land has to do with the question. If the delivery was absolute and unconditional, it cannot matter where the goods were deposited or what Lord did with them. If the delivery was not unconditional, the question must be, Had the goods passed out of reach or were they still within the grasp of the company?"

(2) *Legal possession*, the state of being a possessor in the eye of the law.

"This is a definite legal relation of the possessor to the thing possessed. In its most normal and obvious form, it co-exists with the fact of physical control, and with other facts making the exercise of that control rightful. But it may exist either with or without detention, and either with or without a rightful origin.

A tailor sends to J.S.'s house a coat which J.S. has ordered. J.S. puts on the coat, and then has both physical control and rightful possession in law.

J.S. takes off the coat and gives it to a servant to take back to the tailor for some alterations. Now the servant has physical control (in this



connection generally called 'custody' by our authorities) and J. S. still has the possession in law.

While the servant is going on his errand, Z assaults him and robs him of the coat. Z is not only physically master of the coat, but, as soon as he has complete control of it, he has possession in law, through a wrongful possession. To see what is left to J. S. we must look to the next head."<sup>1</sup>

(3) *Right to possess or to have legal possession*.—This is the right which is left to a person who has lost his physical or legal possession of a chattel by agreement, as on a bailment, or through the wrongful act of another, as in the case of a theft or a conversion. Or, it may be the right of one who is entitled to but has never obtained possession as in the case of the purchaser who has paid the price of goods brought but has not had delivery thereof.

Possession itself, like ownership, is indivisible<sup>2</sup> but the right to possession is not exclusive<sup>3</sup> for by way of example, one in possession of a chattel at the will of the owner has a right to possession as against all but the owner, whereas the latter has a right to possession against every one. No difficulty arises in this respect if one keeps clearly in mind the distinction between possession and the right to possess, though some confusion appears from time to time in the form of the so-called doctrine of "double possession". Pollock says that the rule that possession is indivisible, that is, is single and exclusive is fundamental in English as well as in Roman law, and that such apparent exceptions as may be found consist in the remedies of a possessor being granted to certain purposes and in certain cases, to an owner out of possession. But "it must be admitted that the language of our authorities is anything but clear or uniform and some times a bailor and bailee are spoken of as both having possession. In such passages the word is used in a double sense."<sup>4</sup>

When possession is doubtful it is attached by law to the title.<sup>5</sup> In *James v. Chapman*<sup>5</sup> Maule J. said :

"I agree with the exception of the plaintiff in error that the question raised by the issue of 'not possessed' is whether a plaintiff is in *actual possession* or not : but it seems to me that, as soon as a person is entitled to possession, enters in the assertion of that possession, or which is exactly the same thing and other person enters by the command of that lawful owner so entitled to possession the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in assertion of the right of possession, and if the question is which of those is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

1. Pollock and Wright, "*Possession in the Common Law*", pp. 26, 27.

2. Pollock and Wright, "*Possession in the Common Law*", pp. 20, 21,

3. Ibid, p. 27.

4. Ibid, p. 21. See Vaines, "*Personal Property*", pp. 43, 44.

5. *Ramsay v. Margrett* (1894) 2 Q.B. 18, at p. 24, per Esher M.R.

6. (1849) 2 Exch. 803, at pp. 820, 821,



The principle was applied in *Ramsay v. Margrett*<sup>1</sup> to personal chattels in the case of husband and wife living in the house where the chattels were deposited. Either could be in possession in fact and so : "where possession in fact is undetermined, possession in law follows the right to possess."<sup>2</sup>

#### (4) Mode of delivery.

Section 33 the Act prescribes that 'delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf'. Thus, parties may in time of war agree that the delivery of a despatch telegram may take the place of a bill of lading.<sup>3</sup> Delivery to a carrier or wharfinger is generally regarded as delivery to the buyer (section 39 of the Act).

Delivery may be actual or constructive. Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. Delivery by attornment may take place in three classes of cases. *First*, the seller may be in possession of the goods, but after sale he may attorn to the buyer and continue to hold the goods as his bailee<sup>5</sup>. *Secondly*, the goods may be in possession of the buyer before sale, but after sale he may hold them on his own account.<sup>6</sup> *Thirdly*, goods may be in the possession of a third person, as bailee for the seller, and after sale such third person may attorn to the buyer and continue to hold them as his bailee.<sup>7</sup> When goods are stored in a room or close, delivery may be made by handing over its keys to the buyer. Such delivery is known as symbolic delivery. In the words of Sir F. Pollock, "although keys are not the symbol of the goods but the transaction consists of such a transfer of control in fact as the nature admits and as will practically suffice for causing the new possession to be recognised as such."<sup>8</sup> Another and more genuine example of symbolic possession is the transfer of a bill of lading.<sup>9</sup> While the goods are at sea the owner can deal with them on land only through the instrumentality of the Bill of Lading which represents them. The transfer of the Bill of Lading has the same effect as the delivery of the goods themselves. The term "delivery" includes "symbolic" delivery and is not restricted to the physical transfer of the goods themselves, but covers also transfer of possession of documents of

1. (1894) 2 Q.B. 18 ; *French v. Gething*, (1920) 3 K.B. 380, at p. 390 (gift of furniture to wife.)

2. Pollock and Wright, *Possession in the Common Law*, p. 24.

3. See *Haji Peer Muhammad Ishack v. Hussain Akbari*, A.I.R. 1923 Mad. 103 ; 43 M.L.J. 199.

4. Chalmers, 16th Edn., pp. 224 to 226 citing *Dublin City Distillery Co. v. Doherty* (1914) A.C. 823 at p. 852.

5. *Ibid.*; *Elmore v. Stone* (1802), 1 Taunt 458 ; *Marvin v. Wallis* (1856) E. & B. 726.

6. *Story on Sale*, 312a. Cf. *Cain v. Moon* (1896) 2 Q.B. 283, 289 ; *Blundell*

*Leigh v. Attenborough* (1921) 3 K.B. 235 C.A. (pledge).

7. Pollock and Wright, "*Possession in the Common Law*", p. 72. *Farina v. Home* (1846) 19 M. and W. 119, 123.

8. *Ibid.*, p. 61 ; Cf. *Wrightson v. McArthur*, (1921) 1 K.B. 807, 816. See *Bristol Tramways Co. v. Fiat Motors, Ltd.*, (1910) 2 K.B. 831, at pp. 839, 840 C.A.

9. *Sanders Brothers v. Maclean & Co.*, (1883) 11 Q.B.D. 327, 341 ; per Kennedy L.J. in *Biddell v. E. Clements Horst Co.* (1919) 1 K.B. 934, p. 957 ; Per Lord Sumner in the *Prinz Adalbert* (1917) A.C. 586, 589,



title to goods<sup>1</sup>. Actual delivery is manual transfer of the commodity sold and the physical custody of the things passes from the seller to the buyer. These terms will be found fully explained under section 33.

Even before the enactment of the Sale of Goods Act (English) on the statute book it was held in *Chapline v. Rogers*<sup>2</sup> by Lord Kenyon that "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery; it may be done by that which is tantamount, such as the delivery of key of a warehouse in which the goods are lodged, or by delivery of other indicia of property".

There is no branch of law of sale more confusing than that of delivery. The word is unfortunately used in very different senses, and these should be borne in mind. The following points may be noted in this connection :

1. The word delivery is sometimes used with reference to the passing of the *property* in the chattel,<sup>3</sup> sometimes to the change of *its possession*; in a word, it is used in turn to denote transfer of *title* or transfer of *possession*.

2. Even where "delivery" is used to signify the transfer of *possession*, it is employed both with reference to the *formation* of the contract, and to its *performance*. Under the English law, when questions arise as to the actual "receipt" in a parol contract for the sale of chattels exceeding £ 10 in value the Judges constantly use the word as the correlative of that "actual receipt". But after the sale has been proven to *exist* by delivery and actual receipt, there may arise a distinct controversy upon the point whether the seller has *performed* his completed bargain by delivery of possession of the bulk.

3. Even when the subject is the seller's delivery of possession in *performance* of his contract, there arises a fresh source of confusion in the different meanings of "possession". In general it would be perfectly technical to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the seller. The buyer owns the goods, has the right of possession, may take them away, sell or dispose of them, and maintain trover for them. Yet, if he becomes insolvent under the English law, the seller is said to have retained possession. Again, if the seller has delivered the goods to a carrier for conveyance to the buyer, he is said to have lost his lien, because the goods are in buyer's possession, the carrier being the buyer's agent but if the seller claimed to exercise the right of stoppage *in transitu* during the transit, the goods are said to be only in the *constructive*, not in the actual possession of the buyer.<sup>4</sup>

Delivery in the various senses above mentioned will be found discussed in this work.

In *Mansingh Ka Oil Mills Ltd. v. Commr. of Sales Tax M. P.*,<sup>5</sup> it was held : The expression F.O.R. used in connection with place of delivery means the sales take place when goods are put on rail. The expression

1. Chalmers, pp. 224 to 226. See also the Bill of Lading Act, 1856, Sec. 1.

2. (1800) 1 East 192.

3. As e.g. per Parke J, in *Dixon v. Yates*

(1833), 5 B. & Ad. 313, 340.

4. See Benjamin on Sale Eighth Edition, pp. 685, 686. Now 1st edn., 1975,

5. 1968 M.P.L.J. 735.



when used in connection with price means that the rate is inclusive of all charges.

As to how delivery may be made, see section 33, *post*.

As to the effect of part delivery, see section 34, *post*.

As to the rules of delivery, see section 36, *post*.

As to the effect of delivery of wrong quantity, see section 37, *post*.

As to the instalment deliveries, see section 48, *post*.

As to delivery to carrier, see section 39, *post*.

**Section 2 (2)—Income-tax Act, 1922, S. 24 (1), Explanation 2.**

In *D.M. Wadhawa v. Commissioner of Income-tax, West Bengal*,<sup>1</sup> the Calcutta High Court held: "Under section 2 (2) of the Sale of Goods Act delivery means voluntary transfer of possession from one person to another—the definition being the same as that given in section 62 (1) of the English Sale of Goods Act. A symbolical delivery of goods divesting the seller's possession and lien may be sufficient compliance with the Sale of Goods Act. In enacting the Explanation 2 of section 24 (1) of the Income-tax Act, the legislature did not intend to affect any transaction of sale wherein the goods were not physically delivered by the seller to the buyer but only laid down that if there was no actual or physical delivery, the loss, if any, would be a loss in a speculative transaction which could be allowed to be set off only against a profit in a transaction of the same nature."

**Pucca Delivery Orders issued by Jute Mills in accordance with customs prevailing in Calcutta Jute Market not documents of title—Evidence of trade usage under which such orders are considered as documents of title is barred under proviso (5) to S. 92 of the Evidence Act, 1872.**

In *Juggilal Kamlatpat v. Pratabmull Rameshwar*<sup>2</sup> it was held: (1) Pucca delivery order issued by a Jute Mill is not necessarily a document of title and does not necessarily empower a transferee to obtain goods that it represents. In the Calcutta Jute Market there is a custom or usage whereby the mills sell goods, which have not been appropriated to the contract and may not have come into the existence at all to purchasers for the purpose of export. Such contracts are entered into in the standard Indian Jute Mills Association forms. There are a number of such forms containing terms that are not identical. (2) In such a case the mills normally issue Pucca delivery orders, against cash payment, goods to be put alongside the ship when demanded by the holder of the Pucca delivery order. (3) These Pucca delivery orders denote the goods and pass from hand to hand for a consideration, until they get into the hands of a purchaser who wishes to actually ship the goods. This purchaser demands delivery of goods whereupon the mills deliver the goods alongside the ship. (4) The Pucca delivery order is not a document of title and no title passes to the purchaser until the goods are appropriated, to the contract, by the seller. (5) When the final buyer takes actual delivery, *co instanti* all the intermediate contracts are deemed to have been implemented and possession is deemed

1. (1966) 61 I.T.R. 154, p. 165. See also to the same effect *Commr. of I.T. v. R.C. Gupta and Co.*, A.I.R. 1968 Cal. 385.

2. 70 C.W.N. 741 : *Duni Chand Rotaria v. Bhuvalka Brothers, Ltd.*, A.I.R.

1955 S.C. 182 referred to ; *Anglo India Jute Mills Co. v. Omademull*, I.L.R. (1910) 38 Cal. 127, and *Morvi Mercantile Bank Ltd. v. Union of India*, A.I.R. 1965 S.C. 1954 distinguished.



to have been given to each buyer all along the chain. But before such delivery no intermediate buyer can be said to be in actual possession of goods. (6) Although a pucca delivery order is not a document of title and title does not pass by merely issuing a Pucca delivery order, if the transaction is such that the purchaser of the Pucca delivery order is not put on notice that the entire consideration has not been paid or that there is any impediment in the delivery of the goods when demanded by the holder of Pucca delivery order, the party issuing the Pucca delivery order will be estopped, (1) from denying that the price has been paid, (2) from denying that it has not got the goods in its possession which it has contracted to sell.

Although a Pucca delivery order is used in the ordinary course of business as proof of the possession or control of goods or in any event authorises or purports to authorise the possessor of the document to receive the goods thereby represented, this has to be read with the provision contained in S. 18 of the Sale of Goods Act. If the goods are unascertained then title cannot pass ; the holder of a Pucca delivery order can neither be in possession nor control of goods. If the transferee of a delivery order has to perform new obligations and enter into new stipulations to obtain the right to the delivery of the goods, then it does not satisfy the definition of S. 18 of the Sale of Goods Act and the delivery order cannot be described as document of title.

'Delivery' within the meaning of S. 2(2) of the Sale of Goods Act means voluntary transfer of possession from one person to another. Since under Pucca delivery order the seller cannot be said to be in possession of any specific goods, mere delivery of the Pucca delivery order cannot constitute transfer of possession from one person to other. Further, an oral statement regarding existence of an established trade usage or custom under which such Pucca delivery orders have been treated by the parties as documents of title, cannot be admitted in evidence to show a variation in terms of contract. Such evidence is barred under proviso (5) of S. 92 of the Evidence Act.

#### (5) **Effect of transfer of possession.**

The effect of the transfer of possession differs in different circumstances. A delivery effectual for one purpose may be ineffectual for another purpose, and then it is frequently said that there has been no delivery ; for instance, when the seller of goods delivers them to a carrier to convey them to the buyer, it is in general as effectual as a delivery to the buyer himself for the purpose of passing the property and risk (Section 38), and in discharge of the seller's duty to deliver (Section 32) and to divest his lien [Section 49 (1) (a)] subject to the qualifications contained in section 37 (2) but it is ineffectual for the purpose of defeating the seller's right of stoppage *in transitu*. To defeat this there must be a further delivery from the carrier to the buyer [Section 51 (1)].

#### (3) **Goods in a "deliverable state"**

##### (6) **Goods in a "deliverable state"**

According to section 2 (3) of the Act, goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them. This reproduces section



62(4) of the English Sale of Goods Act, 1893. Cf. section 80 of the Indian Contract Act which contained the corresponding expression, "a state in which the buyer is to take them".

The expression "deliverable state" occurs in sections 20, 21, 22, 23(1), and 36 (5) of the Act. Blackburn paraphrases "deliverable state" as "that state in which the buyer is to be bound to accept" the goods.<sup>1</sup>

It may be observed that the buyer can only take delivery of the goods if all that he requires the seller to do has been done by him. If the goods had to be put in casks, cans or bottles, they must have been so put. As to what is deliverable state depends on the nature of the thing itself, the custom or usage of trade relative to that thing and the course of previous conduct between the parties.

In the nature of things one cannot expect that wheat should be filled in bottles or cakes put in gunny bags. Everything has its own way of packing which is presumed to be a part of the contract unless there is something to the contrary clearly in the contract. Thus if A asks the seller to give him ten seers of wheat after putting them in bottles of one pound each, there is definite condition in the contract which cannot be fulfilled by the customary mode of packing in gunny bag in spite of the appropriation. The seller cannot force A to take delivery of the goods as he has not put them in a deliverable state. The wheat will only be in a deliverable state according to the contract when it is duly put in the bottles. As soon as the seller has done so A has no option and can be forced to take delivery, and if he fails to do so he is guilty of a breach.

Then again there may have been previous dealings between the parties which control their present dealings. If the seller of the wheat has supplied A wheat in one pound bottles ten times before, he is presumed to know A's requirements, and the condition should be deemed to exist : as it is impliedly consented to by the parties and understood by them to exist independently of the special transaction in question.

If the goods are to be manufactured, produced or acquired, they are not in a deliverable state unless and until they are manufactured, produced or acquired. If, according to the contract, the seller is to do something with the goods before the buyer should take delivery of them, they are not in a deliverable state until the seller has done that thing with them.<sup>2</sup>

#### (4) "Document of title to goods"

##### (7) Documents of title to goods : definition.

The Indian Contract Act used the different phrases, "document showing title", "instrument of title" and "document of title" to goods (sections 102, 103, 108 and 178 of the Indian Contract Act, 1872 : sections 103 and 108 since repealed by the Sale of Goods Act, 1930).

In *Ramdas v. S. Amer Chand & Co.*<sup>3</sup> the Judicial Committee, after referring to the expression "document of title to goods" as defined in the Indian Factors Act, 1844 (repealed by the Indian Contract Act, 1872).

1. Blackburn on Sale, 3rd Ed. (1910) p. 184.

2. *Laidler v. Burlinson*, (1837) 2 M. & W. 602 ; *Brown Brothers v. Carron Co.*

(1898), Sc. L.T. 231 (Seot) ; *Young v. Matthews* (1866) L.R. 2 C.P. 127.

3. (1916) L.R. 43 I.A. 164 : 40 Bom. 630, affirming (1913) 38 Bom. 255.



laid down that whenever any doubt arises as to whether a particular document is a "document showing title," or a "document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possession of the document to transfer or receive the goods thereby represented. The question in this case was whether a railway receipt which entitled the endorsee to delivery was an "instrument of title" to goods within the meaning of section 105 of the Indian Contract Act, 1872 (since repealed). It was held that it satisfied the test laid down above, and was a "document showing title" to goods within sections 102 and 108, a "document of title to goods" within section 178, and an "instrument of title" within section 103.<sup>1</sup> It was observed :

"Sections 108 and 178 though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844 which, with certain modifications not material for the purposes of this appeal, made the provision of the English Factors Act, 1842 applicable to British India. Both the last mentioned Acts use the expression 'documents of title to goods' and define it as including any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods and any other documents used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize either by endorsement or by delivery, the possession of the document to transfer or receive the goods thereby represented."

Under section 62 of the English Sale of Goods Act, 1893, the expression "document of title to goods" has the same meaning as it has in the Factors Act, 1889. Section 4(1) of the Act defines "document of title" as follow :—

The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate and warrant or order for the delivery and any other document used in the ordinary course as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

The definition under the Indian Sale of Goods Act, 1930, is wider than that of the English Factors Act, 1889, inasmuch as it includes not only wharfinger's certificates (which, however, are covered by the term warehouse-keepers' certificates in the English Act) but also railway receipts."<sup>2</sup> The word 'includes' shows that the definition is not exhaustive but is only descriptive.

#### (8) Conditions to be fulfilled by a "document of title to goods".

The judgment in *Ramdas Vithaldas v. Amar Chand & Co.*,<sup>3</sup> makes it clear that the use of the expression "any other documents" in the concluding words of the statutory definition of document of title shows that the

1. The decision in *G.I.P. Railway Co. v. Hanumandas*, (1889) 14 Bom. 57 that a railway receipt is not an instrument of title is, therefore, no longer good law.

2. They have been specifically mentioned in order to remove a doubt which was

once entertained as to their nature as 'documents showing title to goods'. See *G.I.P.R. v. Hanumandas*, 14 Bom. 57, 58-59; see also *Remfry on Sale of Goods*, p. 379.

3. (1916) L.R. 43 I.A. 164 : 40 Bom. 630 : A.I.R. 1916 P.C. 7.



remaining words of the clause, "used", etc., qualify each of the particular documents mentioned as well as any other document. Therefore a warehouse-keeper's certificate or any other document, will not be a "document of title" unless it be used "in the ordinary course of business as representing the goods. If it purports to be delivery warrant, making the goods deliverable to A, B or his assignee by endorsement or otherwise," the warrant or certificate then represents the goods ; and is used as proof of the possession or control of them. It follows therefore that when it is sought to bring any document within the category of a "document of title" it must be shown that it is used in the ordinary course of business representing the goods.

In *Farina v. Home*<sup>1</sup>, the wharfinger gave the seller a warrant making the goods deliverable to him or to his assignee by endorsement on payment of rent and charges. The seller forthwith endorsed and sent it to the buyer, who kept it for ten months, and refused to pay for the goods or to return the warrant, saying that he had sent it to solicitor and intended to defend the suit as he has never ordered the goods, adding that they would remain for the present in bond. *Held*, that the warrant was a "document of the title" to goods.

On the other hand, where the document is in form only a certificate that the goods are lying at the wharf and ready for delivery, it does not and is not intended to represent the goods ; it does not authorise or purport to authorise the holder to receive them ; it is therefore, not a document of title.

In *Gunn v. Bolckow*<sup>2</sup> the defendants had contracted to make and sell to the Aberdare Iron Company, for shipment to Russia, iron rails, and delivered to the Aberdare Company, in exchange for their acceptances, wharfingers' certificates in the following form: "I hereby certify that these are lying at the works of Messrs. Bolckow, Vaughan & Co., Limited, of Middlesbrough.....tons of iron rails which are ready for shipment and which have been rolled under contract dated.....between the said company and the Aberdare Iron Company—W. Rai, *Wharfinger*." It was held that this certificate was not a "document of title" to goods.

Similarly, a document may amount to an undertaking to deliver goods, but it must be shown to be an undertaking made unconditionally to the holder of document to deliver them, otherwise it will not be a document of title.<sup>2</sup> In this case the defendants, the sellers of one hundred tons of zinc, gave to the buyers, Messrs. Burrs & Co., four undertakings in the following form: "We hereby *undertake to deliver to your order, endorsed hereon*, twenty-five tons merchantable sheet zinc of your contract of this date." The contract was not for the sale of any specific zinc. The plaintiffs bought from Burrs & Co. fifty tons on the faith of these documents, which were endorsed to them, but which, as admitted were not documents known among merchants. Burrs & Co. failed, and the defendants refused to deliver to the plaintiffs, whereupon the plaintiffs brought detinue and trover. They contended that the defendants had by the time of the undertaking represented to the plaintiffs "that the goods therein mentioned were the property of Burrs & Co., free from all lien or claim

1. (1846) 16M. & W. 119; 16 L.J. Ex. 73; 73 R.R. 423.      2. (1875) L.R. 10 Ch. 491 ; 44 L.J. Ch. 732.



whatsoever on the part of the defendants." But *held* that these "undertakings" must be construed as any other written instruments, and did not contain any representation of fact either that the goods were the goods of Burrs & Co., or that they were free from lien; the only representation was that there was a contract and that the sellers were willing (subject to their rights) to deliver twenty-five tons. The defendants, therefore, were not estopped from setting up that the goods were not the property of the plaintiffs, in their own right as unpaid sellers, to withhold delivery.<sup>1</sup>

In *The Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*,<sup>2</sup> the defendants under a contract of sale to Messrs. Smith and Co. for steel rails to be delivered in monthly quantities, invoiced the rails to Smith & Co. and at their request sent in addition warrants for the monthly quantities in the following form *mutatis mutandis* :

"The undermentioned iron will not be delivered to any party but the holder of this warrant.

"No. 88  
19, 1874."

"Phoenix Bessemer Steel Co. Ltd. Dec.

Stacked at the works of the Phoenix Bessemer Steel Co., The Ickles, Sheffield Warrant for 403 tons 2 qrs. 9 lbs. Steel rails. Iron deliverable (f.o.b.) to Messrs. Gilead Smith & Co. of London, *or to their assigns by indorsement hereon*".

Smith and Co. by way of pledge, endorsed the warrants to the plaintiffs who claimed a first charge upon the iron. The defendants claimed their lien as unpaid sellers. It was proved that by the usage of the iron trade warrants in the above form passed from hand to hand without notice being given to the person issuing the warrants and were taken to the holders for value of title *free* from any seller's *lien*. Jessel M.R., drew the inference that the sellers must have intended the warrants to be used for the purpose of sale or pledge, because, with knowledge of the custom, they had issued them in addition to the ordinary invoices of the goods. He held therefore that they were estopped from afterwards setting up their claim as unpaid sellers.

This decision marks the distinction between a delivery warrant which is a document of title transferable by endorsement and which is intended to represent the goods and wharfinger's certificate that the goods are ready for delivery, as in *Gunn v. Bolckow*.<sup>3</sup>

But a document may be a document of title to goods even if it refers to unascertained goods.<sup>4</sup>

### (9) Bill of lading.

*Bill of lading* is a term applied to the documents signed by the master of a ship or by the shipowners or their agents acknowledging the receipt of goods for carriage, specifying the ports of shipment and destination and the conditions under which the goods are accepted for carriage, a full description of the goods, their marking and alleged contents, and

1. As the goods were unascertained, the seller's right (though called a *lien* in the case) was not a *lien* but a right to withhold delivery similar to a *lien* (section 46). Benjamin on Sale, 8th Edn., p. 871. See now 1st Edn. 1975.  
2. 5 Ch. D. 205 : 46 L.J. Ch. 418.

3. See Benjamin on Sale, 8th Edn., p. 872. See now 1st Edn. 1975.

4. Ant. Jurgens Margarinefabriek v. Louis Dreyfus & Co. (1914) 3 K.B. 40. Cf. Anglo-India Jute Mills v. Omademull (1911) 38 Cal. 127 : 10 I.C. 359.



undertaking to deliver them to consignee or to his order or assigns upon payment of the freight stipulated. A bill of lading is usually made out in sets of two or three copies, all of which are signed and which state that they are respectively the original, duplicate, or triplicate copy. An unsigned copy is retained by both the ship's owners and the master, but all the signed copies together constitute the complete set, *though delivery of the goods will be made from the vessel against production of one signed copy only*. For this reason a bank should always insist on receiving the complete set of bills of lading in respect of any goods against which it makes advances to avoid the possibility of any missing copy being used to obtain prior delivery of the goods. The generally acceptable form of bill of lading states definitely that the goods named in it have been shipped on board a named vessel but another form exists where the goods are stated to have been "received for shipment". This latter form is not favourably regarded by banks, as any delay in shipment might result in the cancellation of the purchase by the buyer or in the case of perishable goods it might result in serious deterioration.<sup>1</sup>

There is no statutory definition of the term "bill of lading" although there are various Acts dealing with it. According to Lord Blackburn,<sup>2</sup> a bill of lading "is a writing signed on behalf of the owner of the ships in which goods are embarked acknowledging the receipts of the goods and undertaking to deliver them at the end of the voyage, subject to such condition as may be mentioned in the bill of lading. The bill of lading is sometimes an undertaking to deliver the goods to the shipper by name, or his assigns, sometimes to order or assigns, not naming any person, which is apparently the same thing, and sometimes to a consignee by name or assigns, but in all usual forms it contains the word 'assigns'."

A bill of lading is defined in the Commercial Laws of Great Britain and Ireland<sup>3</sup> as a document which (1) acknowledges the receipt of goods on board a vessel (2) is evidence of some or all of the terms on which the goods were received (3) is a symbol of the goods so that a transfer of property in them may be evidenced by the endorsement and (4) in the hands of a consignee or endorsee for value is in the absence of fraud or express knowledge of non-shipment, conclusive evidence of shipment against the person who signed it.<sup>4</sup> It is in from, a receipt from the captain to the shipper or consignor, undertaking to deliver the goods, on payment of freight to some person whose name is therein expressed, or endorsed thereon by the consignor. It is used both as a contract for carriage and a document of title.

At Common Law the property in the goods could be transferred by the endorsement of the bill of lading, but the contract created by the bill of lading could not; therefore the endorsee could not sue on the contract in his own name.<sup>5</sup> The English Bills of Lading Act, 1855, (18 & 19 Vic. C. III) confers this right while confirming the Common Law rights.<sup>6</sup> The law as to the endorsement and delivery of bills of lading was thus stated by Bowen, L.J. in *Sanders v. MacLean*<sup>7</sup>: "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During

1. See Evitt's Practical Banking, 4th Edn., p. 88.

2. Blackburn on Sale, 3rd Edn., p. 421, Vol. 1, p. 386.

4. See English Bills of Lading Act, 1855, S. 1; Indian Bills of Lading Act,

1856, S. 3.

5. *Thompson v. Dominy* (1845) 14 M. & W. 403.

6. See Chalmers, Sale of Goods Act, 16th Edn., p. 262.

7. (1883) 11 Q. B. D. 327, at 341 (C.A.)



this period of transit and voyage the bill of lading by the law merchant is universally recognized as its symbol, and the endorsement and delivery of the bill of lading operates as a symbolical delivery of cargo. Property in the goods passes by such endorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would by an actual delivery of the goods. As for the purpose of passing such property in the goods and completing for title of the endorsee to full possession thereof, the bill of lading until complete delivery of the cargo has been made on shore to some one rightfully under it remains in force as a symbol and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the ship-owner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse floating or fixed, in which the goods may chance to be."

Bill of lading is not negotiable like a bill of exchange and therefore the mere honest possession of a bill of lading endorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. The endorsement of a bill of lading gives no better right to the goods than the endorser himself had (except in cases where a mercantile agent, or person in the position of such agent, may transfer it to a *bona fide* holder under the Factors Act)<sup>1</sup>. It was stated by Lord Campbell, C.J. in the case of *Gurney v. Behrend*:<sup>2</sup> "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make a title under it as against the shipper of the goods. The bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented."

#### (10) Indian Bills of Lading Act, 1856.

The common law rule that the assignee of the bill of lading could not sue upon the contract contained in it is abrogated by the Indian Bills of Lading Act, IX of 1856,<sup>3</sup> the first two sections of which are as follows :

(1) Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

(2) Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original ship-

1. See Benjamin on Sale, 8th Edn., p. 923. Now 1st Edn. 1975.

2. (1854) 3 E. & B. 622, at pp. 633-4 ; 13 L.J.Q.B. 165 ; 97 R.R. 687.

3. See Appendix. Cf. the English Bills of

Lading Act, 1855 (18 & 19 Vict. C. III) which is the same as the Indian Bills of Lading Act, 1856 (IX of 1856).



per or owner, or any liability of the consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

As the result of that enactment, the endorsee can both sue and be sued by the carrier upon the bill of lading. It is only, however, where the property, as distinguished from some special property in the goods, is passed by the endorsement that the Act applies. In *Sewell v. Burdick*,<sup>1</sup> a bill of lading had been endorsed by way of pledge to bank, but in the circumstances of the case the pledgees never applied for delivery of the goods to them. It was *held* that they could not be sued upon the contract contained in it.

If, however, the pledgee presents the bill of lading and demands delivery of the goods by virtue of it, a contract may be inferred between him and the carrier to deliver and accept the goods according to the terms of the bill of lading, and the exceptions from liability in the bill of lading may be relied upon by the carrier, and conversely, all circumstances which could prevent him from relying upon such exceptions as against the original party to the bill of lading, will properly be relying upon those exceptions as against the assignee.<sup>2</sup>

In effect, therefore, a pledgee of a bill of lading, who demands delivery of the goods, will be in the same position as if he had been a party to it, or as if it had been endorsed to him in such circumstances as to pass the property to him.

Receipt issued by ship-owners to shippers for goods delivered at the warehouse for shipment though ordinarily accepted by the shipper's agents at the ports of delivery as entitling the consignee to delivery are not evidence of shipment and cannot be strictly treated as bills of lading.<sup>3</sup> The only point in which a bill of lading differs from other documents of title is that its assignment, whether upon a re-sale or by way of pledge, operates as a constructive delivery of the goods to which it refers.<sup>4</sup>

It was observed by the Supreme Court in *J. V. Gokal & Co. (Private) Ltd. v. Assistant Collector, Sales-tax*<sup>5</sup> : A bill of lading is 'a writing, signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading.' It is well settled in commercial world that a bill of lading represents the goods and the transfer of it operates as a transfer of the goods.

### (11) Dock warrant.

Section 111 of the English Stamp Act, 1891 (54 & 55 Vict. C. 39) defines the expression "warrant for goods" as meaning 'any document or writing being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares or merchandise lying in any warehouse or dock or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.' A dock warrant is therefore a document

1. (1884) 10 App. Cas. 74.

2. *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co.*, (1914) 1 K.B. 575 C.A.

3. *Nissim Issac v. Haji Sultanjee*, 40

Bom. 11 (18).

4. *Ramdas Vithaldas v. Amer Chand & Co.*, 40 Bom. 630 (637).

5. A.I.R. 1960 S.C. 595.



issued by a dock or wharf owner, setting out the detailed weights or measurements of a specific parcel of goods and declaring or certifying that the goods are held to the order of the person named, or his assignee by endorsement, and are deliverable to a person therein named or his assigns by endorsement. Like a bill of lading it passes by endorsement and delivery and transfers the absolute right to the goods described therein to the endorsee.

(12) **Warehouse-keeper's certificate.**

A warehouse is a public house in which goods imported are deposited at a reasonable rent without payment of the duties on importation; if they are to be withdrawn for house consumption, then without payment of such duties until they are so removed. According to the Merchant Shipping Act, the expression warehouse includes all warehouses buildings and premises in which goods when landed from ships may be lawfully placed; and the warehouse-keeper means the occupier of a warehouse, *i.e.*, a person in charge of a warehouse.

A wharfinger's or warehouseman's certificate, when it is not in the form of a warrant, is simply an acknowledgment that goods described therein are deposited at the wharf or in the warehouse, and is generally expressed to be not transferable. Both a warrant and a certificate may be subject to condition.<sup>1</sup>

(13) **Wharfinger's certificate.**

A wharf is a broad plain place near a river, canal or other water to store goods thereon which are brought to or from such water.<sup>2</sup> According to the Merchant Shipping Act the expression 'wharf' includes all wharves, quays, docks, and premises in or upon which any goods when landed from ships may be lawfully placed and the expression 'wharfinger' means any person who occupies or is in charge of such wharf.<sup>3</sup>

A wharfinger is a person who owns or keeps a wharf for the purpose of receiving merchandise with a view to its being shipped on payment of his charges.

The definition of "document of title" in the English Factors Act, 1889, does not specifically include wharfinger's certificate. The Indian Sale of Goods Act, 1930, has thus expanded the definition in the English Act. Like the warehouse-keeper's certificate, it is only an acknowledgement by a wharfinger that particular goods are lying at his wharf, unless it is in the nature of a warrant.

(14) **Delivery order.**

Delivery orders are orders given by the owner of goods to a person who holds possession on his behalf directing him to deliver them to a person named in the order. As observed by Martin, B. in *Morgan v. Gath*,<sup>4</sup> "A delivery order is an order from the vendor to the warehouseman to deliver the goods to the vendee." A delivery order, properly so called is, until it is acted upon, a mere "promise to deliver"<sup>5</sup>, the delivery not being completed until the bailee attorns to the buyer and thus becomes the

1. See Benjamin on Sale, 8th Edn., p. 858. Now 1st Edn. 1975.

2. Moz. and Whit. Dictionary.

3. See also 'Commercial Laws of England, Merchant Shipping Act.

4. (1865) 159 E.R. 726; see also Anglo-

Indian Jute Mills v. Omademull, (1910) 38 Cal. 117 : 10 I.C. 859; Imperial Bank v. St. Katherine's Dock (1877) 5 Ch. D. 195.

5. Per Lord Esher, M.R. in *Gillmann v. Carbutt*, (1889) 61 L.T. 281 C.A.



buyer's agent as custodian of the goods.<sup>1</sup> To be a document of title it must be in the nature of a warrant and must represent the goods.<sup>2</sup> In this case, the defendants, warehousemen, held maize in bulk belonging to A who sold 200 quarters thereof to B who sold to the plaintiffs, giving them a delivery order which they lodged with the defendants. The defendants did not object to the order, but they did not make any acknowledgment of the plaintiff's title. Before any appropriation of the 200 quarters, A, as unpaid vendor, put a stop on delivery. It was held by the Court of Appeal, affirming Sankey, J. that the mere receipt of the delivery order by the defendants without objection did not stop them from denying that the plaintiffs were the owners of the 200 quarters. All that had happened in this case with regard to the delivery order was that it had been handed to the defendants. No entry of the fact was made in the defendant's book.<sup>3</sup>

It is to be observed that as between buyer and seller a warehouse certificate, dock warrant or delivery order, or any similar document, does not, like a bill of lading, represent the goods themselves, and so does not *per se* transfer possession; it operates merely as an authority to receive the goods referred to in the document; an attornment by the person in possession to the buyer is necessary;<sup>4</sup> and this is the rule, for whatever purpose a delivery of the goods has to be proved.<sup>5</sup>

In *Gauri Shanker Surajmal v. Moolchand Pannalal*<sup>6</sup> A, who was a charcoal dealer, owed certain amount of money to B. In payment of the debt A wrote a delivery order upon his commission agent X, asking him to deliver certain number of bags of coal to B. X was asked not to charge any commission. In the delivery order, the fact that the coal was to be delivered to B in payment of the debt was mentioned. The bags of coal were mentioned as B's property. When B took the delivery order to X, X refused to deliver the goods on the ground that the goods were pledged to him. B filed a suit against A and X. It was found that the story of X as to pledge was false and the document in support of the alleged pledge was false. In spite of this the Court passed a decree against A only for the return of the price. Suit against X was dismissed on the ground that there was no contract between B and X. B appealed against that decision. It was *held*: The claim against X was not on the basis of a contract but was in tort. There was a transfer of ownership of goods, even though no cash was paid as the price. There had been a completed sale. The document asking X to deliver the goods was document of title of goods within the meaning of S. 2(4) of the Act. Such a document represented the goods themselves and failing to implement the direction in the delivery order X made himself liable in tort in detinue. It was further held that X, the tortfeasor was liable to restore the goods or if he has converted them, the value of the goods on the relevant date. Accordingly, decree was passed jointly against A and X.

1. *Peter Dumenil v. James Ruddin*, (1953) 1 All E.R. 294, 295 C.A.

2. *Per Sankey J. in Laurie & Morewood v. John Dudin & Sons*, (1915) 1 K.B. 383, 390

3. *Laurie & Morewood v. Dudin*, (1916) 1 K.B. 113; 95 L.J. K.B. 191 C.A.

4. See *Farina v. Home* (1846), 16 M. &

W. 119, at p. 123 (dock warrant ante); *Gunn v. Bolckow*, (1875) 10 Ch. App. 491 (warehouse certificate ante) *M. Ewan v. Smith* (1849), 1 H.L. Cas. 309; 39 Digest 513 (delivery order).

5. See Halsbury, *Laws of England*, 3rd Edn. Vol. 34, P. 85.

6. A.I.R. 1958 M.P. 415,



**(15) Delivery chit—Sukkur Pass Godown delivery terms contract.**

A delivery chit which is part and parcel of a contract on Sukkur Pass Godown delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent of the price of the goods is not a document of title within the meaning of S. 2 (4) of the Act.<sup>1</sup>

**(16) Railway Receipt.**

The definition in the English Act does not mention "railway receipt" as included in 'documents of title' to goods. The Indian Sale of Goods Act, 1930, specifically mentions railway receipts as included in this expression. This is based on a decision of the Privy Council in *Ramdas v. Amerchand*<sup>2</sup> wherein their Lordships held that a railway receipt was an instrument of title within the meaning of section 103 of the Indian Contract Act. An unendorsed railway receipt is not a document of title and is not used in the ordinary course of business as proof of the possession or control of goods; but if a person gives a railway receipt to another person, the inference is that he appoints that other person his agent to take delivery of the goods from the railway company, and the fact that in the rules printed on the railway receipt the railway company states that it will not recognize an agent appointed otherwise than by endorsement will not prevent the railway company from pleading that other person was in fact an agent and entitled to receive the goods. The rule, however, may operate as an estoppel if the consignor has acted on the belief that the railway company would not recognize as his agent the person to whom the railway receipt has merely been sent without endorsement.<sup>3</sup>

In *Official Assignee of Madras v. Mercantile Bank of India Ltd.*<sup>4</sup>, the Judicial Committee held, affirming the decision of the High Court, that a railway receipt was document of title within the meaning of the old section 178 of the Indian Contract Act, and that the endorsement and delivery, by way of security for a loan, of a railway receipt, is sufficient to create a valid pledge of goods covered by the receipt, though by the general law, a pledge of documents is not *prima facie* deemed to be a pledge of goods. Even if the documents of title (Railway receipts) were pledged for advances, equity arises between the pledgor and the pledgee and the former can be restrained from claiming delivery of goods without producing receipts. It was also held that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the pledgor for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them in the pledgee's godown.<sup>5</sup>

In *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.*,<sup>6</sup> bank advanced loans to a merchant on the pledge of railway receipts. Following the usual practice, the railway receipts were handed over back to the merchant for the specific purpose of clearing goods represented by the railway receipts from the Port Trust and storing them in the bank's

1. *Hakumat Rai Arjan Das v. Nandu Virumal*, A.I.R. 1941 Sind 78 : 195 I.C. 137.

2. (1916), 40 Bom. 630 : A.I.R. 1916 P.C. 7.

3. *Secretary of State for India in Council v. Rishi Ram Jagdish Prashad*, A.I.R. 1928 All. 145 : (1927) 50 All. 227 ; 108 I.C. 457.

4. A.I.R. 1934 P.C. 246 : 61 I.A. 416 : (1934), 58 Mad. 181 ; on appeal from 1933 Mad. 207 ; 56 Madras 177.

5. *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, A.I.R. 1938 (P.C.) 52.

6. A.I.R. 1938 P.C. 52 ; I.L.R. (1938) Madras 360.



godowns. The bank did not put its stamps on the railway receipts. The merchant fraudulently pledged the same railway receipts to bank B and obtained a second advance. Thereupon bank A brought against bank B an action for conversion. Bank B raised a plea of estoppel against bank A. It was *held*: The plea of estoppel could not be availed of. Bank A did not owe any duty to Bank B in the matter. There was no relationship of contract or agency. There was also no representation by bank A which had no reason to think that it was representing to anybody that the merchant had any title to dispose of the goods. The railway receipts were not dangerous things; there was no question of arming the merchant with them. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder has any implied authority or right to dispose of the goods. It was at the best an ambiguous document. Its possession no more conveyed a representation that the merchant was entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It was not like a negotiable instrument. The document on its face conveyed no representation when presented that the merchant was invested with full disposing power. It was not indeed true to say without qualification that people were not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. Bank A, therefore, was entitled to rely on the rule of law that no one could pass a better title than he possessed.

It was *further held*: The failure to place its stamps would make no difference. It was not the practice nor duty as between the two banks to adopt such a practice.

In *The Madras and Southern Railway Company Limited v. Haridas Banmalidoss*<sup>1</sup>, a case under section 72 and old section 77 of the Indian Contract Act, 1872, (since repealed) it was held that the liability of a Railway Company under the Indian Railways Act in respect of goods consigned for carriage is at an end when the goods are delivered to a person rightfully entitled to them even though he is not consignee and even if the delivery is not made against the railway receipt. After delivery of the goods to the rightful person, the railway receipt ceases to be a symbol of goods and ceases to be negotiable. Hence an innocent endorsee for value of the railway receipt after delivery to such a person has no cause of action for damages against the Railway Company.

A railway Company is not under any duty to the public to insist upon the return of the railway receipt.

It was *further held* that delivery of goods by the Railway Company without getting in the railway receipt was not the proximate cause of the loss to the endorsee.

Where in a suit brought by the plaintiffs for a declaration that a certain quantity of mustard seeds pledged by the defendants to a bank are the properties of a firm of which the plaintiffs are partners and that in the surplus sale proceeds of the said mustard seeds they have a right of property as such partners, if it is found as a fact that the railway receipts in respect of the disputed seeds stood in the name of the firm as the consignee, then the plaintiffs start with an initial presumption in favour of their case that the

Plaintiff as consignee in railway receipt—Presumption as to ownership in goods.

1. I.L.R., 41 Madras 871; 35 Mad. L.J. 35,



said seeds belonged to the firm. In law the railway receipts are documents of title. It may be that the named consignee was the benamidar for some other person but then the onus would be on the said other person to prove the benami and, in that connection, the source of the purchase money would certainly be very relevant and may even be a settlor, but in any case, the onus would be not on the named consignee to prove that he paid the purchase-money but on the other side to show the contrary.<sup>1</sup>

In *Shah Mulji Deoji, a Firm v. Union of India*<sup>2</sup> it was held : A railway receipt being a "mercantile document of title to goods" the mode of assignment prescribed in S. 130 of the Transfer of Property Act, 1882, is not applicable to assignment of a contract of carriage of goods contained in a railway receipt. The assignee's rights are also not subject to equities.

The title to the railway receipt passes to the endorsee by endorsement, and the endorsee has a right of action. A *bona fide* endorsee is not prejudiced by any defect in title of the assignor provided the endorsement is not obtained by practising fraud or forgery. Hence, the effect of S. 137, Transfer of Property Act, is that a railway receipt is in effect clothed with all the essential characteristics of negotiability though it may not be negotiable instrument in its strictest sense.

However, assuming that the aforesaid provisions of the Transfer of Property Act do not so clothe a railway receipt with the characteristic of negotiability and it is necessary to resort to custom, the matter has become so settled that it is no more necessary to prove such a custom by other evidence.

The above decision, however, has been dissented from in *Ibrahim Isaphai v. Union of India*<sup>3</sup> in which it had been held : It is true that by virtue of S. 2(4) of the Sale of Goods Act, 1930, a railway receipt is a document of title to goods ; yet the legislature has not used the term "title" in the expression "document of title to goods" in the wider sense of ownership of goods. The word "title" is used in the limited sense of a right to receive and take delivery of the goods. A railway receipt is a document of title in this limited sense and in the absence of any provision in the Sale of Goods Act either expressly or impliedly stating that an endorsement on or a delivery of the railway receipt passes title to the goods represented thereby, the proposition cannot be subscribed to that such an endorsement and delivery would pass title to the goods.

A railway receipt is not a negotiable instrument or a *quasi*-negotiable instrument. Even if the instrument were to be regarded as a *quasi*-negotiable instrument, it cannot be said that by mere endorsement and delivery of that instrument, not merely the right to take delivery of the goods represented thereby passes but also the title in the goods themselves.

Right of consignor under railway receipt is not actionable claim and, therefore, not transferable.

The above decision of the Gujarat High Court was followed by a single Judge of Orissa High Court in *Fagumani Khuntia v. Union of India*, (1973) 2 C.W.R. 1436 holding : That being the position, an endorsee in whose favour the railway receipt has been endorsed does not become the

1. *Laxmi Devi v. Mahadeb Prasad Rungtha*, 1959 Cal. L.J.I.

2. A.I.R. 1957 Nag. 31.

3. A.I.R. 1966 Guj. 6; Ramdas Vithaldas

*v. S. Amerchand & Co.*, A.I.R. 1966 P.C. 7; *Union of India v. Taherali Isaji*, 58 Bom. L.R. 650; I.L.R. (1956) Bom. 600 relied upon,



owner of the goods but only gets the right to take delivery of the goods. He cannot maintain a suit against the railway for damage to the goods consigned unless he establishes that title to the goods has passed to him and that he has become full owner of the goods. It was observed : Law is well settled that an endorsee of the railway receipt does not acquire title to the goods, because of his possession of the same ; the railway receipt is not a document of title in the sense that an endorsee therein becomes the full owner of the consignment by virtue of the endorsement in his favour.<sup>1</sup>

*Md. Jaffer Haji Ebrahim v. Union of India*, A.I.R. 1972 Orissa 101 was also followed in the above Orissa High Court case. In that case consignment of oil in tank wagon was made by A at Hapur to be delivered to self at Cuttack and the consignor was to arrange delivery to B at Cuttack. It was held that before transfer of ownership rights to B, he had no right to maintain a suit against the railways for the loss of oil that occurred during transport.

In *Shamji Bhanji & Co. v. N.W. Ry. Co.*,<sup>2</sup> Bhagwati J. of the Bombay High Court (as he then was) observed : Though a railway receipt is a document of title to goods, mere endorsement of the receipt by itself is not enough to constitute the endorsee either a *bona fide* pledgee for value or a *bona fide* transferee for value of the goods represented by the railway receipt. Without anything more, it only constitutes the endorsee the agent of the consignee for the purposes of taking delivery of the goods represented by the railway receipt from the railway company. Successive endorsements on the face of the receipt would, therefore, have no other effect than that of constituting the successive endorsees the agents of the consignee for the purpose of taking delivery of the goods represented thereby from the railway company. A re-endorsement in favour of the consignee by the last endorsee would only have the effect of re-investing in the consignee who endorsed the railway receipt in the first instance the right to take delivery of goods. The consignee would in such a case have re-invested in him the original right which he had to take delivery of the goods from the railway company. This result could also be achieved by a cancellation of the previous endorsements including the one made by the consignee himself in the first instance. The endorsement has not, without anything more, the effect of passing the property or title in goods to the endorsee, nor does he thereby become the person entitled to receive delivery of goods from the railway company in his own right.

It was held : As the property in the goods never passed from P to S, P alone was entitled to sue the railway for compensation for loss of the goods represented by the railway receipt because he alone had entered into the contract of carriage with the railway company.

This decision was commented upon by the Allahabad High Court in *Sheo Prasad v. Dominion of India*<sup>3</sup> in the following words :

“The fact of that case were peculiar and these observations must not to our minds, be understood to mean that an endorsee of

1. See yearly Digest, 1973, column 1829. See also *Union of India v. W. P. Factories*, A.I.R. 1966 S.C. 395, followed in this case,

2. A.I.R. 1947 Bom. 169 : 48 Bom. L.R. 698.

3. A.I.R. 1954 All. 747, 748,



a railway receipt must always be deemed to be a mere agent who has no interest in the goods”.

In this case, certain goods were consigned from Chandpur Ghat to Allahabad. The consignment was deliverable to self. This railway receipt was, however, endorsed in favour of the plaintiff who took delivery of the goods and found that there was a shortage of 2 maunds and 7 seers. The value of the shortage was Rs. 174/-. The plaintiff filed a suit for recovery of the amount. The plaintiff admitted in his statement before the court that the consignor had sent the goods to him for sale and pay its price to the consignor after deducting his commission and that the goods were kept at the shop of the plaintiff for purpose of sale as an agent of the consignor. It was held that the plaintiff's right being only to get a share in the sale proceeds by way of commission, he was not entitled to bring the suit. It was observed :

“A railway receipt, therefore, being a mercantile document of title to goods, it is possible to transfer the title in the goods to the endorsee by mere endorsement. It is, therefore, not possible to accept the contention that a mere endorsement of a railway receipt was not by itself enough to transfer the property in the goods represented by the receipt and the endorsee has to prove ‘aliunde’ that he is the owner of the goods covered by the railway receipt endorsed in his favour”.

“The presumption must be in favour of the endorsee though from other facts and circumstances it may be possible to hold that the goods had not been transferred to the endorsee and he was merely deputed to act as agent.”

*Dolatram Dwarkadas v. B.B. & C.I. Rly. Co.*<sup>1</sup> was relied upon in the above case. In that case, the endorsee of the railway receipt had gone to take delivery, the railway had accepted that he had the right to take delivery, he had signed the receipt book and paid freight and demurrage and took delivery of 96 bags and claimed open delivery of 19 bags. The railway refused to give him open delivery. It was urged on behalf of endorsee before the High Court of Bombay that the railway having chosen to accept the freight and demurrage from the plaintiff and having taken his signature in anticipation of the delivery to him, was not entitled to refuse delivery and that the defendant having by its acts recognised the plaintiff as the person entitled to take delivery was estopped from contending that it was not liable for failure to give delivery. The learned Judges held that the railway receipt was a mercantile document of title and “that being so, we think, it necessarily follows that the endorsee of such a railway receipt has sufficient interest in the goods covered by it to maintain an action of this kind.”

Reliance was also placed on *Ramdas Vithaldas v. Amerchand & Co.*<sup>2</sup> in which it was held : “In their Lordships’ opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a ‘document showing title’ or a ‘document of title’ to goods for the purpose of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the

1. A.I.R. 1914 Bom. 178 ; 38 Bom. 659.

2. A.I.R. 1916 P.C. 7 ; 40 Bom. 630 P.C.



possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case, it has been found as a fact by both the courts below, and is not and indeed cannot be disputed before this Board, that the railway receipts in question satisfy the test. It is, therefore, unnecessary to consider whether, apart from the evidence as to the ordinary course of business, the effect of Ss. 4 and 137 of the Transfer of Property Act would be conclusive on the point."

Chapter VIII of the Transfer of Property Act deals with transfers of actionable claims and how they are to be made. Section 137 of the Act, however, provides that,

"Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being by law or custom, negotiable, or to any mercantile document of title to goods."

and in the Explanation appended to the section the expression "mercantile document of title to goods" includes a railway receipt.

*Jalan and Sons Ltd. v. Governor-General-in-Council*<sup>1</sup> was also explained in the following words :

"The sixth and seventh paragraphs of the judgment no doubt lay down that the case of an endorsee of a railway receipt is altogether different from the case of an ordinary agent and that such an endorsee being in a position to take delivery of the goods covered by the railway receipt and give a complete discharge to the railway he is competent to bring a suit in respect of the goods, but in paragraph 8 of the judgment the learned Judges went on to hold that in the case before them the endorsee had become the owner of the goods and had beneficial interest in the same as he was entitled to earn a commission on the proceeds of the sale of the goods.

"If he had become the owner of the goods and the evidence on the point was accepted by the learned judges, the fact whether he was entitled to share in the sale proceeds may not have been of much importance for the purpose of the decision of the case. A trustee who has no beneficial interest in the goods but is the owner of the goods can always maintain a suit if goods are lost or damaged."

In that case A consigned 16 bales of cotton *dhotis* from Okara to Delhi and sent the railway receipt to B, duly endorsed in their favour. The railway receipt was presented by B to the railway at Delhi and they were given delivery of 1675 pairs of *dhotis*. The rest of consignment, consisting of 725 pairs of *dhotis* had got damaged during transit and accordingly B refused to accept them. In a suit for claim by B against the railway for price of 725 pairs of *dhotis* and for damages one of the points raised by the railway was that the plaintiffs being only the endorsees of the railway receipt could not maintain the action. It was held: A railway receipt being a mercantile document of title the endorsement of it vests the endorsee with a valuable right. The endorsee of the railway receipt not only can take the delivery of the goods covered by the receipt but he can also give a complete discharge. It follows that he is also

1. A. I. R. 1949 E.P. 190 ; 50 P.L.R. 290



competent to bring a suit against the Railway company for damage in respect of goods covered by the receipt.<sup>1</sup>

In *Firm Peare Lal Gopi Nath v. E. I. Rly. Co.*,<sup>2</sup> it was held : The title of the consignor can be conveyed to another person by an endorsement on the railway receipt. The endorsee of such a receipt has sufficient interest in the goods covered by it, to maintain an action for damages against the railway company, the carrier of the goods.

The matter was again considered in *Erachsaw v. Dominton of India*.<sup>3</sup> In this case on 26-6-1943 M/s. Eastern Chemical Company Ltd., Bombay booked ten carboys of Hydrochloric acid and five carboys of Nitric acid from Dadar to Indore by railway. The consignees were M/s. Kerrawalla & Co. The carboys broke during the transit and one of the points raised in the suit by plaintiff for damages was whether the plaintiff had the right to sue. According to the plaintiff M/s. Kerawalla & Co. was the name of plaintiff's shop of which he alone was the proprietor. It was held : On facts, plaintiff was not merely an agent having no interest whatsoever in the property destroyed but that he was the purchaser and at any rate had sufficient interest to entitle him to file the suit. Besides, the plaintiff was a consignee of these goods and as such had a sufficient interest in the goods so as to enable him to file the suit. "It cannot be denied that railway receipt is a 'document of title' as will appear from the definition of the term in the Sale of Goods Act, S. 2(4) and enables the person mentioned as consignee to give a valid discharge in respect of the goods to which it relates. How can it then be said that he is not entitled to file the suit"?<sup>4</sup>

The view taken by a Single Judge of the Bombay High Court in *Shamji Bhanji & Co. v. North Western Railways*<sup>5</sup> is thus contrary to an earlier decision of a Division Bench of the High Court<sup>6</sup> and the decisions of some other High Courts as well, as explained above.

Railway receipt endorsed to endorsee—Rights of endorsee under such railway receipt.

In *Commissioners of the Port of Calcutta v. General Trading Corporation Ltd.*,<sup>7</sup> the question was again considered and the position summed up as follows :

The effect of the decisions of the Privy Council in *Ramdas Vithaldas Darbar v. S. Amer Chand & Co.*, A. I. R. 1916 P. C. 7 and *Official Assignee of Madras v. Mercantile Bank of India Ltd.*, A.I.R. 1934 P.C. 246 is that Railway receipt and other documents mentioned in S. 2(4) of the Sale of Goods Act are assimilated to bills of lading for the purpose of Ss. 103 and 178 of the Contract Act. Except for this limited extent these documents are not to be treated on the same footing as bills of lading. In

1. *Dolatram Dwarkadas v. B. B. & C. I. Rly. Co.*, A. I. R. 1914 Bom. 178 : 38 Bom. 659 and *Firm Peare Lal Gopi Nath v. The E. I. Railway Co.*, A. I. R. 1924 All. 574 : 46 All. 691 relied upon. Observations to the contrary in *Shamji Bhanji and Co. v. North Western Railway Co.* A. I. R. 1947 Bom. 169 dissented from as *obiter dictum*. *Maula Baksh Muhammad Shafi v. Secretary of State and another*, A.I.R. 1929 Lah. 590 distinguished—the case of an endorsee of a Railway receipt is altogether different from the case of an ordinary agent.

2. A.I.R. 1924 All. 574.

3. A.I.R. 1955 M.B. 70.

4. *Jalan and Sons Ltd. v. Governor-General-in-Council*, A. I. R. 1949 E.P. 190 ; *Dolatram Dwarkadas v. B.B. & C.I. Rly. Co.*, A.I.R. 1914 Bom. 178 ; *Firm Peare Lal Gopi Nath v. E.I. Rly. Co.*, A. I. R. 1914 All. 574 relied on. *Shamji Bhanji & Co. v. N.W. Rly. Co.*, A.I.R. 1947 Bom. 169 not followed.

5. A.I.R. 1947 Bom. 169.

6. In *Dolatram Dwarkadas v. B. B. & C.I. Railway Co.*, A.I.R. 1914 Bom. 178.

7. A.I.R. 1964 Cal. 290. Case-Law considered.



fact, the two Privy Council decisions contain the clearest possible indication that a railway receipt is not to be assimilated to a bill of lading for all purposes. It is correct except as mentioned above, to ascribe to railway receipt various properties and attributes which belong only to a bill of lading which, by its peculiar position in the Law Merchant and also by the special provisions of the Bills of Lading Act, 1856, which in terms is practically a reproduction of the English Bills of Lading Act, 1855, occupies altogether a different position.

From the aspect of negotiability a railway receipt is more or less comparable to a bill of lading as it was at common law before the passing of the Bills of Lading Act, 1855, in England and the enactment of the Bills of Lading Act, 1956, in India. The properties and incidents of a railway receipt and the effect of endorsement and delivery of the same in India can, therefore, be formulated as follows :

(1) A railway receipt is like a bill of lading, a receipt for the goods delivered by the consignor and accepted by the railway as well as a contract.

(2) A railway receipt is not a negotiable instrument.

(3) Transfer of a railway receipt by endorsement and delivery after the goods have been railed and before they have been delivered to the consignee passes only such property in the goods as it was the intention of the parties to the endorsement to transfer. On transfer of a railway receipt by way of sale, mortgage or pledge, the property in the goods would pass absolutely or otherwise according to the intention of the parties provided that the transferor is competent to dispose of the goods.

(4) The railway discharges its obligation completely as soon as it delivers the goods to the consignee or to person whose name is endorsed on the railway receipt as the assign.

(5) Endorsement and delivery of the railway receipt does not transfer the contract contained in or evidenced by the railway receipt to the transferee.

(6) An endorsee of the railway receipt cannot sue the railway on the contract contained in the railway receipt merely because the property or an interest in the goods has been transferred to him. He only has such right of suit as would belong to a person having a proprietary interest in the goods—that is to say, he can sue in his own name only for conversion or negligence. Without such property or interest he has only the right to receive the delivery of the goods and his position can be likened to the position of a consignee who has no right of property in the goods.

In *Bhayyalal Ramrattan v. B. N. Railway*<sup>1</sup> it was held : The endorsement at the back of the railway receipt by S. who was both the consignor and the consignee, entitles the endorsee to claim delivery of the goods and must entitle him to bring the suit for compensation for damages (with reference to S. 72 of the Railways Act, 1890). This decision has, however, been dissented from in *Ibrahim Isaphi v. Union of India*<sup>2</sup> by a Division Bench of the Gujarat High Court holding that where goods are

1. A.I.R. 1944 Nag. 362.

2. A.I.R. 1966 Guj. 6 ; Chhangamal Harpaldas v. Dominion of India, A.I.R. 1957 Bom. 276 and Governor General of India in Council v. Joynarain Ritolia, A.I.R. 1948 Pat. 36

followed ; Union of India v. Taherali, 58 Bom. L.R. 650 and Shamji Bhanji and Co. v. North Western Railway Co., A.I.R. 1947 Bom. 169 distinguished.



consigned to self by the consignor and the Railway Receipt is endorsed in favour of another, the endorsee cannot sue the Railway for short delivery of goods. The endorsee cannot be said to have acquired an interest in the goods by the mere fact of his being the endorsee. That interest is not sufficient (word 'not' seems to be inadvertently omitted in the head note in A.I.R.) in law to sue the Railway, unless the endorsee has acquired ownership in the goods of which he takes delivery.

In *Chhangamal v. Dominion of India*<sup>1</sup>, The Bombaay High Court held : "Two propositions appear to be well-settled. The right of action to recover compensation for loss or damage to the goods ordinarily vests in the consignor. Where the goods lost or damaged in transit are the subject-matter of a contract of sale, the owner of the goods may in the absence of a contract to the contrary sue the railway administration. Therefore, a consignee who is in possession of railway receipt duly endorsed by the consignor may maintain an action for compensation for loss of the goods covered thereby, but he can do so not because he is the consignee but because he is the owner of the goods. A consignor may sue for compensation for loss relying upon the breach of contract of consignment. An owner of goods covered by a railway receipt may sue for compensation relying upon his title, and the loss of goods by misconduct of the railway administration. But a bare consignee, who is not a party to the contract of consignment and who is not the owner of the goods, cannot maintain a suit for compensation for loss or damage to the goods. He has no cause of action *ex contractu* nor *ex delicto*."

Following this and *Union of India v. West Punjab Factories Ltd.*<sup>2</sup>, it was again held in *Union of India v. Ramprasad Mulchand Agarwal*<sup>3</sup> : An endorsee of a receipt can file a suit against the railway for recovery of damages only when he is shown to be the owner of the consignment.

Merely an endorsement on the Railway Receipt does not transfer the property in the goods covered by a Railway Receipt. To ascertain whether the property or any interest in the goods has or has not passed, the material question to be considered in each case is whether at the time when the endorsee-ment was made and the Railway Receipt was delivered, the parties did or did not intend the property or interest in the goods should pass. This has to be ascertained with reference to the terms of the contract by which the sale of goods took place, the conduct of the parties and the circumstances of the case.<sup>4</sup>

In this particular case, having regard to the definite case set up by the petitioner and the events which preceded the endorsement of the railway receipt, the petitioner had not acquired ownership in the goods represented by the railway receipt.

Where the consignor who himself is the consignee delivers a railway receipt to a Bank himself or through his agent, the Bank would be deemed to be an agent appointed by the consignee and the purchase of the railway receipt by the plaintiff from the Bank after paying the value of the goods will be valid under proviso to S. 27 of the Act, although the

Unendorsed railway receipt—Purchase of, by plaintiff from agent of consignee.

1. A.I.R. 1957 Bom. 276, 279.

2. A.I.R. 1966 S.C. 395 (cited under S. 33 *post*).

3. A.I.R. 1971 Bom. 52 ; A.I.R. 1957 Nag. 31 held impliedly overruled by A.I.R. 1966 S.C. 395.

4. Ibrahim Isaphai v. Union of India, A.I.R. 1966 Guj. 6 ; 58 Bom. L.R. 650 followed ; Daulat Ram Dwarkadas v. Bombay Baroda and Central India Railway Co., A.I.R. 1914 Bom. 178 distinguished.



receipt has not been endorsed by the consignee in favour of the plaintiff. The plaintiff would, therefore, be entitled to sue the railway for damages for non-delivery of the goods.<sup>1</sup>

If a railway receipt is not a negotiable instrument strictly speaking it is still certainly negotiable after endorsement. In *Official Assignee of Madras v. Mercantile Bank of India Ltd.*<sup>2</sup> and *Mercantile Bank of India Ltd. v. Central Bank of India*,<sup>3</sup> it was held that a pledge of the railway receipt operates as a pledge of the goods in transit giving the pledgee a right to take delivery. *Official Assignee of Madras v. Mercantile Bank of India Ltd.*<sup>4</sup> was a case where the endorsement was in blank.<sup>5</sup>

Under section 130, Transfer of Property Act, the transfer of an actionable claim can be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent. But under section 137, this does not apply to instruments which are for the time being by law or custom negotiable, or to any mercantile document of title to goods, and the expression "mercantile document of title of goods" is defined as including *inter alia*, a railway receipt. The contract indicated by the railway receipt can, therefore, be transferred without a writing ; and no particular form or method of transfer has been prescribed by law. It will be regulated by custom. Such a transfer can be made by endorsement in blank coupled with delivery of the document to transferee. Of course, the intention must be to make an absolute delivery carrying with it a right to the goods. The railway receipt might be handed over only for a limited purpose.<sup>6</sup> But in a case where the railway receipt is handed over on payment of the goods, as is the common practice under the V.P.P. system, clearly there is an absolute transfer both of the goods and of the right to take delivery under contract. The property in the goods under the contract of sale passes to the buyer directly, the latter pays the price and the railway receipt endorsed in blank is delivered to him.<sup>7</sup>

In *Samratmal v. Union of India*,<sup>8</sup> the railway receipt contained on it an unsigned endorsement for delivery to the plaintiff. The plaintiff received it through a Bank after making payment to it. The plaintiff acting on the said endorsement the delivery of the goods was effected to the plaintiff firm by the railway administration after collecting from it the freight and wharfage charges. The railway administration thus treated the plaintiff firm as the consignee of the railway receipt. The intention of the consignor to transfer his rights under the railway receipt to the plaintiff firm was amply established by the evidence on record. It was held : It was not open to the railway administration to contend that the plaintiff firm had no right of suit as it was not the assignee

1. *Dookan Khandan Mushtarika Medisetty Narsaya and Sons v. Shahdara (Delhi) Saharanpur Light Railway Co.*, A.I.R. 1955 Hyd. 193 ; *Sri Ram Krishna Mills v. Governor-General*, A.I.R. 1945 Pat. 387 not followed, *Governor-General in Council v. Joynarain Ritolia*, A.I.R. 1948 Pat. 36 ; *Shamji Bhanji & Co. v. N.W. Ry. Co.*, A.I.R. 1947 Bom. 169 ; and *Secretary of State for India in Council v. Rishi Ram Jagdish Prashad*, A.I.R. 1928 All, 145 followed.

2. 65 I.A. 75 at p. 91 : A.I.R. 1938 P.C. 52.

3. A.I.R. 1934 P.C. 246 : 61 I.A. 416.

4. 65 I.A. 75 : A.I.R. 1938 P.C. 52.

5. See *Governor-General in Council v. Joynarain Ritolia*, A.I.R. 1948 Pat. 36.

6. *Official Assignee of Madras v. Mercantile Bank of India, Ltd.*, See 65 I.A. 75.

7. *Governor-General in Council v. Joynarain Ritolia*, A.I.R. 1948 Pat. 36.

8. A.I.R. 1959 M.P. 305.



of the railway receipt whereby the consignor had booked the consignment in question to itself.

In *Union of India v. Western Punjab Factories, Ltd*, A.I.R. 1966 S. C. 395, the contract between the seller Factory and the J. C. Mills was that delivery would be made by the seller at the godowns of the J.C. Mills. The contract further pointed that the goods would be despatched by railway at the seller's risk up to the godowns of the J. C. Mills. Ordinarily, the consignment would have been booked in the name of "self" but there was some legal difficulty in booking the consignments in the name of "self" and therefore the J. C. Mills agreed that the consignments might be booked in the mills' name as consignee; but it was made clear by the J.C. Mills that the contract would stand unaffected by this method of consignment and all risks, responsibility and liability regarding the consignments would be of the Factory till they were delivered to the J.C. Mills in its godowns as agreed. It was held that the property in the goods was still with the Factory when the fire broke out on the railway platform ; and the ordinary rule that it is the consignor who can sue prevailed. It was observed : From the mere fact that a railway receipt is a document of title to goods covered by it, it does not follow, where the consignor and consignee are different, that the consignor is necessarily the owner of the goods and the consignor can never be the owner of goods. The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee, and the question whether title to goods has passed to the consignee has to be decided on other evidence. Ordinarily, it is the consignor who can sue if there is damage to the consignment, because the contract of carriage is between the consignor and the railway administration. When, however, the property in the goods carried has passed from the consignor to consignee, the latter may be able to sue. Whether title to goods has passed from the consignor to the consignee depends on the facts of each case.

This Supreme Court decision was distinguished in *M/s. Mulchand v. The Union of India*, 1972, Cur. L.J. 345 (See Yearly Digest, 1972, Column 2277) in which it was held : Although possession of document of title to goods may be piece of evidence as to ownership of goods represented in the document, it may not be conclusive evidence thereof and the consignor who claims to be the owner thereof may let in evidence to the contrary, in the absence of clear evidence to the contrary.

The principles regarding an action for non-delivery of a consignment of goods delivered to the Railway for carriage as laid down in *State of Bihar v. Union of India*<sup>1</sup> are :

A railway receipt issued to the consignor of goods is a document of title to goods within the meaning of S. 2. (4) of the Indian Sale of Goods Act, 1930, and S. 178 of the Contract Act, there being no distinction between the two terms.

Generally, it is only the consignor, or the consignee or the endorsee of the consignment who can maintain an action for damages for non-delivery of the consignment.

But, even when there is an endorsement in blank in favour of a person, then also such a blank endorsee for value can maintain an action for

1. A.I R. 1959 Pat. 438.



damages for non-delivery of goods. Endorsement in blank means writing one's name merely on the back of railway receipt without specifying any restrictions as to payee, manner of payment, etc., which details may be filled in by holder thereof, in whatever manner he likes. Therefore, where the railway receipt is handed over on payment of the price of the goods, there is an absolute transfer both of the goods and of the right to take delivery under the contract.

No doubt, generally an endorsement of railway receipt creates rights, if any, between the endorser and the endorsee *inter se*, and, it creates no rights between the endorsee and the railway which had issued the railway receipt to the consignor and the only remedy of the endorsee is against the endorser ; but when the property in the goods consigned has passed to the consignee, as the consignee under S. 23, Sale of Goods Act, at the time of the consignment, the consignee who is the principal in the transaction, would be deemed to be the person who had entered into the contract of carriage with the railway company through his agent, the consignor, and would be the proper party to sue railway for loss of the goods.<sup>4</sup>

A Full Bench of the Allahabad High Court has held in *Dominion of India v. Messrs. Gaya Pershad Gopal Narain*<sup>2</sup> : A consignee, who is not the owner of the goods but to whom the goods are consigned for the purpose of sale on commission basis, is entitled to maintain the suit for loss in respect of damage caused to the goods in transit. This decision has, however, not been followed by the Gujarat High Court in *Ibrahim Isaphai v. Union of India*<sup>3</sup> in which it has been held : Only privy to a contract has a right to sue for breach of the contract. The benefits of a contract are assignable, but the assignee of the benefits does not get a right to sue the other contracting party for breach of the contract itself except in the case of a person who is claiming through a party to the contract by operation of law. This is the legal position. The proposition that the transferee of a benefit under the railway receipt will have a right to sue the railway administration cannot be accepted absolutely. Only if assignee of the benefit of contract is able to bring his case within any of the exceptions to the general rule which general rule debars any person who is not a privy to a contract from instituting a suit for breach thereof, then he will have a right to sue.

Railway administration cannot enter into contract for benefit of third person. Consequently a consignee, who is not owner of the goods but in whom the goods are consigned for sale, cannot maintain a suit for loss in respect of damages caused to the goods in transit.

Mere fact that consignee is a "Pucca Adatia" does not entitle him to institute suit for damages, unless he shows that the goods represented by the railway receipt had been transferred to him as owner or any interest therein had been created in his favour.

In *Morvi Mercantile Bank Ltd. v. Union of India*<sup>4</sup>, the Supreme Court of India considered the matter of pledge of goods by transfer of railway receipt with reference to section 178 of the Indian Contract Act, 1872 and held by majority :

1. State of Bihar v. Union of India, A.I.R. 1959 Pat. 438, See also now the Indian Railways (Amendment) Act, 1961, (Act 39 of 1961).  
2. A.I.R. 1956 All. 338.

3. A.I.R. 1966 Guj. 6 ; Shah Mulji Deoji v. Union of India, A.I.R. 1957 Nag. 31 dissented from.  
4. A.I.R. 1965 S. C. 1954.



Under the Contract Act, delivery of goods by one person to another under a contract as security for payment of a debt is a pledge (S. 148 and S. 172). Delivery of tangible property is ordinarily essential to a true pledge ; where, however, the law recognizes that delivery of tangible symbol involves a transfer of possession of the property symbolized, such a symbolic possession takes the place of physical delivery. Under the Indian law the railway receipts are equated with the goods covered by them for the purpose of constituting delivery of goods within the meaning of the Contract Act. It is clear from a consideration of the relevant provisions of S. 178, Contract Act, S. 137, Transfer of Property Act, 1882 and S. 2 (4), Sale of Goods Act 1930 that the railway receipts are documents of title and the goods covered by the document can be pledged by transferring the documents.

The argument that a person other than a mercantile agent cannot make a valid pledge of goods by transferring the documents representing the said goods, will lead to anomalous results and is not acceptable. The argument would mean that an owner of goods cannot pledge the goods by transferring the documents of title whereas his agent can do so. A restriction on the owner's power to pledge cannot be justified when there is no such restriction imposed on the like powers of a mercantile agent. S. 178 of the Contract Act assumes the power of an owner to pledge goods by transferring documents of title thereto and extends the power even to a mercantile agent. A pledge is delivery of goods as security for payment of a debt. If a railway receipt is document of title to the goods covered by it, transfer of the said document for consideration effects a constructive delivery of the goods. S. 178 emphasizes that a mercantile agent shall be in possession of documents of title with the consent of the owner thereof ; if he is in such possession and by transferring documents of title to the goods pledges them, by fiction, he is deemed to have been expressly authorized by the owner of the goods to make the same. The condition of consent and the fiction of authorization indicate that he is doing what the owner could have done.

A valid pledge of goods by its owner can be made by transferring the railway receipt representing the said goods. The general rule is expressed by the maxim *nemo dat quod non habet*, i.e., no one can convey a better title than what he had. To facilitate mercantile transactions, the Indian law has grafted, to this maxim, some exceptions, in favour of *bona fide* pledges by transfer of documents of title from persons, whether owners of goods or their mercantile agents who do not possess the full bundle of right of ownership at the time the pledges are made. To confer a right to effect a valid pledge by transfer of documents of title relating to goods on owners of the goods with defects in title and mercantile agents and to deny it to the full owners thereof is to introduce an incongruity into the Act by construction. On the other hand, if the said right is conceded to the full owner of goods and extended by construction to owners with defects in title or their mercantile agents, the real intention of the Legislature will be carried out.

It appears that this case was not before the learned Judges of the Gujarat High Court when they decided *Ibrahim Isaphai v. Union of India*<sup>1</sup> for there is no reference in this case to the decision of the Supreme Court of India referred to above.

As regards endorsee of railway receipt for consideration and whether he can maintain action on contract embodied in the receipt the majority of

1 - A.I.R. 1966 Guj. 6.



Judges did not express any view though they observed that there was conflict of opinion on this point (A.I.R. 1965 S.C. 1954, p. 1960) but Mudholkar and Ramaswami JJ. constituting the minority observed (p. 1966) : The negotiation of the railway receipt may pass the property in the goods, but it does not transfer the contract contained in the receipt or the statutory contract under S. 74-E of the Indian Railways Act (now S.76-D). Negotiability is a creature of statute or mercantile usage, not of judicial decisions apart from either. So, in the absence of any usage of trade or any statutory provision to that effect, a railway receipt cannot be accorded the benefits which flow from negotiability under the Negotiable Instruments Act, so as to entitle the endorsee as the holder for the time being of the document of title to sue the carrier—the railway authorities in his own name. If the claim of the plaintiff is as an ordinary assignee of the contract of carriage, then the plaintiff has to prove the assignment in his favour.

In *Chinnari Gopalan v. Union of India*<sup>1</sup> it has been held :

Railway receipt— Liability of Rail- way Administration —Duty of the Rail- way Administration to insist upon its production —Appli- cability of principle of bailment under the Contract Act.	Administration should insist upon the production of the receipt before it parts with the goods to which it relates. The railway receipt may be endorsed by the consignor or his endorsee to any other person ; when so endorsed it is a direction from the bailor to the bailee to deliver the goods to such other person and it is the duty of the bailee to obey the instructions of the bailor.
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Section 57 of the Indian Railways Act covers goods coming into the possession of the Railway Administration either for carriage or otherwise and the first clause obviously refers to rival claims made by two or more persons in the case of goods coming into possession of the Railway Administration otherwise than for carriage. If goods are found, for instance, in a train and thus come into possession of the Railway Administration and two or more persons lay claims to them, this section applies. When the receipt given is not forthcoming, this section enables the Railway Administration to withhold delivery until the person entitled in its opinion to receive them has given an indemnity to its satisfaction against the claims of any other persons with respect to the goods. Therefore, before a Railway Authority parts with the goods entrusted to it for carriage, it must be satisfied in the first place that the receipt is not forthcoming and secondly that the person claiming delivery is the person entitled to receive the goods. Once these conditions are satisfied, it can insist upon an indemnity for a person who may subsequently be found or adjudged to be entitled to them.

The mere fact that the consignment was made to self does not make the consignor the rightful owner, because by endorsing the receipt to another, he may have lost his title. If the Railway Authorities deliver the goods on production of the receipt, they are protected, but when they do so without its production they do so at their risk. S. 57 gives the Railway Company the right to withhold delivery until a particular point of time. The section does not protect the Railway Administration from the consequences of delivery to a wrong person. In fact, it provides for

1. (1959) 1 Andh. W.R. 105 : A.I.R. 1959  
 Andhra Pra. 331 ; M. & S.M. Rly. Co.

Ltd. v. Haridoss Banmali Doss,  
 A.I.R. 1919 Mad. 140 distinguished.



the possibility of a wrong delivery by enacting that the authorities should take an indemnity before delivering the goods to a person claiming them.

The relevant provisions of the Indian Contract Act, as to contracts of bailment would apply to the carriage of goods by the railway authority except in so far as they are altered or modified by the Railways Act. Under S. 166 of the Contract Act, where the bailor has no title to the goods, the bailee is protected from the consequences of wrong delivery if he acts in good faith in delivering them back or in accordance with the instructions of the bailor. When to the knowledge of both the parties, the instructions are contained in a document, which is besides a document of title, that is to say, a document capable on endorsement of passing the title to the goods to which it relates, then the instructions of the bailor can only be sought in the document and the bailee is bound to ask for that document, although where it is not forthcoming, he may act in his discretion but still at his risk. Otherwise, the Railway Authorities can hardly be stated to be acting in good faith. They will be absolutely protected if they refuse to deliver except on being reasonably satisfied that the document is lost or destroyed : when, however, they deliver the goods in the absence of the receipt to a person who, in their opinion, is entitled thereto, they cannot have immunity from the claim of the lawful owner. That is indeed the reason why they take an indemnity against such claim.<sup>1</sup>

In *Shop Seth Onkarprasad Balmukand v. Union of India*<sup>2</sup> it was held : A railway receipt had the seals of the consignor, Bharat Bank Ltd., Calcutta and Bharat Bank Ltd., Mandla. The Seal of the consignor contained the rubber stamp of his signature. It also bore the signature of the plaintiff whose suit for damages was dismissed on the ground that he was not an endorsee. It was held : There was no specified manner of affixing one's signature and the seals would be equivalent to signature if they are genuine and affixed by way of signature. In that case they would pass the title to the plaintiff.

Indemnity notes, executed by a consignee of goods in favour of Railway in the form of receipts for the delivery of goods, which proceed on the assumption that the goods described therein had arrived at the destination station and which contain an undertaking by the consignee to indemnify the Railway against all claims made by the rightful owner and a certificate by several witnesses that to the best of their belief the executant of the indemnity notes is the *bona fide* owner of the goods and an undertaking by the witness to share the liability of the executant of the indemnity notes, are not documents of title. They cannot be said to be a warrant or order for the delivery of goods.<sup>3</sup>

A railway receipt is included within the definition of document of title in S.2 (4) of the Act. The rights, if any, in transfer of the documents of title are between the endorser and the endorsee of the receipt. The transfer of document of a title operates only as a token of authority to take possession and not as a transfer of possession and as between the immediate parties there is nothing to modify the common law rule. If the railway

1. See now S. 72 of the Railways Act, as amended in 1961.

2. (1958) M.P.L.J. (Notes) 152,

3. Rampratap Brijmohan v. Union of India, Civ. R. No. 1584 of 1950, D/12 3-1951, (1951) Indian Digest, p. 728,



receipt is endorsed by the consignor to the consignee for valuable consideration such endorsement might form part of the endorsee's cause of action. But, when goods are booked from a forwarding station to the destination station, both places being outside the jurisdiction of the Court and the railway receipt is in the name of the consignee, there being no question of endorsement or assignment of the railway receipt the consignee's cause of action in case of loss or non-delivery would arise outside the jurisdiction of the Court and the delivery of the railway receipt by the consignor or the consignee within the jurisdiction of the Court would not be a part of the plaintiff's cause of action against the railways.<sup>1</sup>

### (17) **Mate's receipt.**

Regarding the inclusion of a mate's receipt in document of title to goods, the Select Committee observed as follows :

"A suggestion has been made that a mate's receipt should be included in the definition of 'document of title to goods'. We considered the suggestion and have come to the conclusion that notwithstanding the irregular practice in Calcutta of treating a mate's receipt on the same footing as bill of lading, a mate's receipt is a mere acknowledgment of the receipt of goods on behalf of the ship. The person in possession of the mate's receipt is as a general rule entitled to a bill of lading, which is the document of title to the goods. The High Court of Calcutta has taken the same view and we are not aware of any judicial decision which regards a mate's receipt as a document of title. In England it has been held that mere endorsement of transfer of a mate's receipt without notice to the ship-owner or his agent does not pass the property in the goods, and a custom to that effect is bad (*See Scrutton on Charter Parties*, page 169.). If a mate's receipt were treated as a document of title, then on the issue of a bill of lading without the mate's receipt having been surrendered, there will be two documents of title in existence relating to the same goods. This would be highly undesirable from a business point of view."<sup>2</sup>

A mate's receipt is a mere acknowledgment of the receipt of goods on board the ship, and the person in possession of it is generally entitled on surrendering the receipt to get a bill of lading.<sup>3</sup> Ordinary holder of the mate's receipt is the person entitled to the bill of lading<sup>4</sup> but this is not necessarily the case, and the master of the ship may properly sign bill of lading in favour of the shipper of the goods without production of the mate's receipt, if he is otherwise satisfied that the goods are on board the vessel, and has no notice that anyone but the shipper claims any interest in them.<sup>5</sup>

*See also notes under section 25.*

### (18) **Cash receipt.**

Cash receipts given in place of delivery order are not documents of title.<sup>6</sup>

1. *Fushraj Thanmull v. Union of India*, A.I.R. 1960 Cal. 458.

2. Report of the Select Committee, Appendix E.

3. *Jugger Nath v. Smith* (1906) 33 Cal. 547; *Natchappa v. Irrawaddy Flotilla Co.* (1914) 41 Cal. 670.

4. *Crown v. Ryder* (1819) 128 E. R.

1103; 16 R. R. 644; *Ruck v. Hatfield* (1822) 106 E. R. 1321; 24 R. R. 507

5. *Hathesing v. Lading* (1873) L. R. Eq. 92; *Cowasjee v. Thompson* (1885) 5 Moo. P. C. 165, 70 R. R. 27.

6. *Kemp v. Falk* (1882), 7 App. Cas. 573, at p. 585.



(19) "**Any other document, etc.**"—**Way-Bill—Registration book of motor car.**

The common law drew a distinction between bills of lading and the other documents of title for "whereas a transfer of a bill of lading was always held to operate as a delivery of the goods, a transfer of the delivery order or a dock warrant operates only as a token of authority to take possession and not as a transfer of possession."<sup>1</sup> But for the purposes of this Act all the documents enumerated in S. 2 (4) have been placed on the same footing as a bill of lading.

As has already been referred to above, to bring any document within the description of "document of title" it must be shown that it is used in the ordinary course of business as proof of possession or control of goods or representing the goods.

Thus the question whether a wharfinger's certificate is or is not equivalent to a document of title depends upon its form. If it purports to be a delivery warrant making the goods deliverable to "A, B or his assigns by endorsement or otherwise" the warrant or certificate then represents the goods, and is used as proof of the possession or control of them. This was the form of certificate in *Farina v. Home*.<sup>2</sup> A document in this form would clearly be included in the general words of the definition. If, on the other hand, the document is in form only a certificate that the goods are lying at the wharf and ready for delivery, it does not and is not intended to represent the goods; it does not authorise or purport to authorise the holder to receive them; it is, therefore, not a document of title, and no alleged custom of trade can make it. This was the form of certificate, in *Gunn v. Bolckow*.<sup>3</sup>

**"Way Bills"**

In *C. I. & B. Syndicate v. Ramachandra*<sup>4</sup>, the plaintiff was a Banking Company. The first defendant was a merchant and commission agent carrying on business in Mangalore Town. The second defendant carried on business as a Public Carrier. The first defendant in the course of his business despatched goods through the second defendant to his customers at different places. On entrusting the goods to the second defendant the first defendant obtained from him documents called 'Way Bills' to evidence the entrustment of the goods for carriage. The first defendant despatched the parcel way bills through the plaintiff Bank endorsing the same in blank in favour of the plaintiff. It was held that the "Way Bills" did not constitute 'document of title' within Section 2(4) of the Act. It was observed: In order to recognise a particular usage in the ordinary course of business, it is necessary that such usage must be certain, definite, and uniformly recognised in the ordinary course of business. But in the absence of uniform and definite usage regarding issue of way bills, and their transfer on endorsement as equivalent to pledge of goods, the way bills cannot be treated as 'documents of title' to goods coming within the meaning of the words 'warrant or order for the delivery of goods and any other document used in the ordinary course of business' as proof to the possession or control of goods or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented. Hence the owner of the goods could not pledge the goods covered

1. Blackburn, 302.

2. (1846), 16 M. & W. 119.

3. 10 Ch. App. 491.

4. A.I.R. 1968 Mysore 133. Ram Das

Vithaldas v. S. Amerchand and Co.,  
A.I.R. 1916 P.C. 7 relied on. Morvi  
Mercantile Bank v. Union of India,  
A.I.R. 1965 S. C. 1954 referred to,



by the way bills, as in the present case, unless the carriers were properly notified of the transfer and they agreed to hold the goods as bailee for the pledgee, that is, the Bank.

**“Registration book of motor car”** held not a ‘document of title’ to car, in *Central Newbury Car Auctions Ltd. v. Unity Finance Ltd.*, (1956) 3 All E.R. 905.

### (5) “Fault”

#### (20) **“Fault” means wrongful act or default.**

This definition is the same as in the English Act, and is required in sections 8, 10 (2) and 26.

The word “wrongful” imports “the infringement of some right”.<sup>1</sup> It is a purely relative term like negligence, and has been defined, in the case of sale of land, as “meaning nothing more, nothing less than not doing what is reasonable under the circumstance—not doing something which you ought to do, having regard to the relations which you occupy, towards the other persons interested in the transaction.”<sup>2</sup> “The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligation he has undertaken to fulfil.”<sup>3</sup>

### (6) “Future Goods”

#### (3) **“Future goods” defined.**

This definition follows the definition of the term in the English Act, with the addition of the words “or produced” in this Act, so as to include specifically agricultural products.

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller or future goods. There may be a contract for the sale of *contingent* goods *i.e.*, goods, acquisition of which by seller depends upon a contingency which may or may not happen, *e.g.*, “a crop not yet sown.”<sup>4</sup>

The goods forming the subject of the contract of sale may thus be either—

- (1) *Existing* goods ; or
- (2) *Future* goods ; or
- (3) *Contingent* goods.

Existing goods may further be either—

- (1) *Specific* goods, *i.e.*, identified and agreed upon at time of contract of sale ; or
- (2) *Unascertained* goods, *i.e.*, goods defined only by a description applicable to all goods of same class.

“Future goods” according to the definition in this Act, means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.

The term “future goods” although not very happy has been held to be convenient. As a general rule any person may sell or offer for sale at any price whatever goods of which he is not the owner, but which he expects or hopes to acquire.<sup>5</sup>

1. *Mogul Steamship Co. v. McGregor* (1889) 23 Q.B.D. 598, C.A.  
 2. *Re Young and Harston's Contract* (1885) 31 Ch. D. 168, C.A., p. 174, Per Bowen L.J. See Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 78. f. n(s),

3. *Sailing Ship Blairmore Co. v. Macredie*, (1898) A.C. 593, at p. 607.  
 4. See Section 6 of the Act.  
 5. Per Stirling J. in *Ajello v. Worsley* (1898) 1 Ch. 274 ; 57 L.J. Ch. 172.  
 6. 10 B. & C. 446 ; 8 L.J. (O.S.) K.B. 181 ; 34 R.R. 477.



It is to be noted that future goods are not the same as unascertained goods *e. g.*, the future crops of a particular named orchard is a class of future goods, midway between specific and unascertained goods. In *Watts v. Friend*<sup>6</sup> the bargain was that the plaintiff should furnish the defendant with turnip seeds to be sown by the latter on his own land, and that the defendant should then sell and deliver to the plaintiff the whole of the seeds produced from the crop thus raised at a guinea a bushel. The contract was held to be a contract of future goods.

Again, in *Wilks v. Atkinson*<sup>1</sup>, a contract to sell oil, not yet pressed from seeds in his possession, was held to be a contract of sale of future goods.

*See also notes under Section 6 of the Act.*

**Sections 2(6) and 2(4)—Agreement for sale and purchase of tendu leaves—Agreement is for sale and purchase of future goods—It is agreement to sell and not a sale—Limitation Act, 1908, Art. 115 (Corresponding to Limitation Act, 1963, Sch., Art. 55).**

The plaintiffs entered into contract with Government for sale and purchase of tendu leaves for a period from 1-10-1949 to 30-9-1954. The contract though for a unit period of five years, consideration was payable at beginning of every year, in five equal instalments. The Government unequivocally rescinded contract on 26-9-1949. The conduct of the plaintiffs showed clear acceptance of rescission. It was held that the suit for compensation for breach of contract was governed by Art. 115 of the Limitation Act, 1908, and the period of limitation started from the date of rescission of the contract. The case was not one of successive or continuing breach and the suit filed on 30-8-1954 was barred by time.<sup>2</sup>

### (7) "Goods"

#### (22) Goods : definition.

The definition of "goods" under the present Act is wider than the definition contained in the English Sale of Goods Act, 1893. Section 62 (1) of that Act defines "goods" as follows :

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The present definition expressly includes stock and shares which are not "goods" according to the English Act. In England scrips and shares are things in action in the same way as bills, notes and cheques.<sup>3</sup> The inclusion of shares in the definition of "goods" under the Indian Act is based on the decision in *Fazal v. Mangal Das*<sup>4</sup> wherein it has been held that the

1. (1815) E. R. 935 ; (1815) 1 Marsh 412.

2. *Firm Bhagwandas Shobhalal Jain v. State of M. P.*, A.I.R. 1966 M.P. 95.

3. See *Humble v. Mitchell* (1839) 11 A. & E. 205, 52 R.R. 318 ; *Colonial Bank v. Whinney* (1886) 11 App. Cas. 426 (a case of shares) ; *Lang v. Smyth* (1831) 7 Bing. 284 (foreign bonds) ; *Freeman v. Appleyard* (1862) 32 L. J. Ex. 175 ; 139 R. R. 790 (certificate of railway stock). See also *Chalmers*,

*Sale of Goods Act, 1893, 16th Edn.*, p. 228.

4. (1922) 46 Bom. 489 ; 66 I. C. 326 See also *Maneckji Pestonji Bahruch v. Wadilal Sarabhai* (1926) 53 I. A. 92, 50 Bom. 360 ; *Domingo v. De Souza* (1926) 50 All. 695. In *Lalit v. Haridas* (24 C. L. J. 335) a contrary view was taken in construing the word "goods" in section 178 of the Contract Act.



term “goods” as used in Chapter VII of the Indian Contract Act, 1872, has a much wider sense than it has in the English law, and includes share certificates. A sale of shares backed by share certificates and blank transfers is in India a sale of goods and not as in England a sale of choses in action.<sup>1</sup>

It is to be noted that while the definition in the English Act is *inclusive*, not exhaustive, the definition in this Act is apparently intended to be exhaustive, (the word used here is “means”). Of course, the definition is governed by the opening words of the section *viz.*, “unless there is anything repugnant in the subject or context.”

Section 76 of the Indian Contract Act defined the goods as ‘meaning and including every kind of moveable property.’ This definition was interpreted to include share certificates<sup>2</sup> but not choses in action<sup>3</sup> or money or emblems of money<sup>4</sup> constituting legal tender<sup>5</sup> or a house apart from its site.<sup>6</sup>

Actionable claims were not excluded from the definition contained in that section. It was accordingly held that the definition included not only registered shares but also title to get on the register, which in England would be treated as a chose in action.<sup>7</sup> The present definition excludes actionable claims with the exception of stocks and shares, and money. It is, therefore, narrower than the definition in section 76 of the Indian Contract Act.

**(23) Moveable property—things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale of ‘goods’.**

Section 3(34) of the General Clauses Act, 1897, (Act X of 1897), defines “moveable property” as meaning property of every description except “immoveable property”, and clause (25) of the same section defines “immoveable property” as including ‘land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.’ Notwithstanding the definitions of moveable and immoveable property in the General Clauses Act, 1897, the concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than growing crops and grass. Under the Act the sole test appears to be whether the things attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil. Thus “goods” also include things attached to or forming part of the land, not only when they are to be severed before sale, but also when they are agreed to be severed “under the contract of sale”, that is to say, in performance of the seller’s duty to deliver or to allow the buyer to take them.

In English law ‘emblements’ *i.e.* such vegetable products as are the annual result of agricultural labour such as corn, hemp, melons and potatoes<sup>8</sup>, were always considered to be “goods”, but somewhat subtle

1. Official Assignee, Bombay v. Madho Lal Sindhu, A.I.R. 1947 Bom. 217.

9. Fazal v. Mangal Das, 46 Bom. 489. Hazarimall v. Satish, (1918) 46 Cal. 331.

3. 14 C. P. L. R. 57 (59); Morgan v. Russell (1909) 1 K.B. 357.

4. Empress v. Joggesur Mochi, 3 Cal. 479; (1878) P.R. 73, 1905 P.R. 18.

5. Ibid.

6. Narayana v. Ramaswami, 8 Mad. H.C. 100 (102).

7. Maneckji Pestonji Bharucha v. Wadilal Sarabhai, A.I.R. 1926 P.C. 38 : (1926) 53 I.A. 92; 50 Bom. 360.

8. See Williams on Personal Property, 18th Ed., p. 162; Chalmers, Sale of Goods Act, 16th Ed., p. 228.



distinctions were drawn in the case of *fructus naturales*, that is, the natural produce of land, such as fruit on trees.

Most of the decisions before the English Sale of Goods Act, 1893, arose on the construction of the Statute of Frauds (29 Car. 2, C. 3), which uses the expression "goods, wares and merchandises," and this expression was somewhat artificially extended in order to bring contracts of sale within the 17th rather than the 4th section of that Act, which does not recognise part performance. The first principle at common law before the Act according to Lord Blackburn is, that agreement to transfer the property in anything attached to the soil at the time of the agreement but which is to be severed from the soil and converted into goods *before the property is transferred* to the purchaser, is an agreement for the sale of goods within section 17 of the Statute of Frauds. The second principle is that where there is a perfect bargain and sale vesting the property at once in the buyer *before severance*, a distinction was made between the natural growth of the soil, as grass, timber, fruits on tree, etc. etc. which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labour of men, in sowing and reaping, planting and gathering. If *fructus naturales* were to be delivered by the seller who was to sever them himself and deliver them, they were goods within the meaning of the 17th section. If the buyer was to take them away, "the question seems to be whether it can be gathered from the contract they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining". If so, they came within the 4th section. If not, and they were to be delivered immediately, even though the buyer was to enter and take them, they came within the 17th section. *Fructus industriales* are *chattels* for at common law a growing crop, produced by the labour and expense of the occupier of lands, was, as the representative of labour and expense, considered an independent chattel.<sup>1</sup>

The doubt as to whether a sale of emblements before severance is a sale of goods, has been dispelled by section 62 (1) of the English Act, which declares them to be goods. By the same section "industrial growing crops" are declared to be goods, and as regards things "attached to or forming part of the land" this section specifically declares that those which are agreed to be severed before sale or under the contract of sale, are "goods." The distinctions at common law pointed out above are not of any importance under the definition of "goods" under the Sale of Goods Act. Now under a contract of sale things attached to or forming part of the land, whether the property is to pass to the buyer before or after severance, are to be deemed "goods". The enactment has removed all doubt with regard to fixtures, and has certainly altered the law with regard to buildings sold as materials, and with regard to *fructus naturales*. If the parties agree that such things shall be severed, they thereby become "goods."<sup>2</sup>

The definition of "goods" in the Indian Sale of Goods Act, 1930, includes all growing crops and grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. No departure from English law is contemplated.

1. See Benjamin on Sale, 8th Ed., pages 171 to 189; Now 1st edn. 1975; Chalmers, Sale of Goods Act, 16th Ed., pages 227 to 229, and the cases cited

thereunder.

2. See Benjamin on Sale, 8th Ed., pp. 181, 182. Now 1st edn. 1975.



**(24) Fixtures and buildings sold as materials.**

"Things attached to or forming part of the land" include fixtures, and buildings sold as materials ; and a contract for the sale of them will be a contract for the sale of "goods" if they are "agreed to be severed before sale or under the contract of sale." But where either the purchaser of the land or an incoming tenant, enters into an *entire* contract to take the land and the fixtures, they are still not to be deemed "goods". Thus there would be no contract of sale of "goods" where a landlord sells landlord's fixtures to an incoming tenant, or an outgoing tenant sells tenant's fixtures to his landlord, or to an incoming tenant, or purchaser of the land ; or, an incoming tenant or purchaser of the land agrees to take the land together with fixtures. Fixtures can be held to be moveable only if they are intended to be severed and sold separately.<sup>1</sup> In *Lee v. Risdon*<sup>2</sup>, where the defendant, who on becoming tenant of the plaintiff's house had agreed to purchase from the plaintiff, the lessor, certain fixtures at a valuation, was sued in action for *goods* sold and delivered it was held that fixtures could not be recovered in that form of action, as the fixtures were, while unsevered, part of the freehold.

The same principles will apply to *fructus naturales*. Thus, where there was a sale of growing crops of wheat at a separate price to an incoming tenant, it was held that this contract was distinct from the contract to demise the land and therefore the balance of the price, part of which had been paid, could be recovered.<sup>3</sup> On the other hand, where a farm was leased, and the tenant had in consideration of the demise verbally agreed to take the growing crops of corn and turnips and pay for them and for the labour and materials expended, according to a valuation, but these things were not excepted out of the demise, it was held that the whole was an *entire* contract for an interest in land under section 4 of the Statute of Frauds.<sup>4</sup>

**(25) Things attached to land.**

Apart from growing crops and grass things attached to the land or forming part of the land are goods only if they are agreed to be severed before sale or under the contract of sale. So it is a question of construction of the contract in each case.

In *James Jones & Sons v. Tankerville*<sup>5</sup> there was a sale of growing timber ; the buyer was to cut and remove the timber for which purposes he would have all facilities and right of access to the land. The court was of opinion that the property in the timber cut passed to the purchaser but not in the uncut timber ; and that 'goods' under S. 62 of the English Act included growing timber which was to be severed under the contract of sale, whether by the vendor or purchaser. In *Lavery v. Pursell*<sup>6</sup> there was a contract for the sale of the building materials of a house which were to be taken down and cleared off the ground (by the purchaser) within two months. It was held to be a sale of an interest in and concerning land and

1. *Commissioner of Income-tax v. Bhurangya Coal Co.*, A. I. R. 1959 S.C. 254.  
2. 7 Taunt 188 ; 17 R. R. 484 ; see also *Benjamin on Sale*, 8th Ed., pp. 182, 183 & 184.

3. *Mayfield v. Wadsley*, 3 B. & C. 357.  
4. *The Earl of Falmouth v. Thomas*, 1 Cr. & M. 89, 2 L.J. Ex. 57, 38 R. R. 584.  
5. (1909) 2 Ch. 440.  
6. (1888) 39 Ch. D. 508,



came within section 4 of the Statute of Frauds.<sup>1</sup> In *Vohra v. Ramchandra*<sup>2</sup> there was an agreement in writing for the sale of standing trees to be cut by the purchaser when they attain a certain size. The court seemed to be of opinion that there was a sale of an interest in land though the decision turned on question of stamp duty.

**(26) Coal, minerals, gravel, sand, gittis etc.**

In *Morgan v. Russel & Sons*,<sup>3</sup> on the sale of all the cinders and puddle slag or iron slag on certain lands to be taken by the buyer, it was held by the County Court judge that the cinders were not separate things, but had become part of the soil itself, and that the contract therefore was for the sale of land, and not for the sale of goods. On appeal this decision was affirmed and it was observed : "The cinders and slag were not definite or detached heaps resting, so to speak, on the ground. I am clearly of opinion that this was not a contract for the sale of goods. The respondent Morgan did not contract to sell any definite quantity of mineral, nor was it a contract for the sale of heap of earth which could be said to be a separate thing. The contract appears to me to be exactly analogous to a contract which gives a man right to enter upon land with liberty to dig from the earth *in suit* so much gravel or brick earth or coal on payment of a price per ton.

Minerals while embedded in the earth or forming part of it are not goods, but when severed from earth they are goods. So a contract for the sale of minerals which are to be severed before sale is a contract for the sale of goods. It is a question of construction in each case.

The essence of manufacture is the changing of one object into another for the purposes of making it marketable. The stones which are won in the process of quarrying may be sold, without fashioning them into something else. If they are so sold they would not be manufactured but merely delivered from the quarryhead. When they are broken into metal or gitti there is some process, normal though it may be, for the purpose of shaping the stones into another marketable commodity. The metal which is produced is goods within the meaning of the Indian Sale of Goods Act or the Constitution. Once the conclusion that what is produced is 'goods' and that some process of manufacture enters into it is reached the definition of 'manufacture' in S. 2 is fully met.<sup>4</sup>

**(27) Growing crops and grass—time of attachment to soil.**

Benjamin has observed :<sup>5</sup> "In spite of the fact that the Act (English Sale of Goods Act, 1893) recognises contracts for the sale of 'future' goods,

1. Cases decided under the Statute of Frauds are to be applied with caution for there the Court was concerned with the question whether the things were "goods, wares or merchandise." Under the Sale of Goods Act it is immaterial whether things were to be severed by the buyer or seller. The only question is whether they have become by agreement goods by reason of the contemplation of their severance from the soil.

2. (1897) 22 Bom., 785.

3. (1909) 1 K.B. 357 ; 78 L.J.K.B. 187.

4. *Kulkarni v. State*, A.I.R. 1957 M.P. 45.

5. *Sale of Personal Property*, 8th Ed., p. 188. See also the cases cited therein. See also *Imam Ali v. Priyawate*, A.I.R. 1937 Nag. 289, wherein it has been held that a "growing crop" necessarily means a crop which is in existence and which is in the process to fruition.



the language of the definition of 'goods' points to an attachment of the thing to the land at the time of the contract. Accordingly, a contract for the sale of an unsown crop of grass, to be cut by the buyer at maturity, would be a contract for an interest in land.

In *Watts v. Friend*,<sup>1</sup> however, there was a sale of a crop not yet sown. The bargain was, that the plaintiff should furnish the defendant with turnip seed to be sown by the latter on his own land, and that the defendant should then sell and deliver to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within section 17 of the Statute of Frauds, as the thing agreed to be delivered would at the time of delivery be a personal chattel.

A growing crop may include crops which do not require annual cultivation, requiring only periodical care and attention.<sup>2</sup>

*See further notes under section 6 of the Act.*

## **(28) Trees standing on the land if "goods"**

### **(i) West Bengal Estates Acquisition Act (1 of 1954), Section 5.**

In *Ajit Kumar v. State of West Bengal*,<sup>3</sup> Maharajadhiraj of Darbhanga was, at the material time, owner of a large tract of forest in the district of Banhura. He used to lease out the forest to contractors. Although the word "lease" had been generally used, the transaction was of a special nature. Sometime in the year 1945, there was a proclamation for sale by public auction. The proclamation of sale declared that there would be a public auction of certain kinds of jungle wood within certain mouzas. On the 22nd of December, 1945, the petitioner was declared to be the highest bidder for the sum of Rs. 26,240/-, which bid was accepted. At first there was no written agreement but subsequently a written document was executed in which the transaction was described as sale of jungle wood. The petitioner having been declared as the highest bidder at the public auction, he was allowed to commence the cutting and removal of wood without the execution of any formal document. On or about the 29th December, 1950, document was executed by the petitioner in favour of the Maharajadhiraj. It had been recited in the document that there was a public auction, that the petitioner had been declared as the highest bidder, and that by the time the document came to be executed, the petitioner had already finished the cutting of wood in 41,761 acres, which had reverted to the khas possession of respondent No. 3. By the time the document came to be executed, the petitioner had already paid Rs. 21,000/- out of the total consideration of Rs. 26,240/- and had cut and removed wood from a considerable portion of the total area which was the subject-matter of the sale, leaving only a small area to be operated upon. It was agreed that this area would have to be operated upon, within a total period of 6 years and 10 months, between the Bengal year 1357 and 1363. By the 13th April, 1951 the petitioner paid to the Maharajadhiraj the entire balance due under the agreement. On or about the 12th February, 1954, the West Bengal Estates Acquisition Act (1 of 1954) came in to operation. The

1. 10 B. & C. 446; 8 L.J. (O.S.) K.B. 181; 34 R.R. 477. See also *Misirilal v. Mozhar Hussain*, (1886) 13 Cal. 262 (future indigo crops.)

2. See *Graves v. Weld* (1833) 5 B. & Ad. 105.

3. A.I.R. 1957 Cal. 350.



State claimed that not only the bare land but also the forest had vested in the State Government and therefore the petitioner was not entitled to remove any further wood.

It was held : The so-called lease was not a lease of the land in the usual sense, but it was really a sale of goods and not a transfer of any interest in land. What was sold was the wood standing in a certain forest, for a specified price. The wood that was sold was already standing. It was true that as a result of the subsequent enactment of the Private Forest Act, the cutting had to be in specified zones, but there was nothing to show that the parties did not intend to treat the contract as a contract of wood that already existed. But even if it was a sale of wood that would come into existence within a specified date, even so, it could not be considered as transfer of any interest in the trees themselves or the forest or the land. There was nothing to show that there was any sale of growing trees. The Maharajadhiraj of Darbhanga had a certain quantity of wood in his forest and he sold it. It was impossible upon a construction of the agreement in this case to hold that the wood that the petitioner purchased was a purchase of a mere profit a prendre. In the agreement in this case, there was no sale of trees. What was sold was the wood to be cut from trees and taken away. As it was a sale of goods the property had passed before the Act I of 1954 came into operation, inasmuch as the entire consideration had been paid, and the petitioner was in possession actually removing the wood he purchased. It was not intended under the Act that goods existing on the land, which had already been sold, that is to say, in respect of which the property had passed to a stranger, was also intended to be acquired by the State. Really speaking, the State had been proceeding upon a misconstruction or misappreciation of the Estates Acquisition Act, and was proceeding to take possession of things which had not vested in the Government. Hence there would be a writ in the nature of mandamus and/or an appropriate writ directing the State not to prevent the petitioner from cutting or removing the wood which he was entitled to do under the agreement. This could only be done in accordance with the provisions of the Private Forest Act and in accordance with the plan sanctioned or that might be sanctioned thereunder.

(ii) **Contracts conveying rights to take forest produce, including tendu leaves, soil for making bricks, right to prune, coppice and burn tendu leaves, and right to build for purposes of business, with proprietors of estates prior to vesting of estates under the M. P. Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act, I of 1951, Ss. 3, 4—Cannot be said to be sale of "goods" simpliciter.**

In *Mahadeo v. State of Bombay*<sup>1</sup> it was held : The agreements conveyed more than the tendu leaves to the petitioners. They conveyed other forest produce like timber, bamboos etc., the soil for making bricks, the right to prune, coppice and burn tendu leaves and the right to build on and occupy land for the purpose of their business. These rights were spread over many years, and were not so simple as buying leaves, so to speak, in a shop. The expression "growing crop" might appropriately comprehend tendu leaves, but would not include "Adjat timber" bamboos, not even tendu plants. The petitioners were not to get leaves from the extant trees alone but also from such trees as might grow in the future.

1. A.I.R. 1959 S.C. 735.



They could even burn the old trees, presumably, so that others might grow in their place. In those circumstances the agreements could not be said to be contract of sale of goods simpliciter.

(iii) **Sections 2, 19—Contract for sale of trees in a Jagirdari Mouza in Madhya Pradesh before coming into force of the Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (1 of 1951)—Trees vest in State under the Act before cutting—Trees before these are “goods” must be severed before sale or under the contract of sale—Contract to cut trees of certain measures were not “ascertained goods” and property would pass only on cutting.**

In *Badri Prasad v. State of M. P.* (A.I.R. 1970 S.C. 706), a contract was entered into between the plaintiff and a minor Jagirdar through his guardian, in respect of forests in Mouza Sunderpani Jagir. The contract was in writing and was signed on January 21, 1951. On January 22, 1951, the Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M. P. Act I of 1951) received the assent of the President and was published in the Gazette on January 26, 1951. The plaintiff started working under the contract in March, 1951. On March 31, 1951, a notification was issued vesting the estates in the State and the State Government prohibited the plaintiff from cutting timber in exercise of the rights under the contract. In appeal before the Supreme Court, two of the points raised were :

- (1) that the forest and trees did not vest in the State under the Act ;
- (2) that even if they vested, the standing timber having been sold to the plaintiff did not vest in the State.

**It was held :**

“There is no force in the contention of the learned counsel that under the contract the plaintiff had become owner of trees as goods. It is true that trees which are agreed to be severed before sale or under the contract of sale are ‘goods’ for the purposes of the Sale of Goods Act. But before they cease to be ‘proprietary’ right or interest in proprietary rights within the meaning of Sections 3 and 4(a) of the Act (M. P. Act I of 1951) they must be felled under the contract. It will be noticed that under Clause I of the contract the plaintiff was entitled to cut teak trees of more than 12 inches girth. It had to be ascertained which trees fell within that description. Till this was ascertained, they were not ‘ascertained goods’ within Section 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees, after cutting had to be 3 inches high. In other words, the contract was not to sell the whole of the trees. In these circumstances property in the cut timber would only pass to the plaintiff under the contract at the earliest when trees are felled. But before that happened the trees had vested in the State.”<sup>1</sup>

(iv) **Section 2 (7)—Contract of sale of standing timber—Timber agreed to be severed under the contract—Sale of timber is sale of goods.**

In *State of Maharashtra v. Champalal Krishanlal Mohita*<sup>2</sup>, reviewing Civil Appeal No. 1878 of 1967, decided on 17-7-1969 (S.C.), the Supreme

1. See also to the same effect *Ram Narain Mahto v. State of M.P.*, (1970) 9 S.C.R. 445 : (1970) 9 S.C.J. 367,

cited under sections 18 and 21 *post*.  
2. (1971) 1 S.C.R. 46 : (1970) 2 S.C.J. 657 : (1971) 27 S.T.C. 116.



**Court held :** The sale of standing timber agreed to be severed under the contract of sale is sale of goods chargeable to sales tax under the Bombay Sales Tax Act, 1959, S. 2 (13) as amended by Act 15 of 1967, with retrospective operation.

Standing timber may ordinarily not be regarded as "goods" but by inclusive definition given in S. 2(7), Sale of Goods Act, things which are attached to the land may be the subject of contract of sale provided that under the terms of the contract of sale they are severed before sale or under the contract of sale. Since it was expressly provided that the timber agreed to be sold shall be severed under the contract of sale, the timber was "goods" within the meaning of S. 2(7) of the Sale of Goods Act and the expression 'sale of goods' in Entry 54 List II of Sch. VII having the same meaning as that expression has in the Sale of Goods Act, sale of timber agreed to be severed under the terms of the contract may be regarded as sale of goods.

**(29) "Goods" means every kind of moveable property other than actionable claims and money.**

"Moveable property" is not defined in the Act, but the General Clauses Act, section 3, clauses 25 and 35 define it, as already referred to above.

"Actionable claims" is defined in section 3 of the Transfer of Property Act, 1882, as meaning 'a claim to any debt, other than a debt secured by mortgage of the immoveable property or by hypothecation or pledge of moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent.

Chief instances of actionable claims are :

- (a) Claims for arrears of rent.
- (b) A claim for rent to fall due in future, being an "accruing debt".
- (c) The benefit of an executory contract for the purchase of goods is a 'beneficial interest in moveable property' and is therefore an actionable claim within the meaning of this section.
- (d) A right to get by division a piece of land reserved by a donor for his own use in his deed of gift (but possession of which was with the donee) is an actionable claim.

Their transfer is governed by sections 130 to 137 of that Act.

**(30) A share in a partnership.**

In *Firm Sahebram Surajmal v. Purushotamlal*<sup>1</sup> it has been held that the interest of a partner in partnership comes within the definition of "goods". It was observed : "The interest of a partner in the partnership is certainly not a claim to a debt as a 'debt' is an obligation to pay a liquidated (or specified) sum of money. It (the interest of a partner in a partnership) is a claim to beneficial interest in moveable property but that moveable property is not one which is not in the possession either actual or constructive of the claimant as it is in the possession of the

1. A.I.R. 1950 Nag. 89.



partners who manage and look after the partnership business and that possession is on behalf of all the partners, *i. e.*, it is in the constructive possession of the partner who wants to sell his interest. It is thus not an actionable claim. The interest of a partner in partnership being moveable property and not being an actionable claim comes within the definition of 'goods' given in S. 2(7), Sale of Goods Act."

### (31) Decree.

A decree is "moveable" property as defined by S. 3(34) of the General Clauses Act, and as such falls within the definition of "goods"<sup>1</sup> in S. 2(7) of the Sale of Goods Act of 1930. A sale of decree may be made orally and it is necessary that the assignment of decree to be valid should be in writing. O. 21, R. 16, C.P. Code can only be construed as laying down that the requirement of a transfer in writing is a mere requirement of procedure. It is not a substantive enactment which says that unless there is an assignment in writing of a decree, a transfer, though made orally shall be inoperative or void.

### (32) Money.

Money, that is to say *current money* is necessarily excluded, because in sale the goods and the price are contrasted, and wholly different considerations apply to them.<sup>2</sup> If a man changes a sovereign for another the contract is exchange, not sale. But a Jubilee five pound gold piece bought as a curiosity, may be treated as goods and not money.<sup>3</sup>

"Goods" does not include money and emblems of money constituting "legal tender," such as currency notes.<sup>4</sup>

Where, however, a particular sum of money is entrusted by one to another, the former may follow it or an equivalent of it in the hand of third parties to whom it has been given or claim a charge on any property acquired with the sum entrusted. To this extent, money is in the nature of goods.<sup>5</sup> But when once it has passed in currency, it cannot be followed.<sup>6</sup>

### (33) Ships.

A ship is clearly a chattel personal, but it is governed by so many special rules that it is doubtful how far it comes under the denomination of "goods" for the purposes of the Act. But unless, and except in so far as there is some provision to contrary, the Sale of Goods Act appears to apply.<sup>7</sup>

In *Hooper v. Gumm*,<sup>8</sup> Turner L.J. observed : "A ship is not like an ordinary chattel. It does not pass by delivery, nor does the possession of

1. *Vithaldas v. Jagjivan*, (1939) 41 Bom. L.R. 33 : A.I.R. 1939 Bom. 84 : 180 I.C. 850 (2).

2. *Empress v. Joggessur Mochi*, 3 Cal. 379 ; 18 P.R. 1905.

3. *Moss v. Hancock*, (1899) 3 Q.B. 111.

4. *Empress v. Juggessur Mochi* (1878) 3 Cal. 379 ; 73 P.R. 1878 ; 18 P.R. 1905.

5. *Banque Belge v. Hambrouck* (1921) 1 K.B. 321 : Cf. *Knatchbull v. Hallet*, (1881) 73 Ch. D. 696.

6. See *Miller v. Race* (1758) 1 Burr. 452,

457.

7. See Chalmers, *Sale of Goods Act*, 16th Ed., p. 229 ; *Behnke v. Bede Shipping Co. Ltd.* (1927) 1 K.B. 649. Cf. *Lloyd Del Pacifico v. Board of Trade* (1930) 35 Ll.L. Rep. 217 C.A., where it was assumed that the sale of ship was within the provisions of section 14 of the English Act, corresponding to section 16 of the Indian Act.

8. (1867), 2 Ch. App. 282, at p. 290.



it prove the title to it. There is no market overt for ships. In the case of American ships the laws of the United States provide the means of evidencing the title to them" (as the Merchant Shipping Act, 1894, does for British ships).

**(34) Sea Customs Act, 1878.**

Although the Sea Customs Act, 1878, does not define "goods", the definition of "goods" in the Sale of Goods Act cannot govern the meaning of the expression in the Sea Customs Act. Under S. 8 (2) read with S. 23A of the Foreign Exchange Regulation Act the exportation of Indian Currency in contravention of S. 8 (2) will be a violation of S. 19 of the Sea Customs Act attracting the penalties and confiscation in S. 167 (8) of the latter Act.<sup>1</sup>

**(35) Gas, water, electricity, etc.**

It has been doubted whether these can be classed as goods for the purposes of the English Act.<sup>2</sup> The Calcutta High Court at one time observed that it is doubtful whether the Sale of Goods Act is applicable to electricity.<sup>3</sup> In the United States of America, it has been held that a contract to supply power, is a contract of sale.<sup>4</sup> In India, according to section 39 of the Indian Electricity Act, electrical energy can be the subject-matter of theft. Article 287 of the Constitution which prohibits a State Legislature from imposing a tax on 'the consumption or sale of electricity' shows that there can be a sale of electricity. In view of the fact that contracts with regard to the supply of electrical energy and water are common, the definition of "goods" though not specifically including power in the shape of electrical energy, water and gas, appears (and in any case should) include these also. This view was upheld regarding electricity, by the Calcutta High Court in *Associated Power Co. v. R. T. Roy*,<sup>5</sup> observing: "We have seen that the City Civil Court Act does not define 'goods'. The Constitution and the Sale of Goods Act do. Both of them, as shown, are wide enough to include 'electricity' within the meaning of the expression 'goods'. The Transfer of Property Act does not define goods or the movable property. But section 3 (36) of the General Clauses Act defines movable property to mean 'property of every description except immoveable property.' That again is a kind of residuary definition within which 'electricity' can certainly come as movable property."

"Article 366(12) of the Constitution provides expressly that unless the context otherwise requires 'goods include all materials, commodities and articles'. The definition appears to be wide enough. Electricity, it is contended comes within materials or commodities or articles. Even if it did not, the separate mention in items 53 and 54 of List 2 cannot by itself justify a conclusion that the Constitution of India intended to draw any

1. *M/s. Agarwal Trading Corporation v. Asst. Collector of Customs*, A.I.R. 1964 Cal. 347.

2. See Chalmers, *Sale of Goods Act*, 16th Ed., p. 228; *Ferens v. O'Brien* (1833) 11 Q.B.D. 21; *County of Durham Electric Power Co. v. Commissioner of Inland Revenue*, (1909) 2 K.B. 604. An agreement between an Electric Co. and one of their customers was assumed to be an agreement for the sale of "goods, wares or merchandise" within the meaning of the English

*Stamp Act, 1891*, but the point was not decided. *Erie County Natural Gas and Fuel Co. v. Carroll*, (1911) A.C. 105, 117 P.C. (natural gas "the measure of damage is the cost of procuring the substituted article."); *Read v. Croydon*, (1938) 4 All E.R. 631 (sale of water is within the Act.)

3. *Rash Behari Shaw v. Emperor*, (1936) Cal. 753; 41 C.W.N. 225.

4. *American Jurisprudence*, Vol. XLVI, p. 216.

5. A.I.R. 1970 Cal. 75.



distinction between electricity and goods. Even if it did, that was for allocating taxes and not for drawing a distinction between 'electricity' and 'goods'."

The above was a decision of a Single Judge of the Calcutta High Court, in the context of the Calcutta City Civil Court Act (21 of 1953) Sch. I Cl. 4(VI) and section 5 (ii). In *Maharana Bhopal Electric Supply Co. Ltd. v. The State of Rajasthan*, A.I.R. 1973 Raj. 132, 138, a Division Bench of the Rajasthan High Court, however, held: "Electricity is not goods covered by the Sale of Goods Act. The reason is that the Sale of Goods Act applies to goods as defined in section 2 (7) of the said Act. The principal ingredient is that, it is moveable property. The Supreme Court in *Avtar Singh v. State of Punjab*, A.I.R. 1965 S.C. 666 has observed that "Electricity is not moveable property. The claim of interest under Sale of Goods Act is therefore not tenable."

It is for consideration of the Legislature whether definition of 'goods' in S. 2(7) of the Sale of Goods Act, 1930, should not be amended so as to include gas, water, electricity etc. specifically within the definition of "goods" in the said provision of the Act.

### (36) Machinery.

Machinery is moveable property within the meaning of S. 2(7) of the Act.<sup>1</sup>

### (37) Shares in company—Shares and share scrips—Companies Act, 1913, S. 56.

Shares in a joint-stock company are goods within the meaning of the Act.<sup>2</sup>

In *A. J. Judah v. Ramapada Gupta*<sup>3</sup> it was held: The share scrips may not be documents of title. But under the Sale of Goods Act, 1930, the shares are marketable property and goods as defined in the Act. It is true that no shareholder can be in possession of the Share Register which must be kept in the registered office of the company under the Companies Act, but the shares scrips representing the shares are themselves goods and can be delivered to the shareholders. The company like any other person can have possessory lien with respect to these share scrips. That under the Companies Act the company cannot retain the share scrips beyond a certain period, does not mean that under a collateral agreement under the Articles the company is debarred from retaining possession of the share scrips in exercise of its possessory lien. When the Article says that 'the company will have lien and charge available at law and in equity', it means that the company will have 'lien at law on the share scrips and equitable charge on the shares', if the scrips are not in possession of the company, but in the possession of share holder. When the Article provides for the sale of shares, subject to lien only, the company will have right to sell only the shares, the scrips of which are in possession of the company. With respect to shares, subject only to equitable charge, right of the company to sell the shares can only be enforced by a suit.

In selling the shares the company will be under an obligation to

1. *Trivedi Pranshankar v. Jayaguru Rughnath*, Civ. S.A. No. 34 of 1951, DT/28-1-1952 (Sau.) See (1952) Indian Digest, 2121.

2. *Kissenchand v. Ram Pratap*, 44 C.W.N. 505; *Madholal Sindhu v. Official Assignee of Bombay*, A.I.R.

1950 F.C. 21; *Fazal D. Allana v. Mangaldas*, A.I.R. 1922 Bom. 303; *Jamshedji v. Maganlal*, 1925 Bom. 314; *Vadilal v. Maneckji*, A.I.R. 1923 Bom. 372; *Maneckji v. Vadilal*, A.I.R. 1926 P.C. 38.

3. A.I.R. 1959 Cal. 715.



make over to the purchaser the share scrips. This cannot be done if the share scrips are not in the possession of the company. The Companies Act provides for the issue of duplicate scrips only in cases where the share scrips are lost. The company has no power to sell the shares under the Article because the shares are only subject to equitable charge and the share scrips are not in possession of the company. The Article gives no authority to the directors to sell shares which are subject to equitable charge only and the only way to enforce the equitable charge is by instituting a suit.

### (38) **Miscellaneous.**

A special Act like the Sale of Goods Act, cannot, except in the branch of the law to which it specially applies, overrule a statute of the nature of the General Clauses Act. The definition of "goods" in this Act cannot therefore be used in order to override the definition of "immoveable property" in the General Clauses Act, 1897, so as to give a Court jurisdiction to try a case in substance relating to the title to immoveable property situate outside its territorial jurisdiction.<sup>1</sup>

It is, however, to be observed that whereas in S. 62 of the English Act goods include chattels personal, in the Indian Act words "goods include moveable property", are used, and the latter expression, as already examined, includes everything which is not immoveable property. Will therefore gas, electricity and water be not included in the definition of "goods" under the Indian Act?

In America the words "goods, wares and merchandise" have been given a wider meaning and have been held to include stock, bills and notes as being the subjects of common sale of barter which have a visible and palpable form.<sup>2</sup>

### (8) **"Insolvent"**

#### (39) **Insolvent.**

The *explanation* added to section 96 of the Indian Contract Act, 1872, defined the term "insolvency". (A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them). The present definition follows the lines of the English Act which again is based on the rule at common law under which insolvency was frequently held to mean inability to pay one's debts.<sup>3</sup> Failure to pay one just and admitted debt would probably be sufficient evidence of this inability, though "stopping payment" has been considered conclusive evidence of such inability.<sup>4</sup>

The point to be noted is that the term is not used in the technical sense which it has in Insolvency Law. Whatever doubt might have been entertained under the definition in S. 96 of the Indian Contract Act, 1872, the definition given here is comprehensive enough to include all those per-

1. Swami Iyah Nadar v. Commissioners of the Port of Rangoon (1934) 9 Rang. 13 : A.I.R. 1931 Rang. 109 : 134 I.C. 511.  
2. Green v. Brookins, 9 Am. Rep. 74 ; Gadsden v. Lance, 57 Am. Dec. 548.  
3. Parker v. Gossage (1835) 2 C.M. & R. 617 ; 5 L.J. Ex. 4 ; Biddlecombe v. Bond (1835), 4 A. & E. 322, 332. 43 R.R. 351. See per Willes, J., in The Queen v. Saddlers Co. (1863) 10 H.L. C. 404, at. pp. 425, 426, 138 R.R. 217

Cf. London and Counties Assets Co. v. Brighton Grand Concert Hall and Picture Palace Ltd., (1951) 2 K.B. 493, C.A. ; Schotsmans v. Lancashire and Yorkshire Rail Co., (L.R.I. Eq. 360) ; (1867) 2 Ch. App. 332 ; it is sufficient to show that the person is in such circumstances as not to be able to meet engagements.  
4. Dixon v. Yates (1883) 5 B. & Ad. 313, 39 R.R. 489 ; Bird v. Brown (1851) 4 Ex. 786, 80 R.R. 785,



sons in the category of insolvents who have ceased to pay their debts in ordinary course of business or cannot pay their debts as they become due, it being immaterial whether they have committed an act of insolvency or not. Under the present definition it is not necessary that they should have committed an act of insolvency or that such ceasing to pay or incapacity to pay must amount to an act of insolvency making them liable under the Insolvency Act to be declared insolvent. All that is necessary is that they must have ceased to pay their debts in the ordinary course of business or be unable to pay them as they fall due. In England, even before the enactment of the Sale of Goods Act, 1893, the law regarded a general<sup>1</sup>, or even an avowed inability to pay,<sup>2</sup> for a petition for liquidation,<sup>3</sup> sufficient for the buyer to be considered insolvent and to give the seller his right of stoppage in transit.

The term occurs in sections 46, 47 and 50 of the Act. The question of the insolvency of the buyer is of considerable importance in connection with the seller's lien and right of stoppage in transit, and will be found explained under the relevant sections.

### (9) "Mercantile agent"

#### (40) Mercantile agent : definition.

"Mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.

This definition is taken from section 1 (1) of the English Factors Act, 1889, and is in fact the same except that the word "his" is omitted before the word "business". In view, however, of the words which immediately follow, "as such agent" the omission does not seem to make much practical difference.

Before 1889, under the repealed Factors Acts in England, the terms used were simply "person" or "agent" entrusted with the possession of goods ; but it was held that the Acts only applied to mercantile transactions, and that the term "person" or "agent" did not include a mere servant or caretaker, or one who had possession of goods for carriage, safe custody, or otherwise as an independent contracting party ; but only persons whose employment corresponded to that of some known kind of commercial agent like that class (factors) from which the Acts took their name.<sup>4</sup> Thus, a person entrusted with furniture to keep in her own house for the plaintiff was held not to be an "agent" within the meaning of the Act,<sup>5</sup> and a wine merchant's clerk who, as such was possessed of delivery orders, was held not to be an agent within the meaning of the Acts, so as to be able to make a valid pledge in fraud of his master.<sup>6</sup> It was further held that if a mercantile agent received goods in some other capacity, the Act did not apply; for instance, where goods were warehoused with a warehouse-man who was also a broker, it was decided that he could not pledge them in his capacity of broker.<sup>7</sup>

1. *Parker v. Gossage*, 2 C.M. & R. 617 ;  
*Biddlecombe v. Bond*, (1835) 4 A.  
 & E. 322, 332.  
 2. *Ex-parte Carnforth Haematite Iron*  
*Co.*, 4 Ch. D. 108, C.A.  
 3. *Nixon v. Verry*, 29 Ch. D. 196.  
 4. *Cole v. North Western Bank* (1875)  
 L.R. 10 C.P. 354, at pp. 372, 373 ;  
*City Bank v. Barrow* (1889), 5 App.

Cas. 664, at p. 678 ; see Chalmers,  
*Sale of Goods Act*, 16th Ed., p. 240.

5. *Wood v. Rowcliffe* (1846), 6 Hare 183.  
 6. *Lamb v. Attenborough*, (1862), 31  
 L.J. Q.B. 41, at p. 42 ; cf. *Oppenheimer v. Attenborough*, (1908) 1 K.B.  
 221, p. 226 C.A.  
 7. *Cole v. North Western Bank* (1875)  
 L.R. 10 C.P. 354, 355.



Under the present Act in *Lowther v. Harris*<sup>1</sup>, the plaintiff had a quantity of valuable furniture, includingly some tapestry, which he wished to sell, and accordingly arranged with one Prior to act as his agent for its disposal. Prior by fraud obtained possession of some of the tapestry, which was at the plaintiff's house, and sold it to the defendant and absconded with the money. The defendant had acted in good faith. The point for decision arose whether Prior was a mercantile agent and it was held that he was. The learned Judge observed : "Various objections have been raised. It was contended that Prior was a mere servant or shop-man, and no independent status such as is essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shop-man.<sup>2</sup> I think this is still law under the present Act. In my opinion Prior who had his own shops and who gave receipts and took cheques in his own registered business name, and earned commissions was not a mere servant but an agent, even though his discretionary authority was limited. It is also contended that event if he were an agent, he was acting as such for one principal only, the plaintiff ; and that the Factors Act, 1898, requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Heyman v. Flewker*,<sup>3</sup> and I think the same is the law under the present Act. In *Weiner v. Harris*<sup>4</sup> it appears that the agent was not acting for any other principal than the plaintiff, and this was also in *Hastings Ltd. v. Hearson*<sup>5</sup> in respect of which case the Court of Appeal in *Weiner v. Harris*<sup>4</sup> held that the agent was a mercantile agent. It is also clear that pictures as objects of purchase and sale, constitute those who deal in them on commission as mercantile agents within the Factors Acts. See under the old Act *Heyman v. Flewker* and under the present Act *Turner v. Sampson*.<sup>6</sup>"

In *Heyman v. Flewker*<sup>7</sup>, it was held that a mere insurance agent who on a particular occasion was entrusted with pictures to sell on commission and who fraudulently pledged them with a pawnbroker, was an "agent entrusted with the possession of goods" within section 1 of the Act of 1842 (5 & 6 Vict. c 39) on the ground that the character of the employment in the particular instance corresponded to that of a factor. "The term 'agent' does not include a mere servant or caretaker, or, one who has possession of goods or carriage, safe custody or otherwise, as an independent contracting party, but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name."

In *Sita Ram v. Ratilal*,<sup>8</sup> the trial Judge held that as this appointment (as **commission agent**) was under a contract, the plaintiff's authority to sell the goods must be held to have arisen out of that contract, and accor-

1. (1927) 1 K.B. 393, 398.  
2. *Cole v. North Western Bank* (1875) L.R. 10 C.P. 354, 372 ; *Lamb v. Attenborough* (1862) 1 B. & S. 831 ; *Heyman v. Flewker* (1863) 13 C.B. (N.S.) 519 ; *U. Ulaiman v. The Ywet*, A.I.R. 1934 Rang. 198 : 151 J.C. 413.  
3. (1863) 13 C.B. (N.S.) 519, 134 R.R. 629.  
4. (1910) 1 K.B. 285 C.A.

5. (1893) 1 Q.B. 62.  
6. (1911) 27 T.L.R. 200. See also *Budberg v. Jerwood and Ward*, (1834) 51 T.L.R. 99 ; *Thoresen v. Capital Credit Corporation* (1962) 37 D.L.R. (2d.) 317 ; *R. v. Eaton* (1966), 50 Cr. App. Rep. 189.  
7. (1863) 13 C.B. (N.S.) 519, 134 R. R. 629.  
8. A.I.R. 1969 Cal. 472.



dingly, he could not be held to have, in the customary course of business, as agent, as aforesaid, authority to sell the goods and, upon that footing, he could not be held to be a mercantile agent. Differing from it, the Calcutta High Court held : "We are unable to accept this conclusion of the learned trial Judge. The mere fact that there was a contract of appointment as commission agent, setting out the terms, on which the said appointment was made, would not take the commission agent out of the category of mercantile agent. Once he is appointed commission agent or an agent for sale of goods on commission, his course of business, under that appointment or transaction, would be sale of goods on commission and he would have, in the customary course of that business, as agent, as aforesaid, authority to sell goods, thus coming within the definition of mercantile agent, as quoted above."

In *Poonamchand Shankarlal & Co. v. Deepchand Siremal*<sup>1</sup>, a Bombay firm used to purchase and sell cotton through **Adhatia** at Ujjain. On Adhatia's representation that some bales could not be sold, the plaintiffs directed him to transfer the goods to specified persons. In spite of this direction the Adhatia pledged the goods with a third party which in its turn pledged those with a Bank. The plaintiff sued the Adhatia and the subsequent transferee for possession of the bales or alternatively for the price on the ground, *inter alia*, that the Adhatia had no title to the goods and he could not convey valid title to his transferee. No bad faith on the part of the transferees was established. There was admission on the side of the plaintiffs that the Adhatia (whether kaccha or pakka) used to sell and purchase plaintiffs' goods in his own name. The pledgee or transferees were not shown to have notice of the plaintiffs' claim. It was held : The Adhatia being 'a mercantile agent' as defined in S. 2(9) of the Sale of Goods Act, 1930, could pass valid title to the goods to the pledgee and the plaintiffs were not entitled to claim the goods or price from the pledgee or subsequent transferees and the suit was liable to be dismissed against them in view of S. 178 of the Contract Act, 1872.

The authority of a mercantile agent is determined by the course of business customary with that agent. It cannot be limited by private instructions from the principal.<sup>2</sup> Lord Alverstone, C.J. said : "When you are dealing with a person who is a mercantile agent you have to find whether in the customary course of his business as such agent he has authority to sell, etc."

The mercantile agent thus does not mean the agent duly authorised under the Civil Procedure Code or under other enactments, but a person who has not been appointed by any particular formality but by the confidence reposed in him by his master, and who by his ordinary behaviour and course of dealing is treated as a mercantile agent by the majority of persons in the market—a person, whom a reasonable businessman would, by course of dealing and commercial usage take to be, and treat as a representative of the principal.

The chief classes of mercantile agents are factors, brokers and auctioneers.

1. 1971 M.P.L.J. 803. See Yearly Digest, 1971, (Oct. issue), Column. 1758.

2. *Oppenheimer v. Attenborough* (1908) 1 K.B. 221 : 77 L.J.K.B. 209.



**(41) Use of the expression "mercantile agent" in the Act.**

The expression "mercantile agent" occurs in sections 27 and 30 of the Act. It is also used in section 178 of the Indian Contract Act as amended by section 2 of the Indian Contract (Amendment) Act, 1930. The difference, however, between the language of this sub-section and of that of the proviso to section 27 of the Act is to be noted. In that section "a mercantile agent" has been substituted for "such mercantile agent." This sub-section deals only with the status of the agent in relation to his principal, defining the circumstances in which he obtains his authority from the principal; while proviso to section 27 concerns the rights of third parties who deal with him. In the first case there is the question of his actual authority; while in the second case it refers to his ostensible authority. The question is fully discussed under section 27.

**(10) "Price"****(42) "Price" means the money consideration for a sale of goods.<sup>1</sup>**

The definition of "price" is taken from section 1 of the English Act. "Price", according to this definition, must be *money*, paid or promised, according as the agreement may be for a cash or a credit sale; but if any other consideration than money be given, it is not a sale. If goods be given in exchanging for goods, it is a barter.<sup>2</sup>

The "price" of a thing is its agreed or estimated value expressed in terms of the currency of the country. The technical term which has been invariably adopted for the numerical expression of the values of commodities in terms of the standard, is, "price."<sup>3</sup> Price means coin or money to be given in return of the property purchased.<sup>4</sup> The acceptance of a Hundi, however, operates as payment of price, though it may be only conditional.<sup>5</sup> According to Allahabad High Court money means and includes not only coin but also bank notes, Government Promissory notes, bank deposits and otherwise generally any paper obligation or security that is immediately and certainly convertible into cash so that nothing can interfere with or prevent such conversion.<sup>6</sup> It has been held that sales-tax is a part of the consideration paid by the purchaser to the dealer in the transaction of sale and is a part of the sale price (*Union of India v. M/s. Pravat Rice Mill*, 1974—2 C.W.R. 1026).

A sugar factory in Bihar Province in compliance with the directions issued by the Sugar Controller of India in exercise of authority under Sugar and Sugar Products Control Order, 1946, despatched sugar to Madras Province. It was held that it was no sale by the assessee to the Madras Province and the transaction could not be taxed under the Bihar Sales Tax Act.<sup>7</sup>

In *The Commissioner of Income-tax, Andhra Pradesh v. Messrs. Motor and General Stores (P.) Ltd.*<sup>8</sup> the Supreme Court of India recently observed:

There is no definition of the word 'price' in the Transfer of Property Act. But, it is well settled that the word "price" is used in the same sense

1. See *Emp. v. Appana*, 9 Mad. 141 ;  
*Kedar Nath v. Emp.*, 30 Cal. 921.

2. *Harrison v. Luke* (1845) 14 M. & W. 139 ; see also *Samartmal v. Gonril*, 25 Bom. 699 ; *Mitchell v. Gile*, 12 N. Hamp. 390.

3. See *Chalmers*, 16th Edition, p. 75.

4. *Volkart Bros. v. Vettivelu*, 11 Mad. 449.

5. *Kuttayan Chetty v. Pallaniappa Chetty*, 27 Mad. 540.

6. Reference by Board of Revenue, 3 All. p. 793.

7. *New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar*, A.I.R. 1963 S.C. 1207.

8. A.I.R. 1968 S.C. 200.



in section 54 of that Act as in Section 4 of the Sale of Goods Act, 1930. Section 2(10) of the Sale of Goods Act defines "price" as meaning the money consideration for a sale of goods. The presence of money consideration is therefore an essential element in a transaction of sale. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.....

The definition of exchange in S. 118 of the Transfer of Property Act is not limited to immoveable property but it extends also to barter of goods. It is clear therefore that both under the Sale of Goods Act and the Transfer of Property Act, sale is a transfer of property in the goods or of the ownership in immoveable property for a money consideration. But in exchange there is a reciprocal transfer of interest in the immoveable property, the corresponding transfer of interest in the movable property being denoted by the word 'barter'. "The difference between a sale and an exchange is this, that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter."

(Chitty on Contracts, 23rd Edn., Vol. II, page 678).

*See also notes under section 4 of the Act.*

## (II) "Property"

**(43) "Property" in the Act means the general property in goods and not merely a special property.**

This definition is the same as in section 62 of the English Sale of Goods Act, 1893. In law a thing may in some cases be said to have in a certain sense two owners, one of whom has the general and the other a special property in it. For instance, when goods are delivered in pawn or pledge, the general property remains in the pawnor, which he may transfer to a third person subject to the right of the pawnee,<sup>1</sup> and a special property is transferred to the pawnee.<sup>2</sup> The same applies to the case of a bailee.

In *Jenkyns v. Brown*<sup>3</sup>, a factor in New Orleans bought a cargo of cord with his own money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letter of advice to that effect and sent invoices to the correspondent and drew bills of exchange on him for the price, but took bills of lading to his own order, and endorsed and delivered them to a banker to whom he sold bills of exchange. This transaction was held to be a transfer of the general property to the London merchant, and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.

Again, the right of property in goods must be distinguished from the right to their present possession. The right of property may be in one person, while the right to possession may be in another as in the case of a lien.<sup>4</sup> So, too, property may be divided between owners, but the right to

1. *Franklin v. Neate* (1814) 13 M. & W. 299; 11 L.J. Ex. 59; 67 R.R. 683.

2. *Halliday v. Holgate* (1868) L.R. 3 Ex. 299; *Harper v. Godsell* (1870), L.R. 5 Q.B. 422; 39 L.J.Q.B. 185.

3. (1849), 14 Q.B. 466; 19 L.J.Q.B. 286;

30 R.R. 287.

4. *Mulliner v. Florence* (1878), 3 Q.B.D. 484 C.A.; *Milgate v. Kebble* (1841), 3 M. & Gr. 100; *Chalmers, Sale of Goods Act*, 16th Ed., p. 230; *Pollock on Possession*, p. 120,



possession may be in one alone<sup>1</sup> and where there is a sale of specific goods for cash, the property passes by the contract but the seller may (unless otherwise agreed), retain the goods till the price is paid. Again, goods may be sold which are in the possession of a third person, such as a carrier or warehouse-man, who has no property in the goods, but has a right to retain them till his charges are paid.<sup>2</sup>

What we are concerned here in connection with the sale of goods is the general property or ownership or dominion in the goods and not merely a special property or a mere right of possession or retention. What passes by sale here is its absolute ownership and nothing short of it. In *State of Bihar v. Rameshwar Jute Mills*<sup>3</sup> it was held : There is a juristic distinction between a right or legally protected interest and the 'res' or object of that right. Section 2(11) of the Act defines property in the sense of the right and not of the 'res'. In *Bhangaru Rama Rao & Bros. v. Tadavarthi Punnayya Bros.*<sup>4</sup> it was held : Under the Essential Supplies (Temporary Powers) Act the representative dealer has all the indicia of ownership, though subject to serious restrictions. The right to pledge the goods conclusively establishes that he is the owner. It cannot be said that he has no right of property in the goods.

See the distinction between general and special property discussed in *Sewell v. Burdick*<sup>5</sup> and see in particular sections 18 to 26 of the Act which require this definition.

**Sections 2(11), 4—Distinction between pledge, mortgage and sale—In the absence of a contract to the contrary, the pawnee has no right to the accretion to the goods pledged—Contract Act, 1872, Ss. 172, 176 and 58—Transfer of Property Act, 1882, Ss. 54, 58.**

In *M.R. Dhawan v. Madan Mohan* (A.I.R. 1969 Delhi 313), the Delhi High Court held : Pledge is a kind of bailment and security. Its primary purpose is to put the goods pledged in the power of the pawnee to reimburse himself for the money advanced, when on becoming due it remains unpaid by selling the goods after serving the pawnor with a due notice. The pawnee at no time becomes the owner of the goods pledged. He has only a right to retain the goods until his claim for the money advanced thereon has been satisfied, with a power to sell the goods pledged, after due notice in case of default by the pawnee. It is only a special property in the goods pledged, which is acquired by the pawnee, leaving the general property intact with the pawnor. In the case of a mortgage, however, an interest in the mortgaged property is transferred in favour of the mortgagee subject to the right of redemption of the mortgagor. Thus the pawnee acquires a right, after notice, to dispose of the goods pledged. This amounts to his acquiring only a "special property" in the goods pledged. The general property therein remains in the owner and wholly reverts to him on payment of the debt or performance of the promise. Any accretion in the shape of dividends, bonus or shares, issued in respect of the pledged shares will, therefore, be, in the absence of any contract to the contrary, the property of the pawnor.

1. *Nyberg v. Handelaar* (1892) 2 Q.B. 202 C.A. ; *The Odessa*, (1916) A.C. 145.  
2. See *Chalmers, Sale of Goods Act*, 16th Ed., pp. 230, 231.

3. A.I.R. 1953 Pat. 236 : 32 Pat. 173 : 1953 B.L.J.R. 126.  
4. I.L.R. (1956) Andhra 502.  
5. (1884) 10 A.C. 74.



In the case of a sale, "the property" in the goods is transferred from the seller to the buyer, per section 4 of the Sale of Goods Act. "Property," according to Section 2(11) of the said Act means "general property in goods and not merely special property". It is, thus, clear that if only special property passes, it may amount to a pledge. It becomes a sale only when the general property in the goods passes.

In the present case, a debtor pledged certain shares with a Bank for moneys advanced by it and the company issued bonus shares and right shares for the holding. The Bank was, therefore, not entitled to such accretions. The accretions remain the property of the pawnor.

### (12) "Quality of goods"

#### (44) **Quality of goods includes their state or condition.**

This definition is the same as in section 62 of the English Act. The word "includes" shows that the definition is not exhaustive. The expression is used in sections 16 and 17 of the Act and is of considerable importance in construing the words "merchantable quality" in section 16. For instance, as cited by Chalmers,<sup>1</sup> flour or tobacco may be of excellent kind, but if it is damaged may not be 'merchantable'.

The distinction between the "description" of goods in the contract (section 13), and their quality has been pointed out by Lord Dunedin in *Manchester Liners v. Rea*<sup>2</sup> wherein he has observed :

"The tender of anything that does not tally with specified description is not compliance with the contract. But when the article tendered does comply with the specified description and the objection on the buyer's part is to the quality alone, then I think section 11(1) [corresponding to section 15(1) of the Indian Sale of Goods Act] settles the standard and the only standard by which the matter is to be judged."

**Sections 2(12), 12, 13, 20, 23, 40, 41—Scope and applicability—Contract for sale of machinery of particular specification—Payment of advance to seller—Seller despatching goods F.O.R. and R/R in name of buyer through Bank for collection—Buyer refusing to take R/R or delivery of goods owing to damage in transit—Suit for refund of advance held not maintainable as plaintiff was guilty of breach and was not entitled to repudiate contract—S. 64, Contract Act, not applicable.**

In *G.N. Behere v. Navagram Bhikamchand Rice Mills Firm*,<sup>3</sup> it was held on facts (1) that appropriation of the article to the contract was done as soon as the goods were despatched and if in order to secure payment of price the railway receipt was sent through the Bank, it cannot be said that the appropriation was conditional. The appropriation was complete as soon as the goods were despatched and at that stage it could not be said that there was any condition attached by the seller to the appropriation. Nor could it be said that he had reserved to himself any right of disposal. It could not also be said that because the plaintiff found the goods in a damaged condition and did not take actual delivery no assent was given by the plaintiff to the appropriation. As the contract

1. See Chalmers, *Sale of Goods Act*, 16th Ed., p. 231.

2. (1922) 2 A.C. 64, at p. 80.

3. A.I.R. 1966 Assam 95.



was that after the machinery had been manufactured it will be despatched to the plaintiff and there being no evidence that when the machinery was despatched it was not in accordance with the specification, it could not be said that there was no implied assent to the appropriation of the machinery to the contract, simply because the plaintiff refused to take delivery of the machinery when it reached the destination. That being so, section 23 was attracted and the title to the property passed as soon as the machinery was entrusted to the carrier; (2) that the contention that even if the title to the property passed to the buyer, as the quality of the machinery was a condition and that condition was not fulfilled, the plaintiff was entitled under S. 12 to repudiate the contract, could not be accepted for two reasons. Firstly, the fact that the goods will be in accordance with the specification is a warranty and not a condition. Even if, however, it is assumed that it was a condition, section 13(2) will be attracted. The contract in this case was for specific goods and as soon as the manufacturers made the machinery according to the specification, the property passed to the buyer and thus when the property passed to the buyer, the breach of any condition under S. 13(2) will be treated as a breach of warranty; (3) that S. 40 also shows that although the seller undertakes to take the goods at his own risk to a place other than that where they are when sold, if any deterioration takes place in the course of the transit, the buyer would be liable for it. Whether there was any determination for which the buyer would have been liable or not within the meaning of section 40 could only have been determined after delivery had been taken and it cannot be said that under no circumstances the buyer was bound to refuse delivery of the goods as soon as he found that the goods were in a damaged condition; (4) that section 41 only gives the buyer a right of examination and not a right to repudiate the contract. The right of inspection under this section can only arise either when the delivery has already been taken or when it is tendered for delivery; in the present case the respondent did not take delivery and thus section 41(1) will not be attracted and even assuming that it was tendered for delivery at the railway station when it reached Bongaigon, the only right which could be exercised by the plaintiff under section 41(2) was to ask for the inspection of the goods but he could not repudiate the contract; (5) that the amount of advance constituted both as a security for the performance of the contract and also a part of the consideration. Till the contract was actually performed it was only in the nature of a security for the due performance of the contract and after the contract had been actually performed, the amount was to be appropriated towards the part of the consideration money. The payment of advance of Rs. 800 was in the nature of a security and the plaintiff was not right in repudiating the contract. The amount of the advance money thus could be forfeited; (6) that as the contract was not rescinded by the seller but was repudiated by the plaintiff, S. 64, Contract Act, had no application at all.

### (13) "Seller"

**(45) Hire-purchase agreement or agreement to purchase—  
Agreement to pay price by instalment subject to condition that  
property in goods was not to pass until payment of instalments—  
Nature of.**

In *Surajmall Radhakrishna v. Sevbux Rai Haradatta Rai*<sup>1</sup> it was held :  
Where a person reserves to himself the option either to purchase the goods

1. A.I.R. 1960 Orissa 165.



or to return the same the agreement would in substance be an agreement to hire. Where there is no such option left to him and the agreement merely provides for payment of the sale price in instalments, the agreement would really be an agreement to sell.

In this case, the terms of an agreement were to purchase the engine and other materials at Rs. 9,111 out of which Rs. 1000 were paid as advance and the rest of the amount to be paid in two instalments per year together with interest and the party agreed not to transfer or sell the engine or its parts to anyone unless the full payment was completed in the stipulated time, and further that if he failed to pay any instalment, the previous payment would be forfeited and the owner of the engine would be entitled to take back the engine and other materials and would also be entitled to compensation for the loss of materials, and there was default in payment of instalments. It was *held*: The agreement was in reality an agreement for sale and the previous owner had the right to recover the price of the goods under sub-S. (2) of S. 55 of the Sale of Goods Act. He was not bound to take back the engine.

#### (14) "Specific goods"

**(46) "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made.**

The definition in the English Act is the same as in the Indian Act. The Act necessarily distinguishes specific or individualized goods from "generic" or "unascertained" goods, *i.e.*, goods defined only by description.<sup>1</sup> Where there is a contract for specific goods the seller would not fulfil his contract by delivering any other goods than those agreed upon. When there is a contract for generic goods the seller fulfills his contract by delivering at the appointed time any goods which answer to the description in the contract.

The term "specific goods" is not identical with "ascertained goods". It does not certainly mean goods which have been examined by the buyer.

To be specific the goods must be actually identified: it is not sufficient that they are capable of identification. The mere fact that goods are capable of identification does not bring it within the terms of the definition of "specific goods".<sup>2</sup> In *Kursell v. Timber Operators*<sup>3</sup> there was sale of uncut timber defined to be "all trunks and branches of trees, but not seedling and young trees of less than six inches in diameter at a height of four feet from the ground," the timber to be cut not more than twelve inches from the ground, the purchaser having fifteen years in which to cut the timber. It was *held* that the contract was not a contract for the sale of specific goods within section 18(1) of the English Act (corresponding to section 20 of the Indian Act), that the goods were neither identified nor agreed upon, that the timber was not in a deliverable state

1. See *Lal Chand Deep Chand v. Baij Nath Jugal Kishore*, A.I.R. 1937 Cal. 140.

2. *Majety Balakrishna Rao v. M/s. Mooke Devassay*, A.I.R. 1959 Andh.

Pra. 30.

3. (1927) 1K.B. 298 (C.A.), : 95 L.J. K.B. 569 following *Morison v. Lockhart* (1912) S.C. 1017.



until the purchasers had severed it ; and that, therefore, the property in the timber did not pass when the contract was made.

In borderline cases it is not always easy to distinguish between specific and ascertained or generic goods. There may be a mixed case, for instance, where certain goods are specified and agreed upon to be sold but there is something to be done by the seller with respect to them, or where there is a contract for the sale of an unascertained portion of a large ascertained quantity of goods. They are specific goods for certain purposes while they are not such for other purposes. For instance, the property in them does not pass until the seller has done that something with them or has ascertained the portion sold from the stock while if the goods are destroyed before such act or ascertainment the seller may be discharged from his obligation.

In *Re Wait*<sup>1</sup>, by a contract of November 20, 1925, Wait bought 1,000 tons of wheat of a particular description "*ex Challenger*" expected to load in December at Oregon. On the following day he resold 500 tons of this quantity to sub-purchasers. The wheat was shipped in bulk on December 21, and a bill of lading for the 1,000 tons was sent to Wait and received by him on January 4, 1926. On February 5, the sub-purchasers, without having received any documents and before any appropriation of the 500 tons, paid Wait for the 500 tons. Wait paid the money to his bank and hypothecated the bill of lading for the 1,000 tons and became bankrupt before the ship arrived. Wait's trustee in bankruptcy redeemed the bill of lading and claimed to retain the whole 1,000 tons. The Divisional Court, reversing the County Court Judge, held that though, for want of appropriation, the property in the 500 tons had not passed to the sub-purchasers, the 500 tons "specific" goods within section 52 of the English Act (corresponding to section 58 of the Indian Act), and the court had jurisdiction to order specific performance of the contract. The Court of Appeal reversed this decision, holding that the 500 tons were not specific or ascertained goods within that section ; and further, that there never was any such *appropriation or identification* of or obligation to deliver a particular 500 tons as to create equitable assignment giving the sub-purchasers a beneficial interest in or a lien in respect of the 500 tons.

Again, suppose a man having a hundred dozen of a particular brand of champagne in his cellar, agrees to sell "twenty dozen of the champagne of that brand now in my cellar." For some purposes this would perhaps be regarded as a contract for specific goods while for other purposes it would be regarded as a contract for the sale of unascertained goods. The property in the wine should not pass till the twenty dozen has been appropriated to the contract, but if the whole of the wine were destroyed, the seller might be discharged from obligation.<sup>2</sup>

The whole of the goods in an identified bulk may, however, be specific goods for this purpose, even if they are not separated from other goods or weighed.<sup>1</sup> In this case a sale of stock of hay, only hay clear of mould to be delivered, was held to be a sale of specific goods.

1. (1927) 1 Ch. 606 C.A.

2. See *Hayman v. M. Lintock* (1907) 9 F (Cl. of Sess.) 936 ; *Chalmers, Sale*

of Goods Act, 16th Edn., pp. 230, 232.



Goods which are not specific goods for the purpose of passing the property or giving the buyer a remedy in specific performance may be treated as specific goods for the purpose of sections 7 and 8 of the Act.

As regards *unascertained goods* the maxim *genus nunguam perit* would apply. "Specific" includes the unascertained product of what is specific and is not confined to actually existing goods. In *Howell v. Coupland*,<sup>2</sup> a sale of 200 tons of potatoes to be grown on the land of the seller was treated as a sale of specific goods for the purpose of avoiding the contract upon the potatoes perishing from blight before the risk had passed to the buyer. It may be argued that a case of this character falls not under sections 6 and 7 of the Sale of Goods Act, 1893 (corresponding to sections 7, 8 of the Indian Sale of Goods Act, 1930) but under section 2 (2) of the Act (corresponding to section 6 of this Act), as under the general common law doctrine of impossibility of performance, which is preserved by section 61 (2) [corresponding to section 66 (1) (e) of this Act] but the practical result seems to be that, so far as the perishing of such goods is concerned, sale of an unidentified portion of an identified bulk is governed by the principles laid down in sections 6 and 7 of the Sale of Goods Act, 1893.<sup>3</sup>

Where the contract is in respect of existing stocks of *bidi* leaves in the godowns of the seller at a particular place and the price is fixed at a lump sum for the amount of stock which is also specified approximately the contract of sale must be deemed to be an entire sale in respect of *specific* goods although the buyer may not have *seen* the goods.<sup>4</sup> It was observed in this case: The expressions 'specific goods' and 'ascertained goods' are not synonymous and bear different meanings. Examination of the goods by the buyer is not the essential test. Specific goods may be goods in existence and may even be future goods if they get specified by some other circumstances, *e.g.* a crop to be grown on specified land though the crop may not be in or even grown. Where the seller contracts to sell some goods out of a large quantity, the goods do not become ascertained unless the identity of the contract goods is established by appropriating them towards the contract.

Where the contract between the parties was for the supply of four tons of caustic soda from Messrs. Alfred Mackenzie and Co. Ltd., Madras, the agreement was for sale of specific goods.<sup>5</sup>

In *Arun (Private) Ltd. v. State of Madras*<sup>6</sup>, out of a large mass of imported milk-powder a portion was sold by the assessee to given buyers. The contract of sale was entered into while the goods were still on the high seas. The clearing agent cleared the goods on behalf of the assessee and the authorisation in the shape of delivery orders issued to the buyers after the goods had arrived in the Madras Harbour delivered the goods to the buyers. It was *held*: This was not a case of sale of specific goods. The transaction fell within the scope of section 23 (1). When the goods to be sold were unascertained, the buyers from the assessee obtained title to the goods only at the point of delivery, because only at the point of delivery

1. *Eldon v. Hedley Bros.* (1935) 2 K.B. 1 C.A.  
 2. (1876) 1 Q.B.D. 258, C.A.  
 3. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 37.

4. *Harnarain v. Firm Radhakisan Narayandas*, A.I.R. 1949 Nag. 178.  
 5. *National Traders v. Hindustan Soap Works*, A.I.R. 1959 Mad. 112.  
 6. A.I.R. 1961 Mad. 216.



to the given buyer there was ascertainment of the goods sold to him. That was a sale after the import had been completed, and a sale which was within the State. Therefore, the sales were taxable under the Madras General Sales Tax Act.

"Future goods", even though particularly described, do not seem to come within the definition of specific goods, but for most purposes would be subject to the same consideration as unascertained goods.<sup>1</sup>

*See notes under sections 19 to 24.*

There was auction sale of full lots of tea by samples at place X in Madras State. Money was accepted and delivery order handed over to the buyer at X. Mere physical delivery of tea was taken at place Y in Travancore-Cochin State. Tea was sent to other parts of India or was exported outside. It was held that the sale amounted to an outside sale and was not taxable under the Travancore-Cochin Sales Tax Act, and the Explanation of Art. 286 (1)(a) of the Constitution was not applicable.<sup>2</sup>

The term "specific goods" occurs in sections 7, 8, 13(2), 19, 20, 21, 22 and 58 of the Act.

### (15) "Expressions used but not defined in the Act"

#### (47) Expressions used but not defined in the Act.

This sub-section lays down that "expressions used but not defined in this Act, and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act". Reference will be found to such expressions wherever these occur.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

### Synopsis

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|--|---|
| (1) Application of provisions of the Indian Contract Act, 1872—relationship of the Indian Sale of Goods Act, 1930, to general law of contract. | (5) Wagering contracts.                       |
| (2) Capacity of parties to contract—minors and lunatics.   | (6) Smuggling—infringement of revenue laws.   |
| (3) Illegal contracts.   | (7) Contracts with foreign enemies.           |
| (4) Object prohibited by law.  | (8) Agreements in restraint of trade.         |
|  | (9) Trade combinations.                       |
|  | (10) Other causes invalidating the contracts. |
|  | (11) Assignment of contract of sale.          |

### (1) Application of provisions of the Indian Contract Act, 1872—relationship of the Indian Sale of Goods Act, to general law of contract.

This section lays down that the unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express

1. See Chalmers, Sale of Goods Act, 16th Edn., p. 232.

2. Thomas & Co. Ltd. v. Deputy Commis-

sioner of I.T. and S.T., Trivandrum, A.I.R. 1964 S.C. 569.



*provisions of this Act*, shall continue to apply to contracts for the sale of goods. The Indian Sale of Goods Act, 1930, deals only with those rules of law which are peculiar to the law of sale of goods. Section 3 of the Act read with section 66 of the same clearly indicates that this Act would form merely a Chapter in a Code relating to law of contract, as it did specifically in the Indian Contract Act, 1872, before its enactment, and the remaining provisions of the Indian Contract Act which contain the general rules of the law of contract and the rules relating to special contracts other than those relating to sale of goods remain in tact and are applicable to cases arising under this Act unless their application is inconsistent with some express provisions of this Act. Thus the rules as to validity of contract, the capacity of parties to make a contract, etc., will equally govern contracts for the sale of goods. And in case of breach of a contract, the measure of damages will be that indicated generally in sections 73 and 74 of the Indian Contract Act.

It was observed by the Special Committee on this point : "Though the Chapter on the sale of goods has been taken out of the Indian Contract Act, the Bill will form part of the general law of contract. We have therefore, provided in this clause that the general provisions of the Indian Contract Act shall continue to be applicable to contracts of sale of goods in so far as they are not inconsistent with the special provisions of the Bill."<sup>1</sup>

The object of the saving provided by this section is two-fold : (1) it emphasizes the fact that the law of sale of goods is only a branch of the general law of contract, and (2) it fills up any *lacuna* in this Act by resorting to the provisions of the Indian Contract Act.<sup>2</sup>

A similar provision is made in S. 61 (2) of the English Act in the following words :

"The rules of the common law including the law relating to merchants save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause shall continue to apply to contracts for the sale of goods."

It may be convenient to refer briefly to some of the provisions of the Indian Contract Act in so far as they relate to the contract of sale of goods.

## **(2) Capacity of parties to contract—minors and lunatics.**

One of the requisites of a valid contract is that there must be due capacity to contract on the part of the persons entering into the contract. It is presumed in law that every person is capable of contracting and if exemption from liability is claimed on the ground of incapacity to contract such incapacity must be strictly proved. Section 11 of the Indian Contract Act, 1872, prescribes that 'every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject'. Section 12 of the same describes what is sound mind

1. Report of the Special Committee (Appendix C).

2. See Chalmers, 16th Edn., p. 222 ;

Booth Steamship Co. v. Cargo Fleet Iron Co. (1916) 2 K.B. 570, C.A.



for the purposes of contracting.<sup>1</sup> The liability of persons incompetent to contract, such as minors and persons of unsound mind to pay for necessities actually supplied to them is governed by section 68 of that Act.<sup>2</sup>

Section 2 of the English Sale of Goods Act, 1893, specifically deals with capacity of parties to contract and runs as follows :

"2. Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property ;

Provided that where necessities are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract he must pay a reasonable price therefor.

'Necessaries' in this section mean goods suitable to the condition of life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery."

There is nothing in the Indian Sale of Goods Act, 1930, corresponding to section 2 of the English Act though sections 11, 12 and 68 of the Indian Contract Act, 1872, seem to cover those provisions.

"Capacity to contract must be distinguished from authority to contract. Capacity means power to bind oneself ; authority means power to bind another. Capacity is part of the law of status ; authority is part of the law of principal and agent. Capacity is usually a question of law ; authority is usually a question of fact."<sup>3</sup> In *Dharmeswar v. Union of India*<sup>4</sup>, the Assam High Court held : Section 11 of the Contract Act aims at finding inherent competency to contract. It does not cover cases of agents and representatives, who, though competent to contract, are contracting for and on behalf of others and therefore are under certain restrictions. These restrictions are not on their inherent capacity to contract. They are on their power to bind others. Section 11 does not deal with such cases. Where, therefore, a party is not competent to contract within the meaning of S. 11, not only no contract comes into existence but there never can be a contract with that party. That could not be said of a person who is competent to contract under S. 11, even if some restrictions on his power to contract are imposed by some other law. In the case of a person acting under certain statutory restrictions, there could always be a contract if prescribed formalities are observed.

Two of the important classes of persons who suffer from incapacity to contract are the minors and the lunatics. In England, before the passing of the Infants' Relief Act, 1874, at

1. Section 12 of the Indian Contract Act, 1872, runs as follows :

"12. A person is said to be of sound mind for the purpose of making a contract if at the time when he makes it he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind but occasionally of unsound mind may not make a contract when he is of unsound

mind."

2. Section 68 of the Indian Contract Act, 1872, is to the following effect :

"If a person, incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

3. Chalmers, Sale of Goods Act, 16th Ed., 61.

4. A.I.R. 1955 Assam 86.



common law there were but two classes of contracts which though made by an infant, were as though made by a person of full age, namely, contracts for necessities and (in certain cases) contracts for the infant's benefit. In all other cases common law treated an infant's contracts as being voidable at his option and these were further divided under two heads :

(a) Contracts which were valid and binding on the infant *until he disaffirmed them*, either during infancy or within a reasonable time after majority ;

(b) Contracts which were not binding on the infant *until he ratified them* within a reasonable time after majority.

One of the effects of the Infants' Relief Act, 1877, was that contracts for goods supplied, except for necessities, became void. And section 2 of the Sale of Goods Act, 1893, further declared the liability of infants to pay a reasonable price for necessities sold and delivered to them.

In India, the Indian Majority Act, 1875 (Act IX of 1875, section 3) prescribes the age of majority as 18 which is extended to 21 where a guardian has been appointed to the minor under the Guardians and Wards Act, 1890 (Act VIII of 1890). Clause (a) of section 4 of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956) defines "minor" as meaning a person who has not completed the age of eighteen years. *What is the nature under the Indian law of contract of contract entered into by a person incompetent to contract ? Is it void or voidable ?*

There is no explicit answer to this question in the Indian Contract Act. Section 11 of that Act simply states that 'every person is competent who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.' The former current of Indian decisions was that, as under the English law, minor's contract is only voidable at his option.<sup>1</sup> In 1903 the point came for decision before the Judicial Committee of the Privy Council in *Mohri Bibee v. Dharmodas Ghose*<sup>2</sup> in which it was held that a mortgage made by a minor is void ; and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money under sections 64 and 65 of the Indian Contract Act on a decree being made declaring the mortgage invalid. It is therefore now settled law that an infant's contract, under the Indian law, is *absolutely void* and therefore there is no possibility of ratification by the infant on coming of age.<sup>3</sup>

In *Bhim Mandal v. Mangaram Corain*<sup>4</sup>, it was held : A contract by a minor is void, and when it is void the party dealing with him is not entitled

1. See *Sashi Bhushan v. Jadu Nath* (1885) 11 Cal. 552 ; *Hanmant v. Jayarao* (1888) 13 Bom. 50 ; *Mohammad Arif v. Saraswati* (1891) 18 Cal. 259 ; *Contra per Norris J. Fatima v. Debnauth* (1893) 20 Cal. 508.

2. (1903) 30 Cal. 539 : L.R. 30 Ind. Ap. 114.

3. See *Indram Ramaswami v. Anthappa* (1906) 16 M.L.J. 422 ; *Arumugha v. Duraisingha* (1914) 37 Mad. 38 ; *Govind*

*Ram v. Piran Ditta*, A.I.R. 1935 Lah. 561 ; *Nazir Ahmed v. Jiwan Das*, A.I.R. 1938 Lah. 159 ; *Suraj Narain v. Sukhu Aheer*, A.I.R. 1928 Lah. 440 ; *Bindeshri Bux Singh v. Chandika*, A.I.R. 1927 All. 242. See to the contrary *Kundan Bibi v. Sree Narayan*, (1906) 11 C.W.N. 135 where the learned Judges did not notice the Privy Council ruling cited above.

4. A.I.R. 1961 Pat. 21.



to claim any refund of the consideration money paid by him to the minor with full knowledge of his infancy, because it is not equitable to compel a person to pay any money in respect of transaction which as against that person the legislature has declared to be void.

In *Miriyala Venkataramanamurthy v. Bodireddy Subbayamma*<sup>1</sup> it has been held: Where there is an agreement to sell property on behalf of a minor and the advance paid by the vendee is utilised for the benefit of the minor, the minor is liable to pay back the advance amount. His share in the joint family property is liable for such amount.

A lunatic or *non compos mentis* is one who had understanding but, by disease, grief or other cause has lost the use of his reason. Under the English law the contract of a lunatic or of an insane person is held to be voidable. It was held in *Imperial Loan Co. v. Stone*<sup>2</sup>, the leading case on this point: "When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it unless he can prove further that the person with whom he contracted knew him to be insane as not to be capable of understanding what he was about". Lopes, L.J. observed: "A defendant who seeks to avoid contract on the ground of the insanity must plead and prove not merely his incapacity but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

The above principles were applied in the case of *Broughton v. Snook*.<sup>3</sup>

A lunatic, even though he has been found insane by inquisition is not on that account incapable of contracting: the validity of the contract depends on the knowledge which the other party may be shown or reasonably supposed, to have possessed, of the state of mind of the insane person. But in this case the burden shifts and the other party should prove that the contract was made during a lucid interval.<sup>4</sup>

The Indian law on the subject does not hold such a contract voidable but declares it to be void. Section 12 of the Indian Contract Act, 1872, defines a person of *sound mind* as follows:

"A person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests."

Now, until the Privy Council decision in *Mohri Bibee's* case referred to above, it was held by the Courts in India that a lunatic's contract was like infant's contract, voidable, but in view of that ruling it naturally follows that a lunatic's contract must also be void in Indian law. Where, however, a person supplies necessities for a lunatic, he is entitled to be reimbursed out of the property of the lunatic under the provisions of section 68 of the Indian Contract Act.

1. (1966) 1 Andh. L.T. 233 : (1966) 1 An. W.R. 368 ; see Yearly Digest, 1966 column 724.

2. (1892) 1 Q.B. 599, p. 601.

3. (1938) 1 All E.R. 411.

4. *Hall v. Warren* (1804) 33 E.R. 738 ; 7 R.R. 306 ; *Snook v. Watts* (1848) 50 E.R. 757 : 83 R.R. 122. See also *Re. Walker* (1905) 1 Ch. 160.



Contracts are not in general affected by the subsequent insanity of one of the parties.<sup>1</sup> There may, however, be circumstances showing an implied condition executing the party from performance in such a contingency, as for instance, a contract to marry will become void by the insanity of one of the parties.<sup>2</sup>

Under the English law it has been held that a person who makes a contract while in a state of intoxication may subsequently avoid the contract, but if it is confirmed by him it is binding on him.<sup>3</sup> In Indian law the contract of a drunken person will be void. Illustration (b) to section 12 of the Indian Contract Act reads :

“A sane man who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst delirium or drunkenness lasts.”

In *Jethalal v. D.S.A. Laxamunwala*<sup>4</sup> it was held : The position of a person, whose estate is taken under the Agency management and who is in consequence declared by a notification to be incompetent to enter into any contract involving him in any pecuniary liability, is like that of a minor. In spite of the incompetency, if such a person enters into such a contract, the contract is a nullity and unenforceable at law ; no question of its ratification arises. And the consideration which passed under the earlier contract cannot be imported into the contract into which he enters after the estate is released from the Agency control.

To the general rule that a person, incapable of entering into a contract, cannot enter into a valid contract, there is an exception, namely, that if such a person or any one whom he is legally bound to support is supplied by another person with *necessaries* suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.<sup>5</sup>

As regards supply of goods to a minor or to a person who by reason of mental capacity or drunkenness is incompetent to contract, in the English Act, as we have already seen, ‘necessaries’ mean goods suitable to the condition of life of the person incompetent to contract, *and to his actual requirements at the time of sale and delivery*. They include, says Coke :

“his necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards.”<sup>6</sup>

The test is subjective, depending on the social and financial status of the infant or other person, and not objective in depending on the nature of the article bought ; there are hardly any articles which are not capable of being necessaries.

1. *Re Pagani* (1892) 1 Ch. 236 ; *Owen v. Davies* (1747) 26 E.R. 905.

2. *Durham v. Durham* (1885) 10 Pr. D. 80.

3. *Matthews v. Baxter* (1873) 8 Ex. 132.

4. A.I.R. 1953 Sau. 177.

5. S. 68, Indian Contract Act, 1872. See also S. 8(I) of the Hindu Minority and Guardianship Act, 1956, regarding powers of natural guardians of the minors governed by the said Act.

6. Co. Litt. 172a.



In an action against such a person the onus is on the plaintiff to prove both that the goods supplied were suitable to the condition in life of the defendant and that the defendant was not sufficiently supplied with goods of that class at the time when they were delivered, not merely at the time when the contract was made, and it is immaterial whether the plaintiff did or did not know of the existing supply.<sup>1</sup> In this case clothes to the value of £ 150, including eleven fancy waistcoats were supplied by a tailor to an infant undergraduate at Cambridge.

The definition of "necessaries" in the English Act is declaratory of the common law.<sup>2</sup> It was ruled by Baron Parke in *Peters v. Fleming*<sup>3</sup> that from the earliest time down to the present, the word "necessaries" is not confined in its strict sense to such articles as were necessary to support life, but extended to articles fit to maintain the particular person in state, degree and station in life in which he is ; and therefore we must not take the word "necessaries" in its unqualified sense but with qualification as above pointed out.<sup>4</sup> To put the matter concisely, "necessaries" mean goods suitable to the condition in life of the dependent and to his actual requirement at the time of the sale and delivery, and whether an article supplied to an infant is necessary or not depends upon its general character and upon its suitability to the particular infant's means and station in life. It must further be observed that the necessities include everything necessary to maintain the infant in the state, station, or degree of life in which he is ; what is necessary is a relative fact, to be determined with reference to the fortune and circumstances of the particular infant ; articles therefore that to one person might be mere conveniences or matters of taste, may in the case of another be considered necessities where the usage of society render them proper for a person in the rank of life in which the infant moves. The infant's need of things may also sometimes depend upon the peculiar circumstances under which they are purchased and the use to which they are put. For instance, articles purchased by infant for his wedding may be deemed necessary, while under ordinary circumstances the same articles might not be so considered.<sup>5</sup> "Necessaries" however must be things which the minor actually needs ; therefore, it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use ; they will not be necessary if he is already sufficiently supplied with things of that kind and it is immaterial whether the other party knows this or not.<sup>6</sup> Objects of mere luxury cannot be necessities, nor can objects which, though of real use, are excessively costly. The fact that buttons are a normal part of many usual kinds of clothing, for example, will not make pearl or diamond buttons necessities.<sup>7</sup>

1. *Nash v. Inman* (1908) 2 K.B. 1 C.A. ; see also *Ryder v. Wombwell*, 1868 L.R. 4 Ex. 32.

2. See *Ryder v. Wombwell* (1868) L.R. 4 Ex. 32 ; *Johnstone v. Marks* (1887) 19 Q.B.D. 509, approving *Barnes v. Toye* (1884) 13 Q.B.D. 410.

3. 6 M. & W. 42.

4. *Ryder v. Wombwell*, L.R. 3 Ex. Ch. 90.

5. See *Jenner v. Walker*, 19 L.T.N.S. 398 in which it was ruled that wedding presents for the bride of the infant may be necessities. To the same effect are the decisions in *Juggesur v. Nilambar*,

3 W.R. 217 and *Mokundi v. Sarabsukh*, 6 All. 417 ; referred to in *Jagan Ram v. Mahadeo*, 36 Cal. 768 : 13 C.W.N. 643.

6. *Johnstone v. Marks* (1887) 19 Q.B.D. 509, followed in *Jagan Ram v. Mahadeo Prasad* (1909) 36 Cal. 768 ; *Daw Nyun v. Maung Nyi Pu*, A.I.R. 1938 Rang. 359 : 178 I.C. 680. Previous English cases were conflicting, but the point may now be taken as settled.

7. The classical English authority is *Ryder v. Wombwell* (1868) L.R. 4 Ex. 32.



As has been said, "articles of mere luxury are always excluded, though luxurious articles of utility are sometimes allowed."<sup>1</sup>

Section 68 of the Indian Contract Act refers to "necessaries" suited to condition in life of the person incapable of entering into contract only and does not refer to the question of actual requirement of such person at the time of the sale and delivery. It has however been held under this section also that though an article may belong to class of things that are unquestionably necessary, and though the particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant was already plentifully supplied with the things purchased, it does not fall within the description of necessities in that particular case. It is thus incumbent upon one who sells goods to an infant to enquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchasers would require, but whether in the particular case, the purchaser had need of it, for if the infant did not require it, the seller cannot recover it. When he assumes the business of a guardian for the purpose of present relief, he is bound to execute it as a prudent guardian would and consequently make himself acquainted with his necessities and circumstances. The credit which infant's necessities give him ceases when these necessities cease, and as further is requisite when these are relieved, the exception to the rule is at an end.<sup>2</sup>

It is essential that the necessities supplied should be suited to the condition in life of such person<sup>3</sup> and the burden of providing the necessity for the goods supplied is on the person who seeks to make the property liable.<sup>4</sup> When no enquiry was made at the time when the goods were supplied as to the necessity, the plaintiff is not debarred from proving that the goods were necessary.<sup>5</sup>

It will be observed that the minor's property is liable for necessities, and no personal liability is incurred by him, as it may be under the English law.<sup>6</sup> Under English law, the liability is not on the express promise, if any there be; the obligation is *quasi ex contractu* to pay a reasonable price for necessary goods supplied. He cannot bind himself to pay for them, but it is for his benefit that he should have them, and the law will therefore see that a fair price is paid therefor, which is not necessarily the stipulated price. The obligation to pay arises *re* and not *consensu*.<sup>7</sup> The word used in section 68 of the Indian Contract Act is "reimbursed", and this also appears to connote payment of fair price for the necessities supplied as in the English Act.

1. Chapple v. Cooper (1844), 13 M. & W. 252, at p. 258; cited with approval in Keane v. Mount Vernon Colliery Co., (1933) A.C. 309, at pp. 326, 327.
2. Jagan Ram Marwari v. Mahadeo, 36 Cal. 768.
3. Sadasheo v. (Firm) Hiralal, A.I.R. 1938 Nag. 65 : 175 I.C. 149; Daw Nyun v. Maung Nyi Pu, A.I.R. 1938 Rang. 359.
4. Sadasheo v. (Firm) Hiralal, A.I.R. 1938

- Nag. 65; Sadasheo v. Sunder, Govind, 1933 Nag. 68 : 175 I.C. 494; Hira Singh v. Sunder Singh, 1930 Oudh 299.
5. Umrao v. Banarsi, 1927 Lah. 414 : 101 I.C. 702.
6. See also Ramchandra v. Hari, A.I.R. 1936 Nag. 12.
7. Re Rhodes (1890) 44 Ch. D.C.A. 94 at pp. 104-107; Nash v. Inman (1908) 2 K.B. 1 at p. 8 C.A.



It is to be noted that under section 68 of the Indian Contract Act, the property of a person incapable of entering into contract is not only liable to be utilized for reimbursing a person who has supplied necessities to such person suited to his condition in life, but also for necessities supplied to any one whom such person is legally bound to support. Thus an infant may marry and so he may make himself liable for necessities supplied to his family.<sup>1</sup> Again, where the law casts a duty on the minor to provide for the marriage expenses of female member, the marriage expenses of a sister of such a minor fall within "necessaries".<sup>2</sup>

"Necessaries" include necessities supplied to one whom, person incapable of entering into a contract, is legally bound to support.

In *Maung Ba Tha Ma Sain Yin v. Dow Set*<sup>3</sup>, a lady owned a piece of land. She was suffering from insanity and her son sold the land for the purpose of enabling him to get funds for the treatment of his mother. In a suit for possession by the mother against the buyer it was held that as the mother received the benefit of the sum forming the consideration for her son executing the document of sale and the benefit received was in the nature of necessities suited to her condition in life, the buyer was entitled to be re-imbursed from the property of the mother to the extent of the value of the necessities supplied. The mother was held entitled to recover possession of the land on her paying to the buyer the value of the necessities.

Payment of goods, even though they be necessities, if they are not supplied, cannot be enforced either in an action for the price or for damages for non-acceptance; and nothing can be recovered in respect of goods which are not necessities, even though supplied and actually used. It is also essential that the necessities supplied should be suited to the condition in life of the person incapable of entering into a contract.

Under the English law a racing bicycle has been allowed as a necessary for an infant getting 21 shillings a week<sup>4</sup>, but cartridges, and jewellery for a girl he was courting were held not to be necessities for an infant with an income of £ 7 a week.<sup>5</sup> As observed, "luxurious articles of utility are sometimes allowed".<sup>6</sup>

A supply of plough bulls to infant ryot has been held to be "necessaries" within the meaning of section 68 of the Indian Contract Act.<sup>7</sup>

False representation by a minor as to his age—restitution of fraud.

In *Khan Gul v. Lakha Singh*<sup>8</sup> the questions referred to a Full Bench of Lahore High Court for decision were in these terms :

(1) Whether a minor, who by falsely representing himself to be a major, has induced a person to enter into contract, is estopped from pleading his minority to avoid the contract ?

1. *Chapple v. Cooper* (1844), 13 M. & W. 252, at p. 259.

2. See *Nandan v. Ajudhia* (1910) 32 All. 325 : 5 I. C. 415 ; *Shrinivasa Rao v. Babu Ram*, 1933 Nag. 296 : 145 I.C. 350 ; *Jai Indra Bahadur v. Mst. Dilraj Kaur*, 1921 Oudh 1 : 31 I.C. 278 ; *Ramajoyaya v. Jaganathan*, (1919) 42 Mad. 18 : 42 I.C. 872.

3. 1947 Rang L.R. 491.

4. *Clyde Cycle Co. v. Hargreaves* (1898),

78 L.T. 296.

5. *Hewlings v. Graham* (1901), 70 L.J. Ch. 568, but see *Elkington & Co. Ltd. v. Amery* (1936) 2 All E.R. 86 in which ring was held to be a "necessary".

6. *Chapple v. Cooper* (1844) 13 M. & W. 252 at p. 258.

7. *Srinivasa v. Balasubramania Odayar*, A.I.R. 1926 Madras 592 : 94 I.C. 534.

8. A.I.R. 1928 Lah. 609; 9 Lah. 701; 111 I.C. 175.



(2) Whether a party, who when a minor has entered into a contract by means of a false representation as to his age, whether he be defendant or plaintiff, in a subsequent litigation, refuses to perform the contract and at the same time retain the benefit he may have derived therefrom ?

It was *held* : (1) Where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract. Though section 115, Evidence Act, is general in its terms, it must be read subject to the provisions of the Contract Act declaring a transaction entered into by a minor to be void.

(a) (*Per Full Bench, contra Harrison J.*)—A party, who when a minor has entered into a contract by means of a false representation as to his age, cannot whether he be defendant or plaintiff, in a subsequent litigation while refusing to perform the contract, claim to retain the benefit he may have derived therefrom.<sup>1</sup>

In this case plaintiffs brought a suit for possession of half a square which had been sold to them by defendant I for Rs. 17,500 out of which Rs. 8,000 had been paid in cash before the Sub-Registrar and Rs. 9,500 were secured by a promissory note payable on demand from the plaintiffs. Defendant I refused to deliver possession and the plaintiffs prayed that possession of the property sold might be delivered to them, or, in the alternative, that a decree for Rs. 17,500, the consideration money, together with interest might be passed against the other property of defendant I. Defendant I pleaded minority.

Sir Shadi Lal, C.J. observed : “The court has to look at the substance, and not at the form of the action ; and if it finds that the action is in reality an action *ex contractu* but disguised as an action *ex delicto* it would decline to enforce the claim. Indeed, it has been repeatedly held in England that when an infant has induced a person to contract with him by making a false statement that he was of full age, the infant is answerable either for the breach of the contract or for damages arising from the tort committed by him.

“But a representation by an infant that he was of full age gives rise to an equitable liability. The court, while relieving him from the consequences of the contract, may in the exercise of its equitable jurisdiction restore the parties to the position which they occupied before the date of the contract. If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to his former owner. The matter is, however, debatable ; if the benefit acquired by him consists of money which is not earmarked, has the court of equity authority to make him liable for the payment, to the defrauded person, of a sum equal to the amount of which the latter has been deprived by the former ? The equitable jurisdiction is founded upon the desire of the court to do justice to both the parties by restoring them to the *status quo ante*, and there is no real difference between restoring the property and refunding the money except that the property can be identified but cash cannot be traced.” Tek Chand, J. observed : “In ordering restitution the court is not enforcing a void contract but is restoring the parties to the *status quo*

1. *Leslie v. Shiell*, (1914) 3 K.B. 607, not approved ; *Balak Ram v. Dadu*, 76

P.R. 1910 and *Kapura v. Hardit Singh*, A.I.R. 1923 Lah. 510 referred to.



*ante*.....This is in accord with equity, justice and good conscience and appears to have been recognized for a long time by the courts in England."

It is well established under the English law that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto*. "You cannot convert a contract into a tort to enable you to sue an infant."<sup>1</sup> In *Stocks v. Wilson*<sup>2</sup>, an infant who had obtained furniture of the value of £ 100 on a fraudulent representation that he was a major, subsequently sold the furniture for £ 30. The court held that the infant cannot better his position by putting out of power to restore the articles bought and directed refund of the £ 30.

The limits within which this principle of restitution for fraud will be applicable in England, was pointed out in *Leslie v. Shiell*.<sup>3</sup> In this case an infant borrowed £ 400 on a fraudulent representation that he was a major. The money-lender sued for the return of the sum of £ 400. The trial court gave a decree on the principle that the infant must restore the property obtained by fraud. Or, in other words, if an infant, under a fraudulent misrepresentation as to his age, purchases goods on credit, he is liable in equity, on attaining full age, to account for money received by disposing of the goods. Lord Sumner distinguishing *Stocks v. Wilson*<sup>3</sup> observed :

"No doubt if the infant has obtained property by fraud, he can be compelled to restore it ; but it is a different thing to say that if he has obtained money, he can be compelled to refund it. Here, the money was paid over in order to be used as the defendant's own and he has so used it. There is no question of tracing it, no possibility of restoring the very things got by the fraud ; nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think, this will be nothing but enforcing a void contract...When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains.....but scrupulously stopped short of enforcing against him a contractual obligation...Restitution stopped where a payment began."

The above two cases show that if an infant retains possession of the property obtained by him by misrepresentation or in a case of money lent, has purchased any property with such money or has invested the money in a bank, he can be compelled to restore the property or the money ; but, where the infant has spent the money, no direction for restoration can be made for it will amount to virtually enforcing the contract against the infant. It seems that, on equitable principle, if an infant, by a fraudulent representation of this kind, procures a loan on mortgage of his lands or goods he may be obliged under the equitable jurisdiction of the court to repay what is owing as a condition of his invoking the assistance of the court to declare the invalidity of the mortgage or to recover possession of

1. *Jennings v. Rundall* (1799) 8 T.R. 335 : 4 R.R. 680.

2. (1913) 2 K.B. 235.

3. (1914) 3 K.B. 607 ; *Cowern v. Nield*, (1912) 2 K.B. 419.



the property mortgaged or the title deeds thereof.<sup>1</sup>

The full Bench ruling of the Lahore High Court cited above (*Khan Gul v. Lakha Singh*) clearly seems to indicate that as far as law relating to goods is concerned the equitable doctrine of restitution applies also and the minor can be compelled to restore any advantage obtained by him by fraud, but not so as to repay any money borrowed which cannot be identified.<sup>2</sup>

The ignorance of the other party that he was dealing with an infant is no answer to the plea of infancy ; but in the case of Lunatics. a person *non compos mentis* in order that the plea of lunacy may succeed in England it is necessary that the other party should be aware of the infirmity at the time of making the contract.<sup>3</sup> Under the Indian law the contract of such a person is, however, void and it would seem that the ignorance of the other party of his condition is immaterial.<sup>4</sup>

Conversely, it has been held under the English law, that, where an infant has contracted to sell goods and has received the price but not delivered the goods, or has delivered goods, of an inferior quality, he cannot be sued either for damages or for the return of the price as money had and received,<sup>5</sup> and effect of this rule cannot be avoided by framing the action *ex delicto*.<sup>6</sup>

In England an infant or other person incapable of entering into a contract may enforce a contract and the seller will be liable if he refuses to deliver goods which he has contracted to sell in an action brought by such a person. Enforcing of a contract by or against a minor. Under Indian law such contracts are void and not merely voidable, and it seems that a contract of sale cannot be enforced against the adult. No specific performance can be had either by or against a minor.<sup>7</sup> Specific performance being an equitable remedy, it is not granted unless there is mutuality, *i.e.*, reciprocal right in both the contracting parties to seek specific performance.<sup>8</sup>

An infant seller, however, is not liable on a trading contract.<sup>9</sup> As to an infant seller setting aside a sale of immoveable property which he had brought about by fraudulently representing that he was of full age, see *Appaswami Ayyanger v. Narayanswami Ayyar*.<sup>10</sup>

It appears that where a contract has been completely performed and the goods delivered and paid for, the transaction must stand. In *Pearce v. Brain*<sup>11</sup>, an infant exchanged his motor-cycle and side-car for a second-hand car. Contracts completed.

1. See *Thurstan v. Nottingham etc. Building Society* (1902) 1 Ch. 1, 12 ; *Lodge v. National Union Investment Co. Ltd.* (1907) 1 Ch. 300.

2. See also *Harimohan v. Dulu Miya*, A.I.R. 1935 Cal. 198 ; (1934) 61 Cal. 1075.

3. *Imperial Loan Co. v. Stone* (1892) Q.B. 599, C.A.

4. See *Molyneux v. Natal Land Co.* (1905) A.C. 355 (P.C.).

5. *Cowern v. Nield*, (1912) 2 K.B. 419.

6. *Leslie v. Shiell*, (1914) 3 K.B. 607,

C.A.

7. *Mir Sarwarjan v. Fakruddin*, 39 I.A. 1 : (1912) 39 Cal. 232 ; *Srinivasa Thathachawala v. Nilamma* (1920) M.W.N. 340 : 55 I.C. 436.

8. See observations in *Zebunissa Begum v. Mrs. Danaghar*, A.I.R. 1936 Mad. 564 : 54 Mad. 492 : 163 I.C. 384.

9. *Cowern v. Nield* (1912) 2 K.B. 419.

10. A.I.R. 1930 Madras 945 : (1931) 54 Mad. 112 : 129 I.C. 51.

11. (1929) 3 K.B. 340.



and when the second-hand car broke down, sued for the return of the motor-cycle. The court held, that he was not entitled to the relief. In *Valentini v. Canali*<sup>1</sup> an infant hired a house and furniture for £ 102, paid £ 68 in cash and gave a note for the balance. He used the furniture for some months and filed a suit for the repayment of £ 68 paid by him and for a declaration that the note given by him for the balance was unenforceable on the ground of infancy. The contract was declared void by the court and the note was ordered to be returned but the court refused to direct the return of the sum paid by the infant. This appears to be the law in India also.

*For further details on the subject of 'capacity of parties to contract', see commentaries on the Indian Contract Act, 1872.*

### (3) Illegal contracts.

Section 23 of the Indian Contract Act, 1872, states that every agreement of which the object or consideration is unlawful is void. It further states that the consideration or object of an agreement is lawful, unless ;

it is forbidden by law ; or

is of such a nature that, if permitted, it would defeat the provisions of any law ; or

is fraudulent ; or

involves or implies injury to the person or property of another ; or the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful.

**Immoral or illegal contracts.**

Section 24 of that Act reads as follows :

"If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."

A contract for the sale of an obscene or libellous book or picture print is unenforceable. The sale of a thing in itself an innocent article of commerce is void when the seller sells it, knowing that it is intended to be used for an immoral or illegal purpose, for "*no man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them*".<sup>2</sup> A man who sells arsenic to one whom he knows intends to poison his wife with it, will not be allowed to maintain an action upon his contract.

In *Bowry v. Bennet*<sup>3</sup>, a prostitute was sued for the value of clothes furnished and pleaded that the plaintiff well knew her to be a woman of the town, and that the clothes in question were for the purpose of enabling her to pursue her calling. It was held that it must not only be shown that

1. (1890) 24 Q.B.D. 166 ; see also *Corpe v. Overton*, (1833) 131 E.R. 901 : 38 R.R. 422 ; *Steinberg v. Scala*, (1893) 2 Ch. 452 ; *Hamilton v. Vaughan Sherrin Electrical Engineering Co.*, (1894) 3 Ch.

589 at pp. 593-4.

2. Per Eyre C.J. in *Lightfoot v. Tenant* (1796) 1 B. & P. 551, 556 ; 4 R.R. 732, 737.

3. 1 Camp. 338 ; 10 R.R. 397.



the plaintiff had notice of this but that he expected to be paid from the profits of the defendant's prostitution and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it.

This decision was considered in *Pearce v. Brooks*<sup>1</sup> in which the plaintiff had supplied a brougham to a prostitute, who pleaded in the action that the brougham was hired for the purpose of her trade; as the plaintiff knew and in the expectation by the plaintiff that the hire of the brougham would be paid out of the receipts of her trade. The plaintiff knew the defendant to be a prostitute but there was no direct evidence that he knew that the brougham was intended to be used for the purpose of enabling the defendant to follow her vocation; and there was no evidence that plaintiff expected to be paid out of the wages of prostitution. It was *held* that it was not necessary to show that the plaintiff expected to be paid from the proceeds of the immoral act; that the knowledge by the plaintiff that the woman was a prostitute being proved, the jury were authorised in *inferring* that the plaintiff also knew the purpose for which she wanted a brougham; and that this knowledge was sufficient to render the contract void.

These two cases show that where goods such as ordinary clothing which have no special connection with the trade or character of a prostitute are supplied, some evidence of a direct furtherance by the seller of the buyer's immoral purpose must be shown. The degree of knowledge possessed by the seller is only evidence of this. If knowledge of the buyer's purpose be expressly shown, such evidence is conclusive proof of the furtherance of an illegal object, where it is to be inferred from the circumstances of the case, it may or may not be sufficient. And the nature of the goods supplied is material to show whether the seller should or should not be fixed with knowledge.<sup>2</sup>

In the case of an illegal contract the seller cannot be sued for failure to deliver the goods, nor if he has delivered them can he recover the price. The rule is that a party to such a contract cannot come into a Court of Law and ask to have his illegal object carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim; and this rule holds although neither party had any intention of breaking the law. The rule is expressed in the maxim *in pari delicto potior est conditio defendentis*.<sup>3</sup>

But where a person has been induced to enter into an illegal contract by fraud or strong pressure, he may be relieved of such a contract. In *Reynell v. Sprye*<sup>4</sup> Sir Thoms Reynell was induced, by the fraud of Sprye to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in Chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the court was satisfied that he had been induced to enter into the agreement by the fraud of Sprye, and considered him entitled to relief.

1. (1866) L.R. 1 Ex. 212 : 35 L.J. Ex. 134, followed in *Unfil v. Wright* (1911) 1 K.B. 506, where a flat was let to a kept mistress.  
2. See Benjamin on Sale, 8th Edn., Bk. III, Ch. V, p. 500.

3. See Anson's Law of Contract, Part II, Chapter VII; *Harse v. Pearl Life Assurance Co.*, (1904) 1 K.B. 558.  
4. 1 D.M. & G.P. 669; see also *Atkinson v. Denby*, 6 H. & N. 778; 7 H. & N. 934.



Thus, as a general rule, moneys paid under an illegal contract by one party to the other cannot be recovered unless the plaintiff can show that he is not *in pari delicto* with the defendant.<sup>1</sup> The same principle is applicable to a defence. Where parties are not *in pari delicto*, as when a buyer buys goods, innocent in themselves but for an unlawful object, unknown to the seller, the buyer cannot defend himself by pleading his own illegal purpose, for, as observed by Lord Mansfield in *Montefiori v. Montefiori*<sup>2</sup> "no man shall set up his own inequity as a defence any more than as a cause of action." It follows from this that an innocent seller may repudiate contract on discovering buyer's illegal object before it is completed or while it is still executory and a person will not be assisted in suing on a contract with an illegal object that a seller who has contracted to supply goods which the buyer in fact wants for such an object, may on discovering the fact and without any liability refuse to deliver the goods. In *Cowan v. Milbourn*<sup>3</sup>, Milbourn let set of rooms to Cowan for certain days ; then he discovered that Cowan proposed to use the rooms for the delivery of lectures which were unlawful ; he refused, and was held entitled to refuse to carry out the agreement.

A contemplated unlawful or immoral use of property (including money) to be obtained under a contract is an unlawful object, and this whether such use is part of the bargain or not, and whether the party supplying the property is to be paid out of the profits of its lawful use or not. If both parties know of the wrongful or immoral intention, the agreement is void ; if the party who is to furnish the property does not know of it, the contract is voidable at his option when he discovers the other party's intent. This is a well-settled principle of law.<sup>4</sup>

If the innocent party to the contract discovers the illegal purpose before it is carried into effect, it would seem that he could not recover on the contract if he allowed it to be performed. If the parties are *in pari delicto*, the party sued may rely on illegality. The court does not sit to enforce illegal contracts. There is no question of estoppel : it is for the protection of the public that the court refuses to enforce such a contract. Whether the illegality of the contract is brought to the notice of the court by the plaintiff or defendant or otherwise, the court will not give its assistance to the plaintiff if his claim is founded on that illegality.<sup>5</sup> In *Taylor v. Chester*<sup>6</sup> the plaintiff failed to recover the half of a £ 50 bank-note deposited with the defendant to secure a debt due from the plaintiff to the defendant for wine and supplied to the plaintiff by the defendant in a brothel kept by her.

Property may pass under an illegal contract of sale. The maxim is *in pari delicto potior est conditio possidentis vel defendantis*. The court will

1. *Harse v. Pearl Life Assurance Co.* (1904) 1 K.B. 558 : 78 L.J.K.B. 373, C.A.

2. (1762) *Urn*. Bl. 363 ; Cf. *Fergusson v. Norman* (1838) 5 Bing. N.C. 76 : 50 R.R. 613, where the defendant who alone had been guilty of illegal conduct was unable to set up a lien against the assignees in bankruptcy of the owners of the goods.

3. (1867) L.R. 2 Ex. 230.

4. *Paragilal v. Rattan Lal*, A.I.R. 1931 All. 458 : 131 I.C. 546 ; *Shahabuddin Sahib v. Venkatachalam*, A.I.R. 1938 Mad. 911 ; *Alexander v. Rayson* (1939) 1 K.B. 179.

5. *Re Mahmoud & Ispahani* (1921) 2 K.B. 716, 729 per Scrutton L.J.

6. (1869) L.R. 4 Q.B. 309.



not assist either of the two parties. Thus property in goods sold under an illegal contract may pass<sup>1</sup> and if in addition the goods have been delivered, the buyer's title is indefeasible, for there is no person who can impeach it though the buyer cannot be sued for the price. As observed by Parke, B., in *Scarfe v. Morgan*<sup>2</sup>, if the illegal contract is executed, and a property, either general or special has passed thereby, the property must remain. Accordingly, it will be recognised as against a third person, who has wrongfully interfered with it in any case where the plaintiff does not require to set up this illegal contract as the foundation of his right.<sup>3</sup> In *Feret v. Hill*<sup>4</sup>, the plaintiff brought ejectment to recover possession of premises from whom he had been ejected by the defendant, the lessor. The plaintiff, at the time of the agreement, intended to use the premises as a brothel, and had induced the defendant to make the agreement by fraudulent misrepresentation as to his character, and as to the purpose for which he wanted the premises. It was *held* that he could recover, on the ground that the misrepresentation was one of fact *collateral* to the agreement.

Agreement by abkari contractor with State to sell particular quantity of cocobrandy per month and to pay damages in case of default has been held to be void.<sup>5</sup>

A suit to enforce agreement to sell two and half annas share in managing agency by way of bribe offered to the plaintiff, a member of the committee appointed to report on the management of Company by the defendant was not enforceable.<sup>6</sup>

In *Lily White v. Munuswami*<sup>7</sup>, on a laundry-receipt there was a printed condition that only half value of garment was to be refunded in case garment was lost. It was held on facts : The term used in the agreement being *prima facie* opposed to public policy and to the fundamental principles of the law of contract would not be enforced only because it was printed on the reverse of the bill and there was a tacit acceptance of the term when the bill was received by the customer. It would put a pressure upon the abstraction of clothes by an employee of the firm, intent on private gain, though the firm itself might be blameless with regard to the actual loss. Such a condition is unlawful.

In *Calcutta National Bank Ltd. v. Rangaroon Tea Co. Ltd.*<sup>8</sup>, the Calcutta High Court observed : When a contract is entered into for making purchases prohibited by statute, no party can invoke the aid of a court to have such a contract carried into effect, as law will not tolerate any party to violate any moral or legal duties. If money is advanced for a purpose which is either opposed to morals or law, in furtherance of an illegal transaction such advance is not recoverable. But the law allows *locus penitentiae* and so, before a fraud or an illegal purpose is carried out, the

1. *Elder v. Kelley*, (1919) 2 K.B. 179 ; 88 L.J.K.B. 1253.  
 2. (1838) 4 M. & W. 270, at p. 281.  
 3. *Gordon v. Chief Commissioner of Police*, (1910) 2 K.B. 1080 ; 79 L.J.K.B. 957, C.A.  
 4. (1854) 15 C.B. 207 ; L.J.C.P. 185 ; 100 R.R. 318.

5. *Kurien v. Government of Kerala*, 1963 Ker. L.J. 19 ; 1963 Ker. L.T. 183.  
 6. *Gulabchand v. Kudilal*, A.I.R. 1966 S.C. 1734.  
 7. A.I.R. 1966 Mad. 13.  
 8. A.I.R. 1967 Cal. 294.



money may be recovered from the person to whom it was advanced. But the court will not render any assistance in the recovery of money if there is even a part performance of the illegal contract. No relief can be given when a case is based on illegality.

In *Regazzani v. K.C. Sethia (1944) Ltd.*,<sup>1</sup> the Government of India by Ordinance prohibited the taking out of British India of goods which were destined for any port or place in the Union of South Africa or which were intended to be taken to the Union although destined for a port or place outside it. The respondents agreed to sell and deliver to the appellant a quantity of jute bags c. i. f., Genoa. To the knowledge of both parties to the contract the goods were to be shipped from India and were to be made available in Genoa so that they might be resold to the South African buying agency contrary to the Ordinance. The proper law of the contract was English law. The respondents did not deliver the jute bags and the appellant brought an action for damages for breach of contract. It was *held*: The contract would not be enforced in England as a matter of public policy, because its performance would have involved, as the parties to it knew, doing in a foreign and friendly country an act which would have violated a law (which was not a revenue or penal law) of that country.<sup>2</sup>

In *Babulal Swarupchand Shah v. South Satara (Fixed Delivery) Merchants' Association Ltd.*,<sup>3</sup> the defendant company was a merchant association founded for promoting and regulating the business in various commodities including turmeric. It followed a clearing house system and distributed the money due to the creditor members of the association from the debtor co-members after it was paid by them, deducting its commission. The plaintiff, a member of the association, entered into certain transaction in turmeric directly with the co-members and became entitled to receive a certain sum from the defendant company in respect of those transactions. The debtor members paid the amount due from them in the clearing house but the defendant company failed to pay over the amount to plaintiff. It was found that the transactions in turmeric were prohibited and were therefore illegal. The plaintiff claimed the amount due to him from the defendant company. It was *held*: The defendant as the agent of the plaintiff having received the amount on his behalf was bound to pay over the amount to the plaintiff and the illegality of the transactions between the members *inter se* did not affect the question at all. The rule founded on the maxim *ex turpi causa non oritur actio* did not apply to the facts of the case.

Where the cause of action is not founded either on illegal contract or on its breach, the party's right to possess his own chattels will be enforced against those who without any right detain the same or convert it to their own use even if it appears either from the pleadings or evidence led at the trial that they have come in possession of the defendants as a result of an illegal transaction.

1. (1957) 3 All E.R. 286 ; (1956) 2 All E.R. 487 affirmed.  
2. *Foster v. Driscoll* (1929) 1 K.B. 470 ; *Ralli Brothers v. Compania Naviera*

*Satay Aznar* (1920) 2 K. B. 287 approved.  
3. A.I.R. 1960 Bom. 548 ; 62 Bom. L.R. 304.



**(4) Object prohibited by law.**

An act or undertaking is equally forbidden by law whether it violates prohibitory enactment of Legislature or a principle of unwritten law. But in India, where the criminal law is codified acts forbidden by law seem practically to consist of acts punishable under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature.<sup>1</sup>

The thing sold may be in its nature an innocent and proper subject of commercial dealings, as a drug, but may be knowingly sold for the purpose prohibited by law, of adulterating food or drink. The contract would be void in this case. Thus, under the English law where a statute as a revenue regulation and to protect the public health, prohibited brewers from using or causing to be used any ingredients but malt and hops in making beer, it was *held* that a druggist who sold drugs to a brewer, knowing the illegal object to which they were applied, could not recover the price.<sup>2</sup> In *Law v. Hodson*,<sup>3</sup> a statute provided a penalty for every sale of bricks of less than a certain size. It was held that a seller who had contravened its provisions could not recover the price of the bricks.

A contract for the sale of goods entered into in contravention of a statutory provision, whether the prohibition be express, or be merely implied from the imposition of a penalty, cannot be enforced by action.<sup>4</sup> Although a statute contains no express words making void a contract which it prohibits, yet when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter person from entering into the contract, or for the purpose of revenue, or whether it is intended that the contract shall not be entered so as to be valid at law.<sup>5</sup>

Under the English law it has been held that if the object of the statute is merely to protect the revenue, it will not be held to prohibit the enforcement of a contract in cases where there has been a breach of the statute. Thus where a seller had not complied with a statute requiring him to take out a licence and to have his name painted on his place of business under a penalty, it was held that he could maintain his action for the price of goods sold.<sup>6</sup> But if the object of the statute, either wholly or in part, is the protection of the public from possible fraud, or the promotion of some object of public, the inference is that contracts made in contravention of its provisions are prohibited.<sup>7</sup> The principle has been thus stated by Pollock :

“When conditions are prescribed by statute for the conduct of any particular business or profession and such conditions are not observed,

1. See Pollock & Mulla's Indian Contract Act, 9th Edn., p. 198. See also *S. Naganatha Iyer v. The Authorised Officer* (1971) 1 Mad. L.J. 274—The transactions entered into in anticipation of a law to come into existence will not be hit by S. 23 of the Contract Act, 1872.

2. *Langton v. Hughes* (1813), 1 M. & S. 593.

3. (1809) 11 East 300.

4. *Cundell v. Dawson* (1847) 4 C.B. 376.

5. *Mellis v. Shirley Local Board* (1885) 16 Q.B.D. 446, Lord Esher, M.R., at pp. 451, 456.

6. *Smith v. Mawhood* (1845) 14 M. & W. 452; and see *Bailey v. Harris* (1849) 12 Q.B. 905.

7. *Victorian Daylesford Syndicate v. Dolt* (1906) 2 Ch. 624; *Brightman v. Tate*, (1919) 1 K.B. 463; *Re Mahmoud and Ispahani* (1921) 2 K.B. 716; see also Chitty on Contracts, Chapter XII.



agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed ; (but they) are valid if no specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g. the convenient collection of the revenue.”<sup>1</sup>

The above principles have been followed in India also.<sup>2</sup> In *Ramanayuda v. Seetaramayya*<sup>3</sup>, a Full Bench of the Madras High Court held that a partnership between the holder of an *abkari* licence and a stranger would be illegal without the permission of the Government and the advances made by the stranger could not be recovered. *Raghunath v. Nathu*<sup>4</sup> related to transfer of a licence for the sale of opium, and *Ismailji v. Raghunath*<sup>5</sup> was a case of assignment of a lease regarding salt, and in both cases, the contract was held unenforceable, because under the guise of a sub-lease, an act which was forbidden by law was contemplated. In *Mahapatra Bhandar v. I.T. Commissioner*<sup>6</sup> there was an agreement to transfer excise licence and opium licence without permission of Authorities. It was held to be an agreement contravening provisions of the Excise Act and the Opium Act and therefore unlawful.

Similarly, in *Rama Rao v. Papayya*<sup>7</sup>, it was held : When a licence is issued to the licensee under the Madras Rationing Order, 1943, it is intended that he should and none else should use that for doing business. Hence, if the licensee enters into a partnership of rationing shop business and the other partners having no ration card along with the licensee buy and sell rice, it amounts to a user of the ration card by the persons other than the one to whom it is issued in contravention of S. 13 of the Rationing Order. It also involves the transfer of a ration document prohibited under S. 16 of the Rationing Order. Thus, partnership entered into between the licensee and the partners in direct contravention of the statutory prohibition being illegal and unenforceable, a suit for accounts by the other partner against the licensee is not maintainable.

In *K. Viswanathan v. Nanakchand Gupta*<sup>8</sup>, it was held : A term of the licence for running a talkie that it should not be assigned or transferred or sub-let will be violated if the licensee enters into partnership with reference to the subject-matter of the licence. Such a partnership will be illegal and void. The partnership is illegal by reason of the prohibition contained in one of the terms of the licence, even though it may not be punishable under

1. Pollock, Principles of Contract, 11th Edn., p. 275.

2. See *Bhikanbhai v. Hiralal* (1900) 24 Bom. 622 ; *Abdulla v. Mammod* (1902) 26 Mad. 156 ; *Gauri Shanker v. Mumtaz Ali* (1879) 2 All. 411 (F.B.) etc. ; *Abdulla v. Allah Diya*, A.I.R. 1927 Mad. 333 ; *Bhagwant Genuji v. Gangabisan*, A.I.R. 1940 Bom. 369 where the authorities are reviewed.

3. A.I.R. 1935 Madras 440 ; 58 Mad. 727. If agreement for partnership is made previous to getting licence, partnership is legal : *Satyala v. Bhogavali*, A.I.R. 1935 Mad. 895 ; see also

*Teegula Bariah v. Moh. Abdus Subhan Khan*, A.I.R. 1954 Hyd. 156.

4. (1895) 19 Bom. 626 ; see *Venkata Subbayya v. Attar Sheik Mastan*, A.I.R. 1949 Mad. 252 ; (1948) 2 Mad. L.J. 198. Purchase of toddy shops *benami*. See also notes in Pollock and Mulla's Indian Contract Act, 9th Edn, pp. 198 to 215

5. (1909) 33 Bom. 636 ; 3 I.C. 779.

6. A.I.R. 1965 Orissa 160.

7. A.I.R. 1954 Andhra 51 ; (1954) 2 Mad. L.J. (Andh.) 108.

8. (1954) 2 Mad. L.J. 782.



S. 8, Cinematograph Act, 1918. Such a provision as one of the terms of the licence is in the interest of the public and for promotion of its welfare ; hence a contravention thereof must be held to be illegal.

In *Babulal Aggarwala v. Firm Vijay Stores*<sup>1</sup>, it was held : if one of the objects of the statute is the protection of the public, then the act must be taken to have been impliedly prohibited by the statute and is illegal. There are several Acts which control particular transactions and prescribe the issue of a licence before the prohibited act is undertaken. On the other hand, there are other statutes which prohibit transactions in the interest, not only of revenue but of public health or morality. The Foodgrains Control Order (1942) was one falling under the second category, and any contract in violation of the provisions of that Order would clearly be illegal and void. While, therefore, a contract to do anything forbidden by law is illegal and void, a contract to obtain a licence and do a thing in accordance with law is not illegal.

In *Birla Jute Manufacturing Co. Ltd. v. Dulichand Partapmull*<sup>2</sup>, it has been held : A settlement contract means that a contract which is made before delivery of jute, is not extinguished by performance and delivery but is settled by the payment of dues. The settlement contract and the original contract "stand together" and it is not within the intention of a settlement contract that the first contract should be treated as altogether discharged. It is therefore clear that if the original contract is on a forward basis so as to come within the mischief of the West Bengal Jute Goods Act, 1950, then the settlement contract must also on that basis be within the operation of the Act, for the simple reason that in the settlement contract the agreement of consideration is to pay the difference with reference to a contract which itself was entered on the forward basis. An arbitration agreement regarding an unlawful jute contract would attract the ban imposed by S. 23 of the Contract Act.

Similarly, a contract object of which is to evade the provisions of the Forward Contracts Prohibition Order of 1944 is illegal and unenforceable.<sup>3</sup>

In *Kamath K. V. v. K. Rangappa Baliga & Co.*,<sup>4</sup> a case under the Travancore-Cochin Public Safety Measures Act, 1950, Ss. 73(1), 3, there was a suit for damages for breach of contracts in respect of goods purchased by the plaintiff on behalf of the defendant. The defendant refused to take delivery on due dates. The contracts were entered into in February, 1952. Section 3 of the Act was found to be valid. Relevant Prohibition Order prohibiting forward contracts continued to remain in force under the Proviso to S. 17(4) of the Essential Supplies (Temporary Powers) Act, 1946. Contracts were held to be against law and suit for damages for breach of those contracts to be not maintainable.

In *Bhramarba Sahu v. Basudev Das*<sup>5</sup>, it was held : A stipulation to realise interest at a rate more than what is recoverable under the Orissa Money Lenders Act, does not render the contract void.

1. A.I.R. 1955 Orissa 49.

2. A.I.R. 1953 Cal. 450.

3. Pottimurthi Sadasivayya v. Tadepalli Venkata Narayana & Co., A.I.R. 1953 Mad. 845 : (1953) 1 Mad. L.J. 811. See also Nagappa Chettiar v. Veeyares & Co., A.I.R. 1953 Mad. 296—*badla*

contracts.

4. A.I.R. 1969 S.C. 604 reversing A.I.R. 1964 Ker. 92.

5. (1971) (2) C.W.R. 533 : 37 C.L.T. 1072. See Yearly Digest, 1971 (Nov. issue) Colmn. 1974.



Motive is essentially different from consideration or object of a transaction and the fact that contract was entered into in expectation of some ulterior gain would not affect the contract which is valid in every way.<sup>1</sup>

Unlawful object-Motive.

In this case, there was a suit to recover grain, which the plaintiff had deposited with the defendant with a view to prevent it from being taken in execution of decree which was expected to be passed against the plaintiff. The defendant contended that the transaction was hit by S. 23 of the Contract Act. It was *held*: The motive of the plaintiff in depositing the grain with the defendant was certainly improper but it could not be said to be unlawful. The object of the transaction could be said to be unlawful only if the plaintiff's creditor had been defeated by the transaction. By depositing grain with the defendant the property in the grain was not transferred to him and it was open to the creditor to have got the grain attached in execution of his decree. The creditor was thus not defeated by the transaction. Consequently, there was nothing in law to prevent the plaintiff from being granted a decree for the price of the grain deposited by him with the defendant.

When an agent for purchase knows at the time he makes the purchase that the goods he is instructed to buy are to be dealt with in a manner prohibited by law, he cannot enforce any right arising out of the contract of agency. Such a case is covered by S. 24 of the Contract Act, 1872.<sup>2</sup>

Illegal contract.

In *Ghudan v. Sarwan*,<sup>3</sup> the defendant had filed a complaint for offences punishable under sections 147, 447 and 506 of the Indian Penal Code, against the plaintiff and nine others. During the pendency of the criminal prosecution, the parties referred the matter to Panchas who by their award, required the plaintiff to give to the defendant 6½ khandis of paddy and directed the defendant to withdraw on receipt of the paddy the prosecution launched by him. The plaintiff gave paddy to the defendant who did not, however, withdraw the prosecution. Thereupon, the plaintiff filed a suit to recover the paddy and the trial court passed a decree for Rs. 227-8-0 being the price of the paddy. It was *held*: The suit was not one for the enforcement of the award. The parties had agreed to the terms of the award but in view of section 23 of the Contract Act, such an agreement express or implied, to prevent, stay, hamper, terminate or otherwise affect the due progress of a pending prosecution for an offence which might not lawfully be compounded, was an agreement founded upon an illegal consideration and was, therefore, *ipso facto* and *ab initio* void. The parties were in *pari delicto* and knowingly made an illegal bargain for the purpose of stifling prosecution for non-compoundable offences. A court of law would

Stifling prosecution.

1. *Sugan Chand v. Hari Bux*, I.L.R. (1959) 9 Raj. 905 : 1960 Raj L.W. 23. See also *Gulabchand Gambhirmal v. Kudi Lall Govindram*, A.I.R. 1959 M.P. 151 (F.B.)—A contract to do a thing which cannot be performed without violation of law is void, whether the parties know the law or not. Likewise, the object of the con-

tract may be lawful in itself but its fulfilment may offend against the well-settled notions of public policy.

2. *Appana Radha Sri Krishna Rao v. V.K.M. Kodandarama Chetty*, A.I.R. 1960 Andh. Pra. 190.  
3. 1961 M.P.L.J. (Notes) 10. See also *Loganathan v. Ponnuswami Naicker*, A.I.R. 1969 Mad. 15.



not aid persons to recover back property given away under illegal and void agreements.

In *Ouseph Paulo v. Catholic Union Bank Ltd.*<sup>1</sup>, it was held : It is only where the agreement is supported by the prohibited consideration that it falls within the mischief of the principle that agreements which intend to stifle criminal prosecutions are invalid. The party challenging the validity of the impugned transaction must show that it was based upon an agreement to stifle prosecution. If it is shown that there was an agreement between the parties that a certain consideration should proceed from the accused person to the complainant in return for the promise of the complainant to discontinue the criminal proceedings that clearly is a transaction which is opposed to public policy. Where the validity of an agreement is impeached on the ground that it is opposed to public policy under S. 23 of the Act the party setting up the plea must be called upon to prove that plea by clear and satisfactory evidence. Reliance on a mere sequence of events may tend to obliterate the real difference between the motive for the agreement and the consideration for it.

In *Myadam Yetlaiah Gupta v. Central Bank of India*<sup>2</sup>, partners of a firm made a false declaration regarding stocks pledged with the bank. The bank after coming to know of it, wanted to take immediate criminal and civil proceedings against the partners. Another person at that time executed a security bond for the amount due to the bank. It was held : Section 23 of the Contract Act is not attracted in this case. There is nothing in the security bond to warrant the inference that the bank agreed, as part of the consideration to be received from the appellant, not to institute criminal proceedings against the partners of the firm for cheating under S. 420, I.P.C. The security bond was not void and unenforceable for the reason that it was executed for the purpose of stifling prosecution.

### (5) Wagering contracts.

Section 30 of the Indian Contract Act, 1872, provides as follows :

“Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.”

A wager is a promise to give money or money's worth, upon the determination or ascertainment of an uncertain event : the consideration for such a promise is either something given by the other party to abide the event, or a promise to give upon the event determining in a particular way.

‘The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature, that is to say, if an event turns out one way, A will lose, but if it turns out the other way, he will win.’<sup>3</sup>

1. (1964) 7 S.C.R. 745 : A.I.R. 1965 S.C. 166. See also *Govinda Gouda v. Kalu Gouda*, A.I.R. 1966 Orissa 228—agreement to stifle prosecution ; onus of proof on person alleging.  
2. (1971) 2 An. W.R. 98. See *Yearly Digest*, 1971 (Oct. issue) Colmn. 1755.  
3. Per Cotton L.J. in *Thacker v. Hardy*

(1878) 4 Q.B.D. 685 ; see also *Richards v. Starck* (1911) 1 K.B. 296 ; *Forget v. Ostigny* (1895) A.C. 318 ; *Rameshwar-das Benarsidas v. New Jooria Bazar Sugar Co.*, A.I.R. 1926 Sind 202, per *Jenkins C.J.* in *Sassoon v. Tokersey* (1904) 28 Bom. 616 at p. 621.



In *Sukhdevadass Ramprasad v. Govinddass*,<sup>1</sup> the suit was for the recovery of Rs. 62,000 being the value of 400 bales of yarn alleged to have been purchased by the defendant. The defendant's plea was that the plaintiff and the defendant were only wagering on the difference in prices in the yarn market. It was in evidence that the 100 bales sold by the plaintiff to the defendant were sold by the defendant to A, and by A to B and by B to C and so on, till the last purchaser sold it back again to the plaintiff and thus the chain became complete. It was also in evidence that delivery orders called *Patta Patties* changed hands from the plaintiff to the defendant, from the defendant to A, and so on till they came back to the plaintiff. The Judicial Committee observed :

"There can be no doubt that these various contracts were in character highly speculative : but.....that is insufficient in itself to render them void as wagering contracts.....To produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that difference only should become payable."

To constitute a wagering contract, Hawkins J. lays down three tests : (1) the intention to gamble must be common to both parties ; (2) each party must be liable to win or lose according to the event ; and (3) the parties should have no interest in the contract except the money or other stake.<sup>2</sup>

In *Thacker v. Hardy*,<sup>3</sup> the defendant had employed the plaintiff, a broker, to buy and sell for him on the Stock Exchange. It was never intended between the parties that the defendant should take up the contracts but the plaintiff was so to arrange matters that nothing but "differences" should be actually payable to or by the defendant. The plaintiff accordingly entered into contracts on the defendant's behalf, thereby making himself by the rules of the Stock Exchange personally liable and sued the defendant for commission and for indemnity against his liability. It was *held* by the Court of Appeal that the agreement was not a wagering contract within the English Gaming Act of 1845, and that the plaintiff could recover.

In the above case the first element was wanting. The contract was one of mandate to the plaintiff to make real contract with jobbers, and this contract was not a wagering contract, as the plaintiff had no interest in the event which determined the defendant's loss, but looked only to his commission.

In *Hirst v. Williams*,<sup>4</sup> where the plaintiff subscribed to a financial operation conducted by the defendant, on the terms that if certain stocks went up, the plaintiff would be entitled to the profit, and if no profit resulted, to a return of his subscription, the transaction was held by the

1. (1928) 51 Mad. 86 : 56 I.A. 32 : A.I.R. 1928 P.C. 30 ; see also *Mul Chand v. Kanhaia Lal*, A.I.R. 1929 All. 134 ; *Rangasa v. Hukum Chand*, A.I.R. 1930 Nag. 111.

2. *Carlill v. Carbolic Smoke Ball Co.* (1892) 2 Q.B. at pp. 490-492.

3. (1878) 4 Q.B.D. 685 at pp. 692, 696.

4. (1895) 12 T.L.R. 128 (C.A.) But Cf. *Richards v. Starck*, (1911) 1 K.B. 216, where Channell J. held that the loss of the interest on his money was sufficient loss to make the contract a gambling one. *Hirst v. Williams* was not referred to.



Court of Appeal not to be, as between the plaintiff and the defendant, a gaming and wagering contract within the Act of 1845, on the ground that the transaction was in effect an advance towards the defendant's own speculation of money, which the defendant agreed to repay.

In *Badridas Kothari v. Meghraj Kothari*<sup>1</sup>, it has been held that a promissory note executed for payment of indebtedness arising out of wagering transactions in shares cannot be enforced by suit.

The third test may be illustrated by a contract of sale of goods to be delivered at a future date at the market price of the date of delivery. Here by the contract the parties may respectively win or lose according to the determination of a future uncertain event *i.e.*, the future market price, but neither of them is in position of "having no other interest in that contract than the sum of stake he will so win or lose, there being no other real consideration", for the contract is *ex hypothesi* a genuine contract for the sale and delivery of the goods, the determination of the future uncertain event merely ascertaining the price.<sup>2</sup>

Mutual intention is essential to make a wagering contract, and, therefore, if one party intends to make a valid contract and to deliver or accept the goods, as the case may be, at the agreed time, it will not be a void contract, even though to his knowledge the other party may have entered into it as a pure speculation without any prospect of being able to pay for or deliver the goods should the speculation turn out unfavourably. "If the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as, if agreed in by the other, would make the contract a wagering one, while those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one."<sup>3</sup>

It is not a wagering contract when both parties intend to deliver and accept the goods, whether at a price fixed by the contract, or at a price dependent on the market price on the date of the delivery of the goods, though each is aware that he may suffer a severe loss or reap a large profit, according as prices may rise or fall between the date of the making of the contract and the date fixed for its completion.<sup>4</sup>

"In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences".<sup>5</sup> It is not sufficient if the intention to gamble exists on the part of only one of the contracting parties. "Contracts are not wagering contracts unless it

1. A.I.R. 1967 Cal. 25.

2. Benjamin on Sale, 8th Edn., p 537. See also *Thacker v. Hardy*, (1878) 4 Q.B.D. 665 at pp. 692, 696; *Badridas Kothari v. Meghraj Kothari*, A.I.R. 1967 Cal. 25—burden of proof when not material.

3. *Per Hawkins J., Carlill v. Carbolic Smoke Ball Co.* (1892) 2 K.B. 484 at p. 491; *Ironmonger v. Dyne* (1928) 44 T.L.R. 497, C.A.; *Weddle Beck & Co. v. Hackett*, 1 K.B. 321; *Kanwar*

*Bhan Sukha Nand v. Ganpat Rai Ram Jiwan*, A.I.R. 1926 Lah. 318; *Venkataratnam v. Hanumanta Rao*, A.I.R. 1935 Mad. 135.

4. *Barnett v. Sanker*, (1925) 41 T.L.R. 960.

5. *Ram Krishna Das v. Mutsaddi Lal*, A.I.R. 1942 All. 170; *Chimanlal Purshottamdas v. Nyamatrai*, A.I.R. 1938 Bom. 44; *Sukhdeo v. Govinddass*, A.I.R. 1928 P.C. 30; *Perosha v. Manekji* (1898) 22 Bom. 899, 903.



be the intention of *both* contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other".<sup>1</sup>

It is not necessary that such intention should be expressed. "If the circumstances are such as to warrant the legal inference that they never intend any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market."<sup>2</sup> In this case the plaintiff was a rice trader ; the defendants were rice millers having a small mill capable of putting out 30,000 bags in a month. During seven weeks in June, July and August, 1899, the defendants entered into several contracts with the plaintiff for the sale to him of 199,000 bags of rice at various prices, aggregating upwards of five crores of rupees, and the latest delivery was to be on 7th October, 1899. The rice was to be delivered from amongst a number of specified mills, in which the defendant's mill was not included. In the same year by fourteen contracts, ranging in time from January to the end of August, the defendants sold to the plaintiff 22,250 bags of rice, to be delivered from the defendant's mill. The latter contracts were all duly fulfilled by delivery and payment. None of the former contracts were performed and the defendants passed to the plaintiff a promissory note for "difference on rice". In a suit upon the note it was held by the Recorder of Rangoon that there was no common intention to wager and that the plaintiff was entitled to succeed. The judgment was reversed by the Privy Council on appeal, on the ground that the consideration for the note was a number of wagering contracts within the meaning of section 30 of the Contract Act. Their Lordships observed : "Now the output of the firm itself would not be much over 60,000 bags during the currency of the contracts ; and the (defendants) had dealings with other persons besides the plaintiff. The capital of the firm as stated was trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundred fold. It is possible for traders to contemplate transactions so far beyond the basis of trade, but it is very unlikely. In point of fact, they never completed nor were they called on to complete any of outside transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are compared, the one class suitable to traders such as the defendants, and fulfilled by them, the other extravagantly large and left without any attempt at fulfilment, the rational inference is strengthened into a moral certainty." Similarly, in *Doshi Talakshi v. Shah Ujamsi Velsi*<sup>3</sup>, certain contracts were entered into in Dholera for the sale and purchase of Broach cotton, a commodity which it was admitted, never found its way either by production or delivery to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. Those rules expressly provided for the delivery of cotton in every case, and forbade all gambling in differences. The course of dealing was, however, such that none of the contracts was ever completed except by payment of differences between the contract

1. J.H. Tod v. Lakhmidas (1892) 16 Bom. 444, 445, 446 ; Ajudhia Prasad v. Lalman, (1902) 25 All. 38 ; Sassoon v. Tokersay, (1904) 28 Bom. 616 ; Rangasa v. Hukamchand (1926) 20

I.C. 406.

2. Kong Yee Lone & Co. v. Lowjee Nanjee, (1901) 28 I.A. 239 at p. 244 ; 29 Cal. 461, 467.  
3. (1890) 24 Bom. 227,



price and the market price in Bombay on the *Vaida* (settlement) day. It was held upon these facts that contracts were by way of wager within the meaning of section 80 of the Contract Act. Jenkins C.J. said : "Here in each the contract was made at Dholera, between men of Dholera, and under the rules of Dholera, and from the evidence we know that the witnesses who have been called have not been able to indicate with certainty or even to suggest, with one doubtful exception, a single instance since the formulation of these rules in 1893 in which any of the numerous contracts similar to that with which we are not dealing has been completed otherwise than by payment of differences. It is an unnatural or strained inference to draw from these facts that behind these apparently innocent documents there is a tacit and recognised understanding according to which parties who enter into these contracts do so without any intention of performing them otherwise than they have consistently and without exception been performed, that is to say by payment of differences. In my opinion that is the reasonable and natural inference to be drawn : it agrees with the experience of the past ; and it represents the actual results in the particular instance we are now considering."

On the other hand, the *modus operandi* may be such as to raise a presumption against the existence of a common intention to wager. This infrequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contract with each other, nor do they know the name of the person with whom they are contracting, until after the bought and sold notes are executed.<sup>1</sup>

In *Sheo Narain v. Bhallar*<sup>2</sup>, the Allahabad High Court held : What has to be proved in order to establish that a transaction of sale and purchase was a wagering one is the fact that it was agreed between the parties that no delivery was ever to be demanded or given. The mere fact that delivery was, in fact, not given does not prove that it was not given because there was a term in the original contract to the effect. In every case the terms of the contract have to be proved. If the terms of the contract have been proved, and they show on their face that delivery was to be given or taken, and it is alleged by the defendant that it was agreed that the term about delivery was not to take effect, but that differences alone were to be paid, then the fact of non-delivery, coupled with certain other facts, may induce the court to believe the defendant instead of the plaintiff. These facts are the financial condition of the parties, and their capacity to deliver the goods in fulfilment of the contract.

As regards *teji mandi* transactions, at the present time the presumption is that these are not mere wagering transactions.<sup>3</sup>

1. See Pollock & Mulla, Indian Contract Act, 9th Edn., p. 308. See *Maynard v. Williams and others*, (1955) All E.R. 81 as to illegal lottery.

2. A.I.R. 1950 All. 352, relied upon in *Shantilal v. Madan Lal*, A.I.R. 1954 All. 789. See also to the same effect *Nand Kishore v. Lachmi Narain*, A.I.R. 1954 Raj. 24. See too *Prabhudayal v. Shankar Ram*, 1953 Raj. L.W. 110 ; *Sitaram, v. Chammanlal*, A.I.R. 1952 Hyd. 95 ; *Narayanan T.K. v. Alleppey Chamber of Commerce*,

A.I.R. 1952 T.C. 435 ; *Venkata Rangayya v. Narayana*, (1954) 2 Mad. L.J. 393 ; *M/s Khimji Punja & Co. v. Maun Devshi Bhanji*, A.I.R. 1950 Kutch 24—Purchase and sale of shares ; *Jankilal v. Badrinarain*, (1947) J.L.R. 283.

3. See *Narandas S. Rathi v. Ghanshamdas*, A.I.R. 1933 Bom. 348 and other authorities cited at p. 310 of Pollock and Mulla's Indian Contract Act, 9th Edn.



In *Gherulal Parakh v. Mahadeodas Maiya*<sup>1</sup>, the Supreme Court held: The common law of England and that of India have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. The moral prohibitions in Hindu law texts against gambling were not only not illegally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering illegal. There is no definite head or principle of public policy evolved by courts or laid down by precedents which would directly apply to wagering contracts. They have been recognised for centuries and have been tolerated by the public and the State alike.

To constitute a wagering contract there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded but only the difference in price should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference in prices on the happening of an event.

In *Rajaram Sampat Kumar Rathi v. Sha Kapoor Chand Kishorilal*<sup>2</sup>, it was held: A wagering contract cannot be enforced as being hit by S. 23 of the Contract Act. When the consideration for the claim is the wagering contract, it cannot be enforced notwithstanding any subsequent agreement when there is intimate connection between the two. The intendment is obvious, viz. that the agreement which has been declared by law to be void would not be enforced in some other garb by a subsequent agreement in some altered form; otherwise the very purpose of the legislation would be defeated. It however excludes from its purview such transactions which were entered into by third party *bona fide* without being aware of the nature of the transaction.

Hence, a suit for recovery of money due on the basis of a pronote executed by the defendant in favour of the plaintiff for cash consideration but for sums due to him on account of wagering contracts with the plaintiff and his brother is not maintainable in law.

In *Mahadeodas v. Gherulal Parakh*<sup>3</sup>, it was held: When at the time of agreement to enter into forward contracts there was no intention that the actual delivery would be asked for but the intention was really to deal in difference, it is a wagering contract and so void. In *Surajmal v. Doongarmal*<sup>4</sup> also it was held: In order that a contract be of a wagering character in law, it should be satisfactorily established that both contracting parties at the time of entering into the contracts had agreed under no circumstances to call for or give delivery from or to each other but to deal

1. A.I.R. 1959 S.C. 781 See also Pannalal Kishanlal v. Lal Chand Sohanlal, 63 C.W.N. 745; Surajmal v. Doongarmal, A.I.R. 1959 Raj. 27; Walyati Ram Ram Ditta Mal v. Bhagwadas Rajinder Kumar, A.I.R. 1960 Punj. 471; Krishnamma Naidu v. Krishna Iyer, A.I.R. 1960 Ker. 122.

2. A.I.R. (1964) A.P. 537; (1964) 2 Andh,

W.R. 272; A.I.R. 1953 Mad. 845; I.L.R. 22 Bom. 809 and A.I.R. 1935 Cal. 748 relied on; A.I.R. 1959 S.C. 781 distinguished. See also D.M. Wadhawa v. Commissioner of I.T. Calcutta, (1966) 61 I.T.R. 154.

3. A.I.R. 1956 Cal. 703. Confirmed on appeal in A.I.R. 1959 S.C. 781.

4. A.I.R. 1959 Raj. 27.



in differences and differences only. To produce such a result, it is not sufficient that an intention to deal in differences exists on the part of only one of the contracting parties. There must be a common intention to wager between both contracting parties.

Regarding how this intention is to be gathered by the court and how a wagering contract is to be distinguished from a highly speculative transaction, it was observed in this case :

“To produce such a result, it is not sufficient that an intention to deal in difference exists on the part of only one of the contracting parties. There must be a common intention to wager between both contracting parties. It may be accepted that in order to determine whether such was the intention of both the contracting parties, the court may and should look at the surrounding circumstances relative to the impugned transactions—and that it would be open to it to ascertain the real intention by tearing through the outward form of the contracts and going behind a written provision of the contract to judge whether such provision was inserted into the contract to conceal its real character.

But be that as it may, where the *modus operandi* of the business is for the defendant to put through such transaction through a broker or a commission agent in his own name and the third parties did not know his (defendant's) name at all, the understanding being that the defendant would pay the broker or the agent commission, charges or brokerage and would indemnify the latter, then a strong inference arises against the existence of a common intention to wager ; though again such a presumption can be rebutted in a particular case.

In this last mentioned class of cases where the business is done through a commission agent, it may be said possibly that the defendant's intention was to gamble, nevertheless the contracts cannot be condemned as being violative of S. 30 for the reason that evidence would be lacking as to the original intention of such third parties because the principals have never been brought into contact with each other.

In such a case, the mere circumstance that the contracts were settled by payment of differences with the third parties on the day of settlement is no good proof of the original intention of the parties because in the first place their minds never met and converged to produce the intended result, and secondly the want of delivery and payment of differences may be merely a matter of subsequent arrangement as suiting the convenience of both of them.

It is true that such transactions are of a highly speculative character and are Satta transactions as characterised in common parlance ; but even so they cannot be struck down as being of a wagering character within the meaning of S. 30 of the Contract Act.”

In *Firm Jonnavirtulu Seetharamanjaneyulu v. Firm Vadlapata Sobhanachalm & Co.*<sup>1</sup> also it was held : In order to constitute a wagering contract neither party should intend to perform the contract itself but only to pay the differences. The common intention of both parties at the time of entering into the contract must be not to call for or give delivery from



one to the other. Speculation is different from wager and there is no law against speculation as there is against gambling or wagering. A subsequent agreement to the effect that the buyer has no longer a right to demand delivery and the seller is no longer obliged to give delivery does not make the contract a wagering contract. The fact that after the original contract a settlement was made even before the period fixed and there was no actual delivery would not lead the court to infer that it was in the nature of a wagering contract.

Where in a suit on the basis of a forward contract, the defendants alleged that the contracts were in the nature of wagering contracts, inasmuch as no delivery of goods was contemplated, but neither the plaintiffs nor the defendants produced direct evidence as to what was decided between the parties about the delivery of the goods when the contract was made, then the defendants are bound to fail. It is for the defendants who challenge the validity of the transactions to prove that the contracts were wagering contracts and no effect could be given to them in the eye of law.<sup>1</sup>

The mere fact that a contract is highly speculative, is insufficient in itself to render it void as a wagering contract. To make a contract as a wager there must be from the outset a common intention of both the parties to make and accept no delivery and to deal only in differences. From the mere fact that delivery of the goods was not taken, no inference can be drawn that the contract was a wagering contract.<sup>2</sup>

In *Hagami Lal Ram Prasad v. Bhuralal Ram Narain*<sup>3</sup>, the forward contracts in respect of cotton were not void *ab initio* but became void and unenforceable due to prohibition of law (Cotton Control Order, 1945). It was held that there was no bar to its enforcement when the inhibition was lifted by the repeal of that law.

In *Buddulal Goerlal Mahajan, Dhar v. Srikishan Chandumal, Indore*<sup>4</sup>, it was held: In all forward contracts, there is an element of speculation. In effect, the constituent instructs the broker to get certain shares for him on a future date. But it is not a wagering contract unless both the parties intend not to take delivery in any event, and whatever happens, only to adjust the differences. If it is intended and is possible that the goods contracted for can be delivered, then the mere fact that in certain circumstances either party would be liable to make good to the other the difference in price cannot make it a wager.

In *Partner T.G. Lakshminarayana Chetty v. Nanjaiah Chetty*,<sup>5</sup> it was held: Wagering contracts dependent on future rise and fall in prices of commodities are generally quoted in the form of forward contracts for the sale or purchase of the commodity. In these cases the court will look into not the mere form but the substance of the transaction, and will take into account not only the terms of the contract but the surrounding circumstances and the conduct of the parties. The test for distinguishing such forward contracts of wager from ordinary commercial transactions is by ascertaining whether neither of the parties intended the actual transfer of the goods. When such is the intention it is not a commercial transaction

1. *Hagami Lal Ram Prasad v. Bhuralal Ram Narain*, A.I.R. 1961 Raj. 52 : I.L.R. (1960) 10 Raj. 1304.  
2. A.I.R. 1961 Raj. 52.

3. A.I.R. 1961 Raj. 52.  
4. A.I.R. 1961 Madh. Pra. 57.  
5. A.I.R. 1966 A.P. 136. Case-law referred to.



but a wager on the rise or fall of the market which comes within the connotation of gambling. The important point, however, is that the intention not to transfer goods must be of both the parties to the contract at the time of entering into the contract. Whether a particular intention can be inferred from a particular set of circumstances is rather a question of fact than of law.

The contract between a pucca adithiya and a constituent is one of employment or reward. The contract of pucca adithiya is one whereby he undertakes or guarantees that delivery should on due date be given or taken at the price at which the order was accepted or difference paid. In other words, he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

*See also Shiv Narain Kabra v. State of Madras*, A.I.R. 1967 S.C. 986, a case under the Forward Contracts (Regulation) Act, 1952.

In *Murlidhar Jhunjunwala v. Commr. of I.T.*<sup>1</sup>, transaction of sale and purchase were completed by delivery of Pucca Delivery Orders. There was no evidence that the Pucca Delivery Orders were backed by goods represented by them. There was no term in the contract that delivery of Pucca Delivery Orders in lieu of the very commodity amounted to actual delivery. It was held that delivery of Pucca Delivery Orders did not amount to delivery of goods themselves.

It is to be observed that in construing a contract with a view to determining whether it is a wagering one or not, the court will receive evidence in order to arrive at the substance of it, and will not confine its attention to the mere words, in which it is expressed, for a wagering contract may be sometimes concealed under the guise of language, which on the fact of it, if words were only to be considered, might constitute a legally enforceable contract.<sup>2</sup>

Contract of sale at an uncertain price is also to be distinguished from wager, as will be explained under sections 4 and 6 of the Act.

#### (6) Smuggling—Infringement of revenue law.

At common law smuggling contracts are also illegal. When a party in England sent an order to Guernsey for goods, which were delivered there by the seller in half ankers,<sup>3</sup> ready slung, for the purpose of being smuggled into England the court held that the plaintiffs, who were Englishmen, residing here, and partners of seller in Guernsey, were not entitled to recover.<sup>4</sup>

If the vendor is merely cognizant of the intention of the purchaser to smuggle the goods, and confines himself simply to the act of selling, rendering no aid or assistance to the purchasers in the prosecution of the

1. A.I.R. 1968 Cal. 253.

2. *Carlill v. Carbolic Smoke Ball Co.* (1892) 2 Q.B. at pp. 491-492. See also *Grizewood v. Blone* (1851) 11 C.B. 516; *Universal Stock Exchange v. Strachan* (1896) A.C. 166.

3. Shipment of foreign spirits in vessels containing less than 60 gallons was illegal.

4. *Briggs v. Lawrence* (1789) 3 T.R. 454; 1 R.R. 740. See also *Clugas v. Penaluna* (1791) 4 T.R. 466; 2 R.R. 442.



smuggling, the English Courts will not refuse to assist him to recover the price.<sup>1</sup>

In *Waymell v. Reed*<sup>2</sup>, the goods were sold, and delivered abroad, and the foreign plaintiff invoked the decision in *Holman v. Johnson*<sup>3</sup>; but was not permitted to recover, because it was found that he had aided the purchaser in his smuggling purposes by packing the goods in a particular manner, so as to evade the revenue.

In *Pellecat v. Angell*<sup>4</sup>, on facts similar to those in *Holman v. Johnson*<sup>5</sup>, the following principles were laid down: That where the foreigner himself breaks the revenue laws of England, as by taking an actual part in the illegal adventure, the contract will not be enforced; but the mere sale of goods by a foreigner in a foreign country made with knowledge that the buyer intends to smuggle them into England, is not illegal and may be enforced.

"Opinions have differed as to the reasoning of the court in *Pellecat v. Angell*. In many of the subsequent decisions it has been approved though by some authorities it has been adversely criticised<sup>6</sup> on the ground that no man ought to furnish another with the means of transgressing the law knowing that he intended to make that use of them".

The matter was considered in *Foster v. Driscoll*.<sup>7</sup> There a financier, a distiller, a firm of shipbrokers and another made agreements to load a ship with a cargo of whisky to be carried across the Atlantic and to be sold in the United States, if that were possible, or if not, in Canada or on the high seas at some point whence it could be smuggled into the United States, in violation of the laws of that country. It was held by a majority of the Court of Appeal (Lawrence and Sankey, L. JJ.) that the object of the agreement being breach of international comity, the agreement was contrary to public policy and void. In this case stress was laid upon the fact that the American law intended to be infringed was not a mere revenue law. Sankey L.J. very strongly observed: "An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them in joining in and endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country, notwithstanding the fact there may be in a certain event, alternative modes or places of performing which permit the contract to be performed illegally."

On the analogy of the English law referred to above, the rules applicable to India appear to be as follows:

(1) If all the parties are subject to Indian law and privy to the illegal purpose, the contract cannot be enforced by the Indian Courts.

(2) If the contract involves smuggling goods into India and is to be completed by delivery of goods in India, the Indian law governs the contract as the place of performance of it is India and it cannot be enforced, even

1. *Holman v. Johnson*, 1 Cowp. 341; *Pellecat v. Angell*, 2 C.M. and R. 311, 4 L.J. Ex. 326.

2. 5 T.R. 59; 2 R.R. 675.

3. (1775) 1 Cowp. 341.

4. 2 C.M. & R. 311; 4 L.J. Ex. 326; 41

R.R. 723.

5. (1775) 1 Cowp. 341.

6. See Benjamin on Sale, 8th Edn., pp. 503 and 504.

7. (1929) 1 K.B. 470 (C.A.); 98 L.J. K.B. 282.



though the seller be a foreigner, assuming that he was privy to the illegal purpose.

(3) If the contract were both made abroad and completed abroad and the foreign seller actively aided the purchaser to carry out his illegal purpose of smuggling goods into India, he cannot recover under it.<sup>1</sup>

(4) But where the contract is made and completed in a foreign country and the foreign seller has not done anything in the way of furthering the illegal purpose, though he might be aware of the intention of the purchaser to smuggle them, he can sue for recovery.<sup>2</sup>

(5) Where the performance of a contract infringes the revenue laws only of a foreign state but its performance is not illegal according to the law of India, the court will not take notice of the revenue laws of the foreign state.<sup>3</sup>

(6) But if the contract is to be performed in a foreign country and performance involves infringement of the law, other than the revenue laws of that country, the illegality by the foreign law can be placed in defence to an action brought for non-performance in an Indian Court.<sup>4</sup>

#### (7) Contracts with foreign enemies.

“It is now fully established that the presumed object of war being as much to cripple the enemy’s commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy’s country and that such intercourse except with the licence of the Crown is illegal.”<sup>5</sup>

It is under this principle that at common law a contract of sale between a British subject and an alien enemy is void, all commercial intercourse being strictly prohibited with an alien enemy, save only when specially licenced by the Sovereign,<sup>6</sup> and cannot be enforced even after the conclusion of peace.<sup>7</sup> And where an executory contract including one between a British subject and a neutral involves in its performance trading or intercourse with the enemy it is dissolved on both sides by the declaration of war.<sup>8</sup> Nor can alien enemy during war enforce a contract made before the war : his rights are suspended until the conclusion of the war but revive when peace is declared. But he may, in such a case, be sued by a British subject, and may then appear and conduct his defence.<sup>9</sup>

1. See *Clugas v. Penaluna*, (1791) 4 T.R. 466 ; 2 R.R. 442 ; *Waymell v. Reed* (1794) 5 T.R. 599, 2 R.R. 675.

2. *Holman v. Johnson*, (1775) 1 Cowp. 341 ; *Pellecat v. Angell*, (1835) 2 C.M. and R. 311, 41 R.R. 723.

3. See *Pellecat v. Angell*, (1835) 2 C.M. and R. 311, 41 R.R. 723 and *British and Foreign Marine Insurance Co. v. Sunday*, (1916) 1 A.C. 650, 672 ; illegality according to the law of a foreign country does not affect the merchant when performance of the contract does not itself involve an infringement of that law.

4. See *Ralli Brothers v. Compania Naviera Sotay Aynar*, (1920) 2 K.B. 287 C.A. See also *Foster v. Driscoll*, (1929) 1 K.B. 470 C.A. reviewing the

cases on this subject.

5. *Esposito v. Bowden*, 1857) (in Ex. Ch.) 7 E. and B. 763, 779 ; 27 L.J. Q.B. 17, 110 R.R. 822, 823 ; *Kershaw v. Kelsey*, 100 Mars. 561 ; and see per Lord Dawsey (1902) A.C. at p. 499.

6. See *Brandon v. Nesbitt*, (1794), 6 T.R. 23 ; 3 R.R. 107 ; *Potts v. Bell*, (1800) 8 *ibid* 548 ; 5 R.R. 462 (Ex. Ch.).

7. *Wilson v. Patteson*, (1817), 7 Taunt 449 ; 18 R.R. 525.

8. *Esposito v. Bowden*, (1857) 7 E. & B. 763 ; *Ertel Bieber & Co. v. Rio Tinto Co.*, (1918) A.C. 260 ; 87 L.J.Q.B. 531 ; *Abdul Razack v. Khandi Row*, (1917), 41 Mad. 235 : 49 I.C. 851.

9. See *Benjamin on Sale*, 8th Edn., p. 509 and the cases cited therein.



Thus if goods are sold and delivered by a German to an English firm before war, no action for the price can be maintained during the war.<sup>1</sup>

A clause in the contract suspending the contract for the duration of the war between the countries of the parties is void as against public policy, as tending to advantage of the enemy's country and to the detriment of this.<sup>2</sup>

The same prohibition attaches to the citizens of an allied state as upon the subjects of a belligerent state.<sup>3</sup>

With reference to civil rights, the test of "alien enemy" is not nationality, or domicile, but the place of residence of business.<sup>4</sup> Thus British subject, or a neutral, voluntarily residing or carrying on business in hostile territory, is regarded in this connection as an alien enemy, as adhering to the king's enemies.<sup>5</sup> Conversely, the subject of a hostile state is not an alien enemy if he neither reside nor carry on business in the enemy's territory.<sup>6</sup>

And if he be in this country by permission of the Crown, he is *sub protectione regis*, and in the same position as an alien friend.<sup>7</sup> So, also, is the subject of a neutral state, who while engaged in the service of the enemy, has been taken prisoner of war, for his temporary allegiance to the enemy is determined by his capture.<sup>2</sup>

A contract between two subjects of a neutral state to export contraband of war to a belligerent is lawful, and may be enforced in the court of the neutral state.<sup>9</sup>

### (8) Agreements in restraint of trade

Section 27 of the Indian Contract Act, 1872, dealing with this subject reads as follows :

"Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent, void.

*Exception :* One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein :

Provided that such limits appear to the court reasonable, regard being had to the nature of the business."

Under the English law, a covenant or promise in a contract of sale, by terms of which either party is unreasonably restrained in the carrying

1. *Wolf & Sons v. Carr. Parke & Co.*, (1915) 31 T.L.R. 407 C.A.

2. *Ertel Bieber & Co. v. R. Tinto Co.*, (1918) A.C. 260.

3. *The Panariellos* (1915), 84 L.J.P. 140 ; 112 L.T. 177.

4. Per Lord Lindley in *Janson v. Driefontein Consolidated Mines* (1902) A.C. 484, at 505 ; 71 L.J.K.B. 857 ; *Porter v. Freudenburg* (1915) 1 K.B. 857 (C.A.) ; 84 L.J.K.B. 1001. See *The Daimler Co. v. The Continental Tyre Co.* (1961) 2 A.C. 387, as to a British registered company under enemy control, which gives it enemy status.

5. *McConnel v. Hector*, (1802) 3 B & P.

113 ; 6 R.R. 754.

6. Per cur. in *Porter v. Freudenburg supra Re Mary, Duchess of Sutherland* (1915) 31 T.L.R. 248.

7. *Caseres v. Bell*, (1799) 8 T.R. 166 ; *Porter v. Freudenburg, supra* ; *Johnstone v. Pedlar*, (1921) 1 A.C. 262 (P.C.) ; 93 L.J.P.C. 181.

8. *Sparenburgh v. Bannatyne* (1797) 1 B. & P. 163 ; 5 R.R. 772 ; see Benjamin on Sale, 8th Edn., pp. 501, 502.

9. *Chavassee, Ex parte Grazebook, In re.* 34 L.J. Bk. 17. *The Helen* 35 L.J. Admn. 2 ; L.R. 1 Adm. 1 : see Addison's Law of Contracts, 11th Edn. p. 103 (Bk. 1. Chap. 11. Sect. 1).



on of his trade, is against public policy, and is void. Originally, any agreement restraining an individual from carrying on a lawful profession or trade was considered to be absolutely void at common law. This was laid down as long ago as the Year Book of 2 Henry V,<sup>1</sup> where a bond given by one John Dyer, the condition of which was that he should not use the dyer's craft for half a year, was held void. *Colgate v. Bachele*<sup>2</sup> was an action of debt under an obligation, the condition being that defendant should not "either as apprentice or servant, or for himself as master or otherwise, use the trade of a haberdasher within the county of Kent, the cities of Canterbury or Rochester." The court held that "this condition is against law to prohibit or restrain any to use a lawful trade at any time or at any place for as well as he may restrain him for longer times and more places, which is against the benefit of the commonwealth ; for being freemen it is free for them to exercise their trade in any place."

In course of time, however, the severity of the common law doctrine was in its working felt as a great hardship. The rigid rule was based on the theory that the welfare of the state required that the skill, intelligence and enterprise of every individual should be at the disposal of the public. It was subsequently experienced that as a result of it traders were unwilling to take apprentices, because every apprentice was a prospective rival, and he could not, after the apprenticeship was over, be restrained from carrying on a competing trade or business. Likewise, persons who had carried on a business for a long time and wanted to retire were unable to sell their business, there being no inducement to any purchaser to buy as there was nothing to prevent the seller from carrying on a similar business and competing with him.

The rigid common law rule thus relaxed and the view then adopted was that total restraints may be bad but partial restraints would be valid. The most important case on the subject is *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd.*<sup>3</sup> In this case a patentee and manufacturer of guns and ammunition sold his business to a company, and covenanted that he would not for 25 years, except on behalf of the company, engage directly or indirectly in the business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company. The patentee having entered into an agreement with other manufacturers of guns and ammunition, the company brought an action against him to enforce the covenant by injunction. The patentee contended that the covenant as involving a restraint unlimited in space, was *ipso facto* void. Lord Macnaughten, L.C. said :

"The true view at the present time, I think, is this, the public have an interest in every person carrying on his trade freely ; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade themselves if there is nothing more, are contrary to public policy, and, therefore, void. This is the general rule. But, there are exceptions.

1. Henry 5, 5b, p. 26.

2. Cro. El. 872. See also *The Ipswich Tailor's Case*, 11 Co. 53 a ; Benjamin

on Sale, 8th Edn., p. 511.

3. (1894) A.C. 535 ; 63 L.J. Ch. 908.



Restraint of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case.

It is a sufficient justification, and indeed it is the only justification, if the restriction is *reasonable*—reasonable, in reference to the interest of the public.”

In this particular case the court held that the restraint was reasonable and therefore enforceable.

The distinction between general and partial restraint thus disappeared and now the only point is *reasonable*. Accordingly, in *Vancouver Malt & Sake Brewing Co. v. Vancouver Breweries Ltd.*<sup>1</sup>, where the appellants in consideration of a sum of £ 15,000 undertook not to engage for a period of 15 years in the business of brewing beer and to confine themselves to the business of brewing *sake*, the House of Lords held that the burden of proving the agreement to be valid will be on the person seeking to uphold it and the restrictive covenants relied on not only amounted to a purchase of protection “against mere competition” but were also wide and unreasonable as between the parties.

In *British Motor Trade Association v. Gilbert*<sup>2</sup> A purchased a motor car and entered into a covenant with the Motor Trade Association. The covenant provided as follows :

“1. The Covenantor (A) hereby covenants with the association and (as a separate covenant) with dealer that in the event of the said vehicle being delivered to him he will not during the period of two years from the date of such delivery or of first registration under the Road Vehicle Registration and Licensing Regulations (of which he agrees to give full particulars to the association in the case of a chassis) whichever is the later, without the consent of the Association such consent not to be unreasonably withheld, use the said vehicle or permit the same to be used for any purpose whatever other than for his private, profession or trade purposes, so that (without prejudice to the generality of the foregoing) he will not during the said period sell, give, pledge, hire (whether by way of hire purchase or otherwise) or otherwise deal with the said vehicle in any manner whereby the property therein is or may be transferred to any other person.”

“2. The covenantor further covenants with the association that if during the said period of two years he wishes to obtain such consent he will apply therefor in writing and at the same time will offer the said vehicle for sale to the association who shall have the irrevocable right (to be exercised at their option) of purchasing the same or nominating such person as they may select to purchase the same at the original list price plus purchase tax less such sum as is reasonable in respect of wear and damage prior to delivery up ; if not mutually agreed such sum to be settled by arbitration. And the covenantor further covenants that upon making such application he will pay to the association the sum of two guineas to cover the expenses of the association in relation to such application.”

1. (1934) A.C. 181 ; A.I.R. 1934 P.C. 101. 2. (1951) 2 All E.R. 641.



A sold the car in breach of the covenant. The association brought an action claiming damages for breach of the covenant.

It was *held* : (i) A covenant of this kind, which is designed, not to enforce restrictions unfair or undesirable in the interest of the public and protect honest dealers in the motor trade against those who are prepared to sacrifice principles for profit, cannot be otherwise than proper to protect the interests of the persons concerned.

(ii) That the measure of damages obtainable by the plaintiffs for the failure of the defendant to deliver the car to them on their option was that difference between the market value and the actual price to be paid in the ordinary way, under the limited scheme.

Section 27 of the Indian Contract Act, 1872, is general in its terms and declares all agreements in restraint of trade void *protanto*, except in the case specified in the exception *viz* sale of goodwill of a business. The object appears to have been to protect trade. "Trade in India is in its infancy ; and the Legislature may have wished to make the smaller number of exceptions to the rule against contracts whereby trade may be restrained."<sup>1</sup>

The law in India is thus practically the same what the English law was in the beginning. The Indian law makes no reference to the character of the restraint *i.e.* as to its being general or partial, but provides generally that the restraint is bad, unless it falls in the *exception* to this section. It has been observed<sup>2</sup> that section 27 of the Act aims at "contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business, and not at contracts by which in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business."

Reasonable construction must be put upon the section, and not one which would render void the most common form of mercantile contracts.<sup>3</sup> Thus, a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant and there was obligation on the part of the defendant to buy was held not in restraint of trade.<sup>4</sup> Similarly, an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade.<sup>5</sup> In *Prem Sook v. Dhurum Chand*<sup>6</sup> a contract for supply on credit of goods for sale in a particular market containing a stipulation that if the goods were sent by the buyer to any other market a higher rate would be charged, was held not to be in restraint of trade.

On the other hand, if the agreement while binding the manufacturers not to sell their goods to any other person than the other contracting party, does not bind the other party to buy all the produce or any definite

1. Per Rindersley J. in *Oakes & Co. v. Jackson*, (1876) 1 Mad. 134, 145.

2. Per Handley J. in *Mackenzie v. Striramiah*, (1890) 13 Mad. 472, 473.

3. 13 Mad. at p. 474.

4. *Carlisles Nephews & Co. v. Rieknauth*

*Bucktearmull*, (1882) 8 Cal. 809.

5. *Mackenzie v. Striramiah* (1890) 13 Mad. 472 affirmed in appeal sub-nominee *Sadagopa v. Mackenzie*, (1891) 15 Mad. 79.

6. (1891) 17 Cal. 320.



quantity, it is in restraint of trade and therefore void. When twenty-nine out of thirty manufacturers of combs in the city of Patna agreed with R.S. to supply him with combs and not to sell combs to any one else, with an option to R.S. not to accept the goods manufactured if he found there was no market for them in Patna, Calcutta, or elsewhere, the agreement was held void.<sup>1</sup>

In *Niranjan Shanker Golikari v. Century Spinning and Manufacturing Co. Ltd.*,<sup>2</sup> the Supreme Court of India has held : In an agreement challenged on the ground of its being a restraint of trade, the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Once this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract.

In *Tiruvenkada Moopanar v. Subbiah Moopanar*,<sup>3</sup> it was held : Though as a general rule an agreement in unreasonable restraint of trade is illegal and void as being contrary to public policy, it is also the policy of the law to hold persons bound by their contracts. Hence unless it is shown that the restraint is manifestly injurious to public welfare, a contract in reasonable restraint of trade is valid. If the court is satisfied that the restraint is reasonably necessary to protect the interest of the contracting parties and was not inimical to the interests of the public it will treat it as valid. The test is whether the primary object of the parties was in restraint of trade or was one to have a restrictive covenant in a sale. The reasonableness of the restriction must be judged by the character and the nature of the business or its customers. For example, an agreement by a person not to sell a particular kind of his goods to any one else except the plaintiff generally, or within a specified territory e.g. exclusive agency of certain goods or an agreement to sell certain goods only to specified party for a stipulated period have all been held to be valid. An agreement by a grower of betel vine to sell the betel leaves grown by him in a particular village only to the plaintiff and to none else is not one in restraint of trade within the prohibition of section 27 of the Contract Act.

Condition at auction among members of Senayar community to sell their betel leaves only to highest bidder at auction and to none else was held valid.

In *Harbilas v. Mahadeo*<sup>4</sup>, the defendant agreed to sell a certain quantity of silica sand to the plaintiff and undertook not to sell to four specified factories and pay damages at a certain rate in case of breach of the undertaking. In a suit for damages on breach, the agreement was construed as one in restraint of trade, even though the actual degree of restriction was not clear from the document.

In a case reported as *Abdul Karim v. Sheikh Dubar*<sup>5</sup>, a contract between A and B requiring B to sell hides only to A and to nobody else was held manifestly in partial restraint of B's exercise of his trade and as such void. In this case it was not, however, taken into consideration that

1. *Seikh Kalu v. Ram Saran Bhagat* (1909) 13 C.W.N. 388 : 1 I.C. 941.  
2. A.I.R. 1967 S.C. 1098.  
3. (1967) 1 Mad. L.J. 117. See Yearly

Digest, March 1967, Colmn. 486.  
4. A.I.R. 1931 All. 539 : 130 I.C. 482.  
5. A.I.R. 1937 Oudh 445 : 170 I.C. 479.



there was a legal obligation cast on the buyer to buy and that therefore the restraint was not objectionable and fell within the principles laid down in *Carlisles Nephews & Co. v. Ricknauth*, *Prem Sook v. Dhurum Chand* and *Sadagoppa v. Mackenzie* referred to above.

It is settled law that a bare agreement in restraint of competition cannot be upheld. Such an agreement can only be sustained when it is ancillary to some main transaction and is reasonably necessary in the interest of both parties in order to render that transaction effective and is consistent with the interests of the public.<sup>1</sup>

There is also nothing in the wording of S. 27 of the Contract Act to suggest that the principle stated therein does not apply when the restraint of trade or business is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception of the section.<sup>2</sup>

On the whole attempt to invalidate a contract of sale of goods on the ground of restraint of trade is not usually successful. In *Eiliman v. Carrington*<sup>3</sup> it was held not to be in restraint of trade for a manufacturer to exact from the wholesale dealer a contract that the latter will not resell below a fixed price, and will also require on a resale a similar contract from the retail trader. In *Palmolive v. Freedman*<sup>4</sup> it was held by the Court of Appeal that an agreement not to sell Palmolive soap "howsoever acquired" to the public under six pence a tablet in consideration of being on the plaintiff's wholesale list and allowed their wholesale discount was not injurious to the public.

In one sense every agreement for the sale of goods whether in *ease or in pose* is a contract in restraint of trade, for if A agrees to sell goods to C, he precludes himself from selling to anybody else. But a reasonable construction must be put on section 27 of the Contract Act, and one which would render void most common form of mercantile contracts.<sup>5</sup> Thus, a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant is not in restraint of trade.<sup>6</sup> Similarly, an agreement to sell all salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade.<sup>7</sup> It is otherwise if the agreement while binding the manufacturers not to sell their goods to any other person than the other contracting party, does not bind the other party to buy all produce or any definite quantity. In such a case the agreement is bad as being in restraint of trade. Where twenty-nine out of thirty manufacturers of combs in the city of Patna agreed with R to supply him with combs and not to sell combs to any one else, with an option to R not to accept the goods manufactured if he found there was no market for them in Patna, Calcutta,

1. *Premji Damodar v. L. V. Govindji & Co.*, A.I.R. 1943 Sind 197.

2. *Khemchand Manekchand v. Dayaldas Bassarmal*, A.I.R. 1943 Sind 214 : 201 I.C. 376.

3. (1901) 2 Ch. 275 : 70 L.J. Ch. 577.

4. (1928) 1 Ch. 267 : 93 L.J. Ch. 41 (C.A.) See also *Connors Bros. Ltd. v. Connors*, A.I.R., 1941 P.C. 75,

5. *Mackenzie v. Striramiah*, (1890) 13 Mad. 472, at p. 474.

6. *Carlisles Nephews & Co. v. Ricknauth Bucktearmull* (1882) 8 Cal. 809.

7. *Mackenzie v. Striramiah* (1890) 13 Mad. 472 ; affirmed in appeal *Subnom Sadagopa Ramanijah v. Mackenzie*, (1891) 15 Mad. 79.



or elsewhere the agreement was held void.<sup>1</sup> And where A agreed to purchase certain goods from B at a certain rate for the Calcutta market and the contract contained a stipulation that if the goods were taken to Madras, a higher rate should be paid for them, it was held that the stipulation for the higher rate was not in restraint of trade.<sup>2</sup>

A contract which creates pernicious monopoly may, however, be void against the interests of the public though the onus is on the party alleging and it is heavy especially where the contract is reasonable as between two parties.<sup>3</sup>

Such restrictions, moreover, do not bind a sub-buyer from the original buyer, even if he has notice of them, for there is no privity between him and the original seller, and conditions cannot be attached to goods<sup>4</sup> though in the case of patented goods the sub-buyer may be bound by such conditions, but only if he has notice of them.<sup>5</sup>

It would seem that the cases which hold that monopolies are opposed to public policy and therefore void under section 23 of the Indian Contract Act are based on the theory of trade being free, in the interests of the community.<sup>6</sup> Grant of a monopoly in favour of a Panchayet to sell vegetables in the village was held opposed to public policy and therefore void under section 23 of the Indian Contract Act.

The law relating to monopolies and restrictive trade practices has now been codified in *The Monopolies and Restrictive Trade Practices Act, 1969* (Act No. 54 of 1969).

### (9) Trade Combinations

Another matter for consideration is how far trade combinations and price maintaining agreements will be valid under the Indian Contract Act. Such a thing may arise where two or three rival firms find it more advantageous to combine with a view to maintain the level of prices and one member of such combination violates the agreement. Is it possible to enforce such an agreement in a Court of Law?

An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportion is not avoided by this section, and cannot be impeached as opposed to public policy under S. 23 of the Contract Act, 1872.<sup>7</sup> The question whether an agreement whereby manufacturers agree with one another to carry on their works under special conditions, or traders agree amongst themselves to sell their wares at a fixed price, is in restraint of trade has frequently arisen in English Courts. Such agreements have in some instances been disallowed, and in others upheld, according as the

1. *Shaikh Kalu v. Ram Saran Bhagat*, 1 I.C. 94.  
 2. For standing offers *R. v. Demers*, (1900) A.C. 103; *Prem Sook v. Dhurum Chand*, (1890) 17 Cal 320.  
 3. See *Att. Gen. of Australia v. Adelaide S.S. Co.*, (1913) A.C. 781 at p. 796.  
 4. *Dunlop Pneumatic Tyres Co. v. Selfridge & Co.*, (1915) A.C. 847.

5. *National Phonograph Co., Australia v. Menck*, (1911) A.C. 336 P.C.  
 6. See *Devi Dayal v. Narain*, A.I.R. 1928 Lah. 33; 100 I.C. 859, following *Somu Pillai v. Municipal Council, Mayavaram*, (1905) 28 Mad. 205.  
 7. *Fraser & Co. v. Bombay Ice Manufacturing Co.*, (1904) 29 Bom. 107.



restraints were or were not deemed to be in excess of what was reasonably sufficient to protect the interests of the parties concerned.<sup>1</sup> Agreements of this description do not appear to be common in India.<sup>2</sup>

In *Haribhai v. Sharaf Ali*,<sup>3</sup> the earliest case on the subject, four ginning factories agreed to maintain a price level. On reference the court was equally divided in opinion on the question whether such an agreement was in restraint of trade. In a later case in *Fraser & Co. v. Bombay Ice Manufacturing Co.*<sup>4</sup> where four ice factories agreed to maintain the price, that point again arose but it was not found necessary to decide it though the judges were inclined to hold that the agreement was enforceable. In a later case reported as *Bholanath v. Lachmi Narain*<sup>5</sup>, it was, however, held by the Allahabad High Court that a combination among trades in a particular place to do business only among their members, paying part of their profits to a common fund and levying fines upon their members for breach of conditions laid down by the combination did not offend against section 27 of the Indian Contract Act and was not actionable merely because it brought profit to the combination and indirectly damaged their trade rival: "It is perfectly clear that the defendant did not unlawfully or by illegal means procure any branches of control in favour of the plaintiffs. There was no conspiracy on the part of the defendants to compel the plaintiffs' vendors not to supply goods to the plaintiffs. A certain amount of pressure was brought to bear upon their constituents the object of which was that if the latter wished to continue to be members of the association, they had to obey the edicts of the association and to cease to deal with outsiders. These persons had a choice of action. They were not the victims of any coercion on the part of the defendants. Where a person has a choice of one or other of two courses with their attended advantages or disadvantages, coercion is not necessarily one of the elements involved in the transaction. There was no organized conspiracy on the part of the defendants to do harm to the plaintiffs. The association of the defendants was formed with the primary object of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs. The association therefore was not unlawful and there was no cause of action for claim founded upon conspiracy. The plaintiffs are, therefore, not entitled to the relief claimed." An agreement in the nature of a trade combination for mutual benefit for the purpose of avoiding competition is not necessarily unlawful, even if it may damage others.<sup>6</sup> The agreement which was held void in *Sheik Kalu v. Ram Saran Bhagat*<sup>7</sup> was clearly not for the mutual benefit of the parties and was an attempt to create a monopoly.

Where two persons enter into an agreement not to raise the bids in revenue sales but to divide the property purchased between themselves, the

1. The law is reviewed by the House of Lords in the case of *Crofter Hand Woven etc. Co. v. Veitch*, (1942) A.C. 433; (1942) All E.R. 142 H.L. where earlier cases are considered and discussed.

2. See Pollock & Mulla's *Indian Contract & Specific Reliefs Acts*, 9th Edn., p. 269.

3. (189 ) 22 Bom, 861.

4. (1915) 29 Bom. 117.

5. A.I.R. 1931 All. 83 : 53 All. 316 : A full discussion of the authorities will be found in the judgment. See also *Kedar Nath v. Mahali Ram*, (1912) 34 All. 587.

6. *Daulat Ram v. Dharam Chand*, A.I.R. 1934 Lah. 110 : 146 I.C. 1030.

7. (1909) 13 C.W.N. 381 cited at p. 117.



effect of which is to prevent the land from being sold for its real value, such agreement is void as its object is fraudulent and unlawful<sup>1</sup>.

Price maintenance agreements are valid in English law.<sup>2</sup>

#### (10) Other causes invalidating the contract.

The general rules relating to fraud and coercion contained in sections 16 to 19 of the Indian Contract Act apply to contracts of sale as between the immediate parties to the contract, sections 27 to 30 of the Act dealing with complications which arise when rights of third parties become involved.

Similarly, an agreement may be avoided on the ground of mistake, on the principles laid down in sections 10 to 22 of the Indian Contract Act.<sup>3</sup>

Clause (h) of section 2 of the Indian Contract Act states that 'an agreement enforceable by law is a contract'. As regards the sale and purchase of goods, it is competent for the parties to expressly declare that arrangements made shall impose no legally enforceable obligation on either of them. Such arrangements, therefore, are contracts ; but if goods are actually supplied in pursuance of terms of such an arrangement, the seller may enforce the payment of the price by an action.<sup>4</sup>

In this case, by successive arrangements made before 1913 between an American firm and an English Co., the American firm was constituted sole agents for the sale in the United States and Canada of tissues for carbonising paper supplied by the English Co. The greater part of these tissues was manufactured for this English Co., by another English Co. By an arrangement made between the American firm and both English Cos. in 1913 the English Cos. expressed their willingness that the existing arrangements with the American firm, which were then for one year only should be continued on the same lines for three years and so on for further periods of three years subject to six months' notice. The document, after setting out the understanding between the parties, including several modifications of the previous arrangements, proceeded as follows : "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation. This is hereinafter referred to as the honourable pledge cause."

1. *Huthegowda v. H. M. Basaviah*, A.I.R. 1954 Mys. 29 ; but see *Ramalingaiah v. Subbarami Reddi*, (1950) 2 Mad. L.J. 634—agreement not to bid against each other at auction sale not against public policy ; *Mohafazul Rahim v. Babulal*, A.I.R. 1949 Nag. 113—Persons agreeing not to bid against another—agreement is not illegal.

2. See *Imperial Tobacco Co. v. Parslay*,

(1936) 2 All F.R. 515.

3. See *Scriven Bros v. Hindley & Co.*, (1913) 3 K.B. 564 ; *Smith v. Hughes* (1871) L.R. 6 Q.B. 597 ; *Raffles & Wichelhaus*, (1864) 2 H. & C. 906, 133 K.R. 853 ; *Bell v. Lever Bros. Ltd.*, 1932 A.C. 161.

4. See *Rose and Frank v. Crompton Bros.* (1925) A.C. 445 and notes under section 4 of the Act,



Disputes having arisen between the parties, the English Cos. determined this arrangement without notice. Before the relations between the parties were broken off the American firm had given and the first mentioned English Co. had accepted certain order for goods. In an action by the American firm for breach of contracts and for non-delivery of goods, it was *held* : (i) That the arrangement of 1913 was not a legally binding contract ; (ii) that at the date of the arrangement of 1913 all previous agreements were determined by mutual consent, but (iii) that the orders given and accepted constituted enforceable contracts of sale.

### (11) Assignment of contract of sale.

There is no specific provision in this Act or in the Indian Contract Act which deals with the assignment of contracts of sales ; consequently the rules governing the assignability of, and the effects of assigning, contract of sale depend upon general principles of law. The general rule may be said to be that the burden of a contract may be assigned without the consent of the promisee : but the benefit of contract is assignable if there is no obligation annexed to it, and if no personal qualification of considerations were the foundation of the contract. In *Illuru Hanumanthiah v. Umnabad Thimmaiah*<sup>1</sup> it has been held that a contract to sell goods is assignable by seller and equally a contract to buy goods is assignable by the buyer.

Novation must be distinguished from assignment and is a matter of agreement between the parties.

The simplest cases arise where the goods have been delivered and the right to receive the price is assigned, or where the price having been paid, the right to receive the goods is assigned. In both these cases the assignor has performed his part of the contract, and the obligation of the other party to contract is varied to this extent only, that he must pay price or deliver the goods by the assignor instead of to the person with whom he contracted. The rule is the same where the price is not due at the date of the assignment ; the right to receive it when due can be assigned. The contract may provide for a series of deliveries, or the quantity, or the time of the delivery may depend on the wishes or needs of the parties. All these points will be found discussed in notes under the relevant sections of the Act. In any case it is only the benefit of a contract which can be assigned. The assignor cannot get rid of his obligations. The most he can do is to perform them through his assignee, he himself remaining liable.<sup>2</sup>

1. A.J.R. 1954 Mad. 87 : (1953) 2 Mad. L.J. 310,

2. See Chalmers. Sale of Goods Act,

16th Edn., pp. 28, 29 and Commentaries on the Indian Contract Act, 1872,



## CHAPTER II

### FORMATION OF THE CONTRACT

#### Contract of Sale

**4.** (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

#### Synopsis

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| (1) <i>Analogous law.</i>  | (12) <i>Cases where general property is not transferred.</i>   |
| (2) <i>"Sale" and "agreement to sell".</i>                                   | (13) <i>Sub-section (3)—sale and agreement to sell distinguished.</i>  |
| (3) <i>Sub-section (1)—essentials of a contract of sale.</i>                 | (14) <i>Sub-section (4)—agreement to sell passing into sale.</i>   |
| (4) <i>Contract of sale distinguished from other contracts.</i>              | (15) <i>Plea that contract was not one of sale but an agreement to sell—if open for first time in revision—contract held of sale and not of hire or agreement to sell.</i> |
| (5) <i>Barter or exchange distinguished from sale.</i>                       | (16) <i>Sale of shares of a company.</i>   |
| (6) <i>Gift distinguished from sale.</i>                                     | (17) <i>Quasi-contracts of sale.</i>   |
| (7) <i>Contract of sale distinguished from contract of work and labour.</i>  | (18) <i>Constitution of India, Sch. 7. List II, Entry 54—Meaning of "sale of goods"—Whether the same as in S. 4 of Sale of Goods Act, 1930.</i>                            |
| (8) <i>Sale distinguished from hire-purchase agreement.</i>                  | (19) <i>Miscellaneous cases.</i>   |
| (9) <i>Sale Distinguished from bailment.</i>                                 |  |
| (10) <i>Sale distinguished from agency.</i>                                  |  |
| (11) <i>Sub-section (2)—contract of sale may be absolute or conditional.</i> |  |



**(1) Analogous law.**

This section reproduces section 1 of the English Sale of Goods Act, 1893<sup>1</sup> (except for the fact that the latter contains a definition of "price"), and replaces section 77 of the Indian Contract Act.<sup>2</sup> Section 1 of the English Act is declaratory of the common law. The section shows clearly the distinction between a sale (completed sale, as it is sometimes called, or bargain and sale or sale and delivery as used to be called at common law) and an agreement to sell. The word "agreement" in "agreement to sell" is used in the sense of an enforceable agreement or contract and not in the sense of an unenforceable agreement as would follow from the definition given in section 9 of the Indian Contract Act.

**(2) "Sale" and "agreement to sell".**

According to this section, a contract of sale of goods is a contract whereby the seller (a) transfers or (b) agrees to transfer the property in goods to the buyer for a price. 'The whole object of a sale is to transfer property from one person to another : where seller has no right to sell the goods, buyer has not received any part of that which he contracted to receive—namely the property and the right to possession and, that being so, there has been a total failure of consideration.'<sup>3</sup> It removes the confusion that had been caused by the definition of sale in section 77 of the Indian Contract Act read with section 78 of the same Act. A contract of sale of goods now clearly includes a mere agreement to sell as well as an actual sale. The Special Committee observed<sup>4</sup> on this point :

"The distinction between a sale and an agreement to sell which was not clear in Chapter VII of the Contract Act has been clearly brought out. The distinction is very necessary to determine the rights and liabilities of the parties to the contract."

The question whether the transaction is a sale or an agreement to sell is of some importance. The main points of distinction are : (1) Sale is a contract, plus a conveyance ; an agreement to sell is a contract. (2) In sale the buyer at once becomes the owner and usually has the risk : under an agreement to sell, the seller remains the owner and the risk is with him.<sup>5</sup> (3) On breach of an agreement to sell the buyer has only a personal remedy against the seller. But if after a sale the seller deals with the property as his own (for instance, resells it), the buyer apart from his rights *ex contractu* can sue the seller for conversion. The buyer can also in some cases follow the goods in the possession of third parties. (4) If after a sale the buyer makes a default, the seller may sue for the price, but if there is a breach of an agreement to sell, the seller can only sue for damages.<sup>6</sup>

A contract of sale may be (1) absolute or (2) conditional. It is a "sale" or "executed contract" when under it the property in the goods is transferred from the seller to the buyer. It is an "agreement to sell" or "executory contract" when

1. See Appendix (A).

2. Section 77 of the Indian Contract Act, 1872 (since repealed) read as follows : "Sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer."

3. Per Atkin L.J. in *Rowland v. Divall*, (1923) 2 K.B. 500, 507.

4. Report of the Special Committee (Appendix C).

5. See section 26 post.

6. See *Chalmers, Sale of Goods Act*, 16th Edn., pp. 58, 59. See also *Stein Forbes & Co. v. County Tailoring Co.* (1916) 86 L.J.K.B. 448 ; 15 L.T. 215.



property does not pass until (1) some future time, or (2) subject to some condition thereafter to be fulfilled.

An "agreement to sell" becomes a sale (i) when the time elapses, or (ii) the conditions are fulfilled subject to which the property in the goods is to be transferred.

It is to be observed that, generally speaking, with regard to specific or ascertained goods the property is transferred and sale is completed by offer and acceptance though payment of price or delivery, or both, may be postponed, until the parties clearly express a contrary intention. In the case of unascertained goods, the property is not transferred until a later date, and until then there is no completed sale but merely an agreement to sell.

There may be a contract of the sale between one part-owner and another.

Mere offer is not sufficient. There was a mining lease giving option to government to purchase certain quantity of ore on their demand. The term was only in the shape of offer and did not constitute subsisting contract within the meaning of that term in S. 7 (d) of the Representation of the People Act, 1951.<sup>1</sup>

Sale can be complete without effecting immediate delivery or even without immediate payment. Though passing of title in goods is an essential ingredient of sale, physical delivery of goods is not essential.<sup>2</sup>

### (3) Sub-section (1)—essentials of a contract of sale.

The transfer or *agreement* to transfer of *property* in goods from one person to another for a *price* constitutes the essence of a contract of sale. It includes a mere agreement to sell as well as an actual sale. Property is defined in section 2 (11) of the Act as meaning 'the general property in goods, and not merely a special property.' 'Price' means the money consideration for a sale of goods.<sup>3</sup>

To constitute a contract of sale there must be a transfer or agreement to transfer of property from one person to another or, in other words, the seller and the buyer must be different persons. Hence it has been said that if man purchases his own goods there is no sale. Thus if the buyer be already the owner of that which the seller purports to sell to him, the transaction is nugatory. "The parties intended to effectuate a transfer of ownership; such transfer is impossible: the stipulation is *naturali ratione inutilis*."<sup>4</sup>

It is, however, provided that one co-owner may sell to another and therefore a partner may sell to his firm and a firm may sell to a partner.<sup>5</sup>

1. Bhaskarrao v. G. V. K. Rao, (1963) 2 An W.R. 288.

2. Dist. Board Hoshiarpur v. Hira Singh, A.I.R. 1968 Punj. 289.

3. Section 2 (10) of the Act. See I.T. Commr., A.P. v. M. & G. Stores, A.I.R. 1968 S.C. 200 cited at p. 73

*ante*.

4. Bell v. Lever Bros. Ltd., (1932) A.C. 161, 218 per Lord Atkin citing Cooper v. Phibbs, (1867) L.R. 2 H.L. 149.

5. Re Maclaren; ex p. Cooper, (1879) 11 Ch. Div. 68 C.A.



The position is different in the case of a member of an ordinary club. Where anything the property of a club, for instance, intoxicating liquor or meat, is supplied by the club to a member of the club, who pays for it, the transaction though resembling sale, is not a sale. The transaction is a release of the joint interest of the other members of the club. In substance the member is consuming his own property and the mode of payment is a matter of internal arrangement regulated by the rules of the club and agreed to by the member on his admission.<sup>1</sup> Members of a club or voluntary society are undivided joint owners, not part owners.

There are certain apparent exceptions to the general rule that a man cannot buy his own goods. Where one person has by law the right to sell another person's goods, that other person may purchase his own goods. For instance, *if the law permits*, a man may purchase his own goods sold under an execution or distress and similarly a bankrupt may buy his own goods from his trustee. But a trustee or an auctioneer or any one having fiduciary character, is precluded from becoming a purchaser by the general policy of the law which prohibits an agent from selling to himself.<sup>2</sup>

The *second essential* is that there should be transfer of the *absolute* or general property in the thing sold ; for in law a thing may in some cases be said to have in a certain sense two owners, one of whom has the general and the other a special property in it : and a transfer of the special property is not a sale of the thing.

*See also notes on pages 74 and 76 ante.*

To constitute a contract of sale, consideration for transfer must be *money*, paid or promised, according as the agreement may be for a cash or a credit sale : but if any consideration other than money be given, it is not a sale. Goods may be given in consideration of work and labour done or for board and lodging,<sup>3</sup> all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales of goods.

Moreover, the money must be given as the *price*, that is to say, as a *quid pro quo* on a transfer of property on a sale. It is not every transaction involving a transfer of property and a payment that constitutes a sale : the payment may be the motive for making a gift, or for giving some benefit by agreement or otherwise.<sup>4</sup>

In *Hirji Govindji In re*,<sup>5</sup> the applicant, a dealer, regularly sent goods to pakka adatia firm in Calcutta. No orders were placed with or received

1. *Graff v. Evans*, (1882) 8 Q.B.D. 373, 378 ; *Davies v. Burnet* (1902) 1 K.B. 666 ; *Humphrey v. Tudgay* (1915) 1 K.B. 119 ; *Metford v. Edwards* (1915) 1 K.B. 172 : as to status of member of proprietary clubs, see *Baird v. Wells* (1890), 44 Ch. D. 661. But see *Deputy Commercial Tax Officer v. Enfield India Ltd.*, A.I.R. 1968 S.C. 838 cited *post*—Co-operative Society supplying refreshment to members for price.

2. See under the English law *King v. England* (1864) 4 B. & S. 782 ; *Plasycoced Collieries Co. v. Partridge Jones*

and Co. (1912) 2 K.B. 545 (distraint taking goods at the appraised value) ; *Moore v. Singer Mfg. Co.* (1904) 1 K.B. 829, C.A. (distraint buying at auction goods distrained) : Ex parte *Villars* (1874) L.R. 9 Ch. App. 432.

3. See *Keys v. Harwood*, (1846) 2 C.B. 905 ; 15 L.J.C.P. 207.

4. See *Benjamin on Sale*, 8th Edn., p. 3. See also *Commr. of I.T., A.P. v. M. & G. Stores*, A.I.R. 1963 S.C. 200 cited at p 73 ante.

5. (1951) Nag. L.J. 516 (Rev.) : (1952) 3 S.T.C. 263.



by the applicant but there were communications between the parties regarding ruling market rates at Calcutta and their adequacy or inadequacy. The Calcutta firm undertook to find buyers of the goods despatched at prices approved by the applicant (subject to narrow marginal fluctuations) and also guaranteed payment of the price received after it had reimbursed itself its expenses and appropriated to itself its commission or reward for the services rendered. It was held that the contract of the sale took place between the Calcutta firm and the person who bought of that firm after the goods had reached Calcutta. There was no sale in the Province and the amounts involved were exempt from assessment under the C.P. & Berar Sales Tax Act, 1947. Such a contract as might be presumed to exist between the parties prior to the despatch of the goods from the Province was not a contract of sale as defined in S. 4, Sale of Goods Act but a contract whereby the Calcutta firm agreed to find money for the goods placed at its disposal by the applicant.

In *Bank of India v. J.A.H. Chinoy*,<sup>1</sup> the Judicial Committee of the Privy Council held: In India contract for the sale of shares does not, of itself and in the ordinary course of events, create an equitable interest in the purchaser. The natural meaning of the expression "acquire any securities in relation to a sale of shares" points to the completion of the contract, in the sense of the acquisition by the purchaser of the documents necessary to procure his registration rather than to the contract itself. As between a buyer and a seller of shares the buyer is entitled to all dividends declared after the date of the contract for sale, unless otherwise provided. No distinction can be made in this respect between dividends declared in respect of a period antecedent to the contract and those declared in respect of the subsequent period.

Where the price is determined as provided in a contract it is the same as if the parties have fixed it in the contract and if the method of fixing the price provided in an executory contract of sale becomes unavailable, that itself will preclude the formation of a contract.<sup>2</sup>

Where there is a contract for the sale of goods and a part payment for the goods is made, but no goods are delivered or tendered by reason of the default of the buyer, the seller's only remedy is to recover damages for the default while the buyer, notwithstanding that is by reason of his default that the contract has not been performed is entitled to recover the purchase price that he has paid subject to the right of the seller to set off against that claim the damages to which he can establish his title. The true measure of damages which the seller is entitled to is the loss of net profit that the seller would have made on the deal.<sup>3</sup>

In *Loon Karan Sohanlal v. Firm John and Co.*<sup>4</sup>, it was held: If a person makes an agreement of purchase of goods with another paying the price in advance and the seller directs his agent or stockist or pledgee to deliver the goods to the purchaser from the stock in his possession, and the Seller's agent stockist or pledgee refusing to deliver—remedy.

1. A.I.R. 1950 P.C. 90.

2. M. Abdul Sathar v. Kunjurvarkby, A.I.R. 1955 T.C. 189.

3. Dies and another v. British and Inter-

national Mining and Finance Corporation, (1939) 1 K.B. 724.

4. A.I.R. 1967 All. 308.



agent fails or refuses to deliver them, the purchaser's remedy is against the seller and not against the seller's agent because the latter is under no obligation or liability to him, being no party to the agreement.

#### (4) Contracts of sale distinguished from other contracts.

It sometimes happens that a contract is disguised in such form that it apparently appears to be a contract of sale but when its nature is analysed it is discovered that in reality it is not a contract of sale but some other contract in disguise of a contract of sale. As the Sale of Goods Act applies only to contracts of sale and to no other contracts<sup>1</sup> the question whether a particular contract is a contract of sale or some other contract is a question of substance and not merely a question of form. It depends on the real meaning and nature of a contract whether it is to be construed as a contract of sale or exchange or a mere guarantee for the price, or a bailment on trust, or a contract of *del credere* agency, or a contract of sale on commission, or a contract of loan on security or a mortgage, or a contract of hiring, or a contract to do work as agent or a licence to get mineral products from land, or a pledge, or a gift, or an award or a supply of liquor for wages.

So, although a contract may be clothed with the form of a contract of sale or may contain terms implying that it is a contract of sale yet if on its true construction it appears to be some other kind of contract, effect will be given to it as such and the provisions of the Act will not apply.

#### (5) Barter or exchange distinguished from sale.

Where the consideration for transfer of property in goods from one person to another consists of delivery of other goods, the contract is not a contract of sale, but is a contract of exchange or barter.<sup>2</sup> But if the consideration for such a transfer consists partly of the delivery of goods, and partly the payment of money, it seems that the contract is a contract of sale.<sup>3</sup> If the goods are to be paid for by money and other goods, on which a fixed value is put, the contract may be treated as one of sale for the aggregate sum as the price.<sup>4</sup> If the goods on either side are delivered any money balance payable may be recovered as on a contract of sale.<sup>5</sup> Similarly, if the exchange is made for goods or alternatively for price, it is sale.<sup>6</sup>

Thus, where 52 bullocks, each valued at £ 6, were to be exchanged for 100 quarters of barley at £ 2 per quarter, the difference to be paid in cash, the contract was treated as a contract of sale.<sup>7</sup> But where goods were supplied on the terms they were to be paid for by the bill of a

1. See section 66, *infra*.

2. *Harrison v. Luke*, (1845) 14 M. & W. 139. See also *Gannon Dunkerley & Co. v. State of Madras*, A.I.R. 1954 Mad. 1130, affirmed by the Supreme court in *Madras State v. G. Dunkerley & Co.*, A.I.R. 1958 S.C. 560.

3. *Aldridge v. Johnson*, (1857) 7 E. & B. 885, 110 R.R. 875; *Sheldon v. Cox*, (1824) 3 B. & C. 420.

4. *Hands v. Burton* (1808) 9 East 349, 12 Digest 459.

5. *Sheldon v. Cox*, (1824) 3 B. & C. 420;

*Ingram v. Shirley*, (1816) 1 Stark, 185. 39 Digest 601 (balance struck payable in money); *Garey v. Pyke*, (1839) 1 Ad. and El. 512, 39 Digest 646 (no balance struck). Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 6.

6. *South Australian Insurance Co. v. Randell*, (1869) L.R. 3 P.C. 101.

7. *Aldridge v. Johnson*, (1857) 7 E. & B. 385; 26 L.J.Q.B. 296. See also *Harman v. Reeve* (1856) 25 L.J.C.P. 257.



third party, without recourse to the buyer if the bill was dishonoured, the contract was treated as exchange, not sale.<sup>1</sup>

There must be saleable property to be transferred in exchange for the price. Accordingly, money cannot be the price of money. The change of a Government currency note for money is not a contract of sale, for it amounts to an exchange of money in another form. "Either form being legal tender, it is impossible to say that one is the price of the other."<sup>2</sup> Foreign money or currency and coins of denominations or issues formerly current in the jurisdiction, but no longer so, are however chattels which can be bought and sold. In *Moss v. Hancock*<sup>3</sup>, a five-pound gold piece of the jubilee year which was current coin, and also a curiosity and of greater value than its denomination, was stolen from the prosecutor and sold for five pounds to a dealer in curiosity. The thief was convicted, and an order for restitution was made. On a case stated, the court, drawing the inference of fact that the coin was sold as a curiosity, and was not passed as currency, held that the order was right.

It also appears that where foreign money is taken in exchange for any other kind of chattel (unless it has been made legal tender and perhaps unless it is current by custom at a settled rate) the transaction is not a sale, but barter.

The legal effect of a contract of barter is practically the same as that of a contract of sale : only such transaction does not come under the Sale of Goods Act. Again, the remedies in the two cases are different in form, though not in substance.

#### (6) Gift distinguished from sale.

Where goods are transferred by one person to another without any price or other consideration being given in return the transaction is called a gift. It is not sale.<sup>4</sup>

#### (7) Contract of sale distinguished from contract of work and labour.

There are certain contracts in which one of the parties engages himself to do some work for the other and to supply his own material for the completion of the work for a pecuniary or other consideration to be paid by the other party. The question then arises whether the finished article or materials supplied by the workman should be considered as purchased by the other party. There can be no contract of sale unless the contract contemplates the delivery of a chattel as such and not merely the affixing of a chattel by the workman to land or some other chattel.<sup>5</sup>

A contract of sale of goods is distinguished from a contract for work and labour. The distinction is often a fine one and opinions have differed much as to the test for distinguishing between these two contracts, but

1. *Reid v. Hutchinson*, (1813) 3 Camp 351.

2. *Empress v. Joggesur Mochi*, (1879) 3 Cal. 379; *Mathra Das v. Rammanand*, (1878) P.R. No. 73; *Dasaundi v. Imam-ud-Din* (1905) P.R. No. 18.

3. (1899) 2 Q.B. 111, 86 L.J.Q.B. 657.

4. See *Cochrane v. Moore*, (1890) 25 Q.B.D. 57, C.A. for distinction between sale and gift in English law. According to English law gift without delivery does not pass the property in the goods even though the gift is

assented to by the donee, but it will be good if it is made by a deed. *Re Seymour* (1913) 1 Ch. 474. But there may be constructive delivery: *Kilpin v. Ratley*, (1892) 1 Q.B. 582. Under S. 123 of the Transfer of Property Act, a gift is incomplete without delivery except when it is made by a registered instrument.

5. See *Clark v. Bulmer*, 11 M. & W. 243; *Reid v. Macbeth and Geany*, (1904) A.C. 223.



since the case of *Lee v. Griffin*,<sup>1</sup> the general rule seems to be that if the contract is intended to result in transferring for a price from A to B, an article in which B had no previous property, it is a contract of sale, but if the real substance of the contract is the performance of work by A for B, it is a contract for work and materials notwithstanding that the performance of the work necessitates the use of certain materials and that the property in those materials passes from A to B under the contract.<sup>2</sup> A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, chattel as a chattel by the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel *qua* chattel, the contract is one for work and labour.<sup>3</sup> The more recent view is that it is the substance of the contract that is to be gone into. If the substance of the contract is the production of something to be sold as a chattel, then that is a sale of goods. But if the substance of the contract is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that, there will pass from the producer to his client some materials in addition to the skill involved, the substance of the contract is skill and it will not be sale of goods.<sup>4</sup>

In the words of Stephen J., "the true principle of these cases appears to be that neither the book when printed nor the deed when drawn is the absolute property of the printer or solicitor, the author's copyright in the book and the client's interest in the deed qualify their proprietary rights. If the printer being unpaid, were to sell the copies to publisher or if the solicitor, not getting his costs, were to threaten to destroy the deed, each could be restrained. A book is more than a bare combination of ink and paper. I should say the material used in making it had ceased to exist as such and that the new product was the property of the employer, subject to the printer's lien and other remedies for the price of his labour."<sup>5</sup>

In an article on this subject by Stephen J., and Sir F. Pollock, 1 Law Quart Rev. 1 they suggest the following test of sale of contract for work and labour: "A contract by which one person promises to make something which when made will not be his absolute property, and by which the other person promises to pay for the work done, is a contract for work, although the payment may be called a price for the thing, and although the materials of which the thing is made may be supplied by the maker,"

The conditions and warranties implied into contracts for work and labour differ from those implied by this Act into contracts of sale; e.g. a contract for work implies that the work shall be done in workmanlike manner,<sup>6</sup> and a skilled labourer, artisan or artist who is employed under a contract of service impliedly warrants 'that he is of skill reasonably competent to the task he undertakes.'<sup>7</sup> In other respects there is similarity also between the two.

The following illustrations may be studied with advantage:

(1) The contract was that the plaintiff, a printer, should print for the defendant a second edition of his book, the plaintiff to find the materials,

1. (1861) 1 B. & S. 272, 29 Digest 360.

2. See Chalmers, Sale of Goods Act, 1893, 16th Edn., p. 52

3. See Halsbury, Laws of England, 3rd Ed., Vol. 34, p. 6.

4. Clark v. Mumford, (1811) 3 Camp. 37; Grafton v. Armitage, (1845) 2

C.B. 336.

5. 1 Law Quarterly Review (an article by Stephen J.)

6. Pearce v. Tucker, (1862) 3 F. & F. 13.

7. Per Willes J. in Harmer v. Cornelius, (1858) 5 C.B. (N.S.) 236, 246.



including the paper. *Held*, that this was not a contract for the sale of a thing to be delivered at a future time nor a contract for the making a thing to be sold when completed but a contract to do work and labour, furnishing the material.<sup>1</sup>

(2) An action was brought by a dentist to recover £ 21 for two sets of artificial teeth made for a deceased lady, of whom the defendant was executor. Materials were wholly found by the dentist. It was *held* to be a contract for the sale of goods.<sup>2</sup>

Referring to *Clay v. Yates*, Crompton J. observed : "I do not agree with the proposition that wherever skill is to be exercised in carrying out the contract that fact makes it contract for work and labour, and not for the sale of a chattel. It may be, the cause of action is for work and labour when the materials supplied are mere ancillary, as is the case put of an attorney or printer. But in the present case, the goods to be furnished, *viz.*, the teeth, are the principal subject-matter ; and the case is nearer that of a tailor, who measures for a garment, and afterwards supplies the article fitted."

Blackburn J. said : "If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labour be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy. I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action ; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been, nevertheless, for the sale of a chattel."

(3) The defendant orally commissioned the plaintiff, an artist, to paint the portrait of a lady and promised to pay 250 guineas therefor. The defendant subsequently repudiated the contract before the portrait was completed. In an action by the plaintiff for the agreed price of portrait it was *held* that it was a contract for work and labour and not for the sale of goods, as the substance of the contract was that skill and labour should be exercised upon the production of the portrait and that it was only ancillary to that contract that there would pass from the artist to his customer some materials, namely, the paints and the canvas, in addition to the skill and labour involved in the production of the portrait.<sup>3</sup>

Slesser L.J. observed : "If Blackburn J. meant to state that whenever there was an agreement whereby a chattel would ultimately have to be delivered, there was of necessity a sale of the chattel, he is stating the matter too broadly...Normally in the class of cases which we have here to consider, when the work has to be done in order to make the chattel fit for ultimate delivery to the purchaser, there will always be, or nearly always be some material which at some stage or another will have to be delivered, and if that be the only test, so that the ultimate delivery of some material decides that the subject-matter is the sale of goods. I would find it difficult to understand how such cases as the delivery of written documents of parchment by a solicitor, which have always been agreed to be questions of work and not sale of goods, would not fall within the category of sale of goods.

1. *Clay v. Yates*, 25 L.J. Ex. 237, 1 H. & N. 73, 138 R.R. 461.

2. *Lee v. Griffin*, (1861) 1 B. & S. 272 ;

124 R.R. 555.

3. *Robinson v. Graves*, (1935) 1 K.B. 579.



But I think that the authorities are clear to be to the contrary, notwithstanding the weighty observations of Blackburn J."

(4) Where an attorney is employed to draw a deed on paper and with ink furnished by him, the contract is for work and not for the sale of goods.<sup>1</sup>

(5) A picture dealer, whose sole object was to acquire something which he might sell in his business, engaged an artist to paint and deliver to him a picture of a given subject at an agreed price. It was *held* to be a contract for the sale of goods.<sup>2</sup>

(6) In *Dixon v. The London Small Arms Co.*,<sup>3</sup> the Secretary for War issued tenders for the supply of a number of rifles, to be made according to the plaintiff's patent, and the defendants contracted to supply them at £3 10s. each the stock in the rough and the steel tube for the barrel being supplied *out of Government stores* their value 9s. 8d. to be deducted from the price. In the manufacture the defendants applied the plaintiff's patent to the breech-action of the rifles and being sued for infringement of patent justified as being servants of agents of the Crown, the Crown having the right, it was contended, to use by its servants or agents a patented process without compensation to the patentee. It was *held* by the Court of Queen's Bench, that the contract was not for the employment of a servant or agent at a salary or wages, but simple and ordinary contract for the manufacture and supply of goods. On appeal, this decision was reversed by the Court of Appeal, who held that the patentee was not entitled to compensation, as the defendants had been directly employed by the Crown to manufacture the articles, and that the fact that they were also contractors, and were not working in the workshops of the Crown was immaterial but the decision of the Queen's Bench was unanimously restored by the House of Lords.

(7) If one orders another to make and fix curtains at his house the contract is one of sale, though work and labour is involved in the making and fixing. The transfer for a price of the curtain to one who had no previous property in them is a sale of goods. Where an article is taxed whether by purchase-tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. It is for the seller to quote a price which includes the tax if he desires to pass it on to the buyer; if the buyer agrees to the price, it is not for him to consider how it is made up, or whether the seller has included the tax or not. Where, however, the parties omitted to take purchase-tax into consideration, the incidence of the tax must lie where it falls, i.e., on the seller.<sup>4</sup>

The question whether a certain contract of the nature described above is for sale of goods or for work and labour done which ultimately may produce a chattel which is delivered to the purchaser has vexed jurists from the earliest ages. According to the Civil Law as finally settled by Justinian, the test whether a contract was *locatio conductio operis* or *emptio venditio* depended upon whether the material was supplied by the employer or by the workman. That view appears to have been accepted by Bayley J. in the case of *Atkinson v. Bell*<sup>5</sup> but this was repudiated in *Grafton v.*

1. Per Blackburn J. in *Lee v. Griffin*, (1861) 1 B. & S. 272, 124 R.R. 555.  
2. *Isaacs v. Hardy*, (1884) Cab. & El. 287.  
3. (1879) 1 A.C. 632, 1 Q.B.D. 384, 46

L.J.Q.B. 617.  
4. *Love v. Norman Wright (Builders) Ltd.*, (1944) 1 All E.R. 618 (C.A.)  
5. 8 B. & C. 277, 283.



*Armitage*<sup>1</sup> where a person was employed not only to make but to invent the machine for a specific purpose and it was *held* that he could at all events recover the value of his work and materials independently of the question whether there was a contract of sale or not, and has not since been followed. The English doctrine is far more elastic in this matter than that contained in the Institutes of Justinian or in most of the foreign civil bodies. The question of the ownership of the material on which the work is done is not conclusive of the matter, as has been noticed above.

In England under the old system of pleading a plaintiff might lose his case if he sued *e.g.* for work and labour when he should have sued for goods bargained and sold or goods sold and delivered. Again section 17 of the Statute of Frauds replaced in England by section 4 of the English Sale of Goods Act which has since in turn been repealed by the Law Reform (Enforcement of Contracts) Act, 1954, required certain special kind of proof to establish a right of action on the contract for the sale of goods above a certain value. Distinction between contract of sale and contract for work and labour is therefore of importance under the English Act. There is no provision in the Indian Act corresponding to now repealed section 4 of the English Act and consequently such points cannot arise in India in the same manner ; still the decisions under the English Act referred to above explain clearly the principles involved.

In *Dr. Barreto v. T.R. Puce*<sup>2</sup>, Dr. Barreto, a dental surgeon, sued for the recovery of Rs. 175, the price of a set of artificial teeth made by him for the defendant, T.R. Puce. The defendant contended that no definite price was fixed for the teeth, that after fitting on 25th they were found to be unsatisfactory and so he took them for a trial of two days at the plaintiff's request, that he found them to be so defective for various reasons specified by him, that he returned them with the letter dated 27th May, 1955, and again with a letter on the following day but that the plaintiff sent them back on both the occasions. The trial court found that the price was found fixed at Rs. 175, that the set was given on trial and that it was found not fit. The suit was therefore dismissed and it was held that the Sale of Goods Act applied and on revision the order was upheld by the High Court, following *Lee v. Griffin*.<sup>3</sup>

*Camera House v. State* (A.I.R. 1969 Bom. 437) related to **transactions undertaken by a photographer** and it was held : "In the case of transaction embodied in Bill No. 60293 only the contract for the supply of the enlarged photographs as reproduced on paper of the particular size mentioned therein, excluding the work of preparing the enlargements which is a contract for skill and labour, amounts to a sale.

"In the case of the transaction embodied in Bill No. 95198 only the contract for the supply of prints on paper of the particular size mentioned therein, excluding the work of developing the negative from the film roll of the customer which is a contract for skill and labour, amounts to a sale.

"In the case of the transaction embodied in Bill No. 16531 only the contract for the supply of prints of the particular size mentioned therein, excluding the contract for the taking of the photograph, as well as the contract for the developing of the negative which are contracts for skill, and labour, amounts to a sale."<sup>4</sup>

1. (1845) 2 C.B. 366, 15 L.J. (C.P.) 20.

2. A.I.R. 1939 Nag. 19.

3. (1861) 1 B. & S. 272 ; 121 E.R. 716,

4. *D. Masanda & Co. v. Commr. of Sales Tax*, A.I.R. 1957 M.P. 76 diss. from,



Another interesting point is raised. *In the case where there is no sale of goods, is the thing produced as a whole the maker's absolute property?* The answer appears to be in the negative, notwithstanding that part, or even the whole, of the materials may have been his property. In the other case, he might, however, if he found it possible and profitable, and is not restrained by patent, copyright or any other similar law, make in duplicate or in greater numbers chattels of the kind ordered, fulfil his special contract, and sell the others to persons. In *Dixon v. London Small Arms Co.*,<sup>1</sup> cited above, one of the questions pointed out by Lord Penzance was ; "If the defendants, while the breech-actions were being manufactured, had sold some to other persons, would that alone have given the Crown a cause of action? The answer was in the negative."

Where an architect was employed to carry out alterations in a building and preparing plans for that purpose, it was held that the property in these plans passed on payment of the remuneration provided under the contract.<sup>2</sup> This shows that although a contract may be a contract to do work and not an order for a specific article, yet the property in the article produced may pass to the party giving the order.

Contract for work and materials is not a sale and has been held not to come under S. 17 of Statute of Frauds (replaced by S. 4 of the English Sale of Goods Act, 1893 which also has since been repealed) according to which certain contracts for sale of goods should be evidenced by a memorandum in writing. From this point of view the distinction is not material in this country.

**Summary.** Benjamin<sup>3</sup> thus summarises the gist of the authorities on this point :

1. A contract whereby a chattel is to be made and affixed by the workman to land or to another chattel before the property therein is to pass is not a contract of sale but a contract for work, labour and material, for the contract does not contemplate the delivery of a chattel as such.

2. When a chattel is to be made and ultimately delivered by a workman to his employer, the question whether the contract is one of sale or of a bailment for work to be done depends upon whether previously to the completion of the chattel the property in its materials was vested in the workman or in his employer. If the intention and result of the contract is to transfer for a price property in which the transferee had no previous property, then the contract is a contract of sale.

Where, however, the passing of property is merely ancillary to the contract for performance of work, such a contract does not thereby become a contract of sale.

3. Accordingly,

(i) Where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do work, there is a bailment by the employer, and a contract for work and labour, or for work, labour and materials (as the case may be), by the workman.

Materials added by the workman, on being affixed to or blended with the employer's materials, thereupon vest in the employer by accession, and not under any contract of sale.

1. (1876) 1 App. Cas. at p. 651.  
2. *Gibbon v. Pease* (1905) 1 K.B. 810  
C.A.

3. Benjamin on Sale, 8th Edn., pp. 167, 168.



(ii) Where the workman supplies either all or the principal materials, the contract is a contract for sale of the completed chattel, and any material supplied by the employer when added to the workman's material vest in the workman by accession.

4. The fact that the value of materials supplied by one of the parties exceeds the value of the materials supplied by the other does not conclusively prove that the more valuable are the principal materials."

In Halsbury's Laws of England (3rd Edn.) Vol. 34, pp. 6-7, Paragraph 3, it is stated : "A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel, qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale : neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

**Section 4—"Sale"—What constitutes—Works contract—Bengal Finance (Sales Tax) Act, 1941, S. 2 (g).**

Goods were to be imported by the petitioner for the Electricity Board. The contract between the parties was to be interpreted as contract under the Sale of Goods Act, 1930. Full payment of the price was to take place after the plant was erected and put to work. The petitioner was to supply Engineers for erection of plant. It was held : The contract was not works contract. The supply of materials by the petitioners to the Board constituted sale and justified imposition of sales tax. There being unconditional appropriation by delivery of goods at Calcutta, the State of West Bengal had jurisdiction to tax. It was the contract of sale between the parties which occasioned movement of goods into the territory of India by import. The assessment contravened Art. 286(1)(b) of the Constitution.<sup>1</sup>

**Sections 4, 9—Distinction between contract of sale and works contract—Bombay Sales Tax Act, 1953, S. 2 (6).**

There was an agreement of embroidering saris supplied by the customer according to his instructions. The *jari* materials used in embroidery work were purchased by the concern and embroidered saris returned with consolidated bill including service charges and cost of material. It was held : Though property in *jari* materials passed to the customer the contract was simple contract of work only and implied contract of sale cannot be inferred. The transaction was not taxable.<sup>2</sup>

**Section 4—Question whether contract is for sale of goods or works—Orissa Sales Tax Act, 1947, S. 4.**

An assessee contracted to build bus bodies on chassis supplied by the customer. The consideration received therefor was claimed as deduction from gross turn-over for the purposes of assessment of sales tax. The question was whether the contract was for the sale of goods or works con-

1. Associated Electricals Industries (India) (P.) Ltd. v. Commercial Tax Officer, A.I.R. 1965 Cal. 236,

2. Joriwala & Bros. v. State of Gujarat, A.I.R. 1965 Guj. 253,



tract. It was held (*by majority*): The answer to the question must depend on the construction of the contract and the real intention of parties must be gathered by looking at the contract as a whole. There was no general proposition of law that whenever a contract provided for the fixing of the chattel to another chattel there could not be sale of goods.

Clause 5 (providing payment of liquidated damages by the body-builder for any delay in executing the contract) and 6 (providing for supervision by the purchaser during manufacture) of the agreement were not totally inconsistent with an agreement for the sale of goods. A contract for the sale of goods to be manufactured would not cease to be a contract for sale of goods merely because the process of manufacture was supervised by the purchaser. It was clear on the terms of the contract that the property in the bus-body was not to pass on its being placed or constructed on the chassis but when the whole vehicle including the bus-body was to be delivered and the contract as a whole was a contract for the sale of goods.<sup>1</sup>

#### **Section 4—Sale on works contract—Body-building contracts.**

In *State of Madras v. Champion Motor Works*, (1974) 34 S. T. C. 338 (Mad.) (See Yearly Digest, 1975, February issue, column 350), the assessee who undertook body-building works on motor chassis provided by the customers, prepared two separate bills in relation to the same vehicle, one for the materials and the other for labour charges. The Tribunal held that the two bills could not legally be combined as the one preceded the other and, therefore, they should be treated as independent transactions. On revision it was *held*: The mode of billing could not be conclusive and having regard to the assessee's business, it was necessary to consider whether the sale of materials and the contract for labour were independent of the body-building contract entered into earlier by him with the same customer. If really the bills for materials and for labour related to as anterior order placed for body-building, then it must be taken that there were no independent contracts for supply of materials and for labour, and that they related only to the prior order for body-building.

#### **Section 4—Contract for work involving transfer of contractor's goods when amounts to sale of these goods—Madras General Sales Tax Act, 1939, S. 2(h), (i).**

The business was of re-drying raw tobacco. The assessee packed re-dried tobacco before delivery to customer and charged consolidated charge for re-drying the packing. It was held (*by majority*): Packing tobacco in water-proof material must be regarded as an integral part of the process of re-drying and not independent of that process. In the absence of any evidence from which contract to sell "packing material" for a price might be inferred, the use of "packing materials" by the company must be regarded as in execution of contract and the fact that the tobacco delivered by the constituent was taken away with the "packing material" would not justify an inference that there was an intention to sell the "packing material".<sup>2</sup>

In *State of Madras v. G. Dunkerley & Co.* (A.I.R. 1958 S.C. 560) the Supreme Court held: The expression "sale of goods" in Entry 48 (of Sch. 7, List 2 of the Government of India Act, 1935, corresponding to

1. *Patnaik & Co. v. State of Orissa*, A.I.R. 1955 S.C.1655.

*Guntur Tobacco Ltd.*, A.I.R. 1965 S.C. 1396.

2. *Government of Andhra Pradesh v.*



Entry 54, Sch. 7, List 2 of the Constitution of India), is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passes therein pursuant to that agreement. In a building contract which is one, entire and indivisible—and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale. The provisions of the Madras General Sales Tax Act which impose a tax on such materials as if there is a sale of them are therefore *ultra vires*.<sup>1</sup>

**(8) Sale distinguished from hire-purchase agreement.<sup>2</sup>**

Hire-purchase agreements must be carefully distinguished from contracts of instalment basis. In hire-purchase agreements goods are let for certain terms at a rent payable by monthly or other instalments, and the hirer has the *option* of purchasing them on payment either of the total amount of all the instalments or of that amount, together with some further sum and it is stipulated that the hirer shall remain the *bailee* and shall not become *owner* of the goods unless and until he shall have paid the whole amount agreed upon as their price, and that the latter shall have the right to resume possession of the goods on the hirer's failure to pay any of the instalments of rent or any other breach by the hirer of the terms of the agreement.

If the hirer in effect agrees to buy the goods though the price is to be paid by instalments and not merely acquires an option to purchase them in future, then the contract is a contract of sale and not a contract of hiring. In this case the buyer is bound to pay the full price be it by instalments, and the owner is entitled to the full balance of the unpaid purchase price, if a part has been paid already. The property in the goods passes at once to the purchaser, who has, immediately on sale, a right of action for possession against the owner irrespective of the payment of the price or part thereof. An essential feature of a contract of hire-purchase is the option given to the prospective purchaser to terminate the contract and return the chattel. Where such option is absent, the contract is not of hire-purchase.<sup>3</sup>

In *K. Narayan v. Laxmi Narasimham*<sup>4</sup> it was held: The leading test for determining whether an agreement is that of sale or of a hire-purchase is to take into consideration the fact whether an option to terminate the agreement has been reserved to the hirer. And if such an option is given, then the agreement is generally held to be of hire-purchase. In other words, where a person has a right to terminate the agreement for hire at his pleasure and is not bound to pay the value of the goods, it is a hire-purchase agreement. The option, however, must be real one and the hirer must not be compelled to the exercise of the option.

In *Lee v. Butler*<sup>5</sup>, certain furniture was left to one Lloyd under the agreement whereby Lloyd agreed to pay "as and by way of rent" the sum of £ 1 on May 6 and a further sum of £ 96 4s. on August 1. The owner had power on default in payment, or on removal of the furniture with-

1. *Cannon Dunkerley & Co. v. State of Madras*, A.I.R. 1954 Mad. 1130 affirmed.  
2. The law relating to "hire-purchase" has recently been codified in India.  
3. *Subbaravalu v. Annamalai Chettiar*,

A.I.R. 1944 Mad. 526.  
4. A.I.R. 1955 Hyd. 104; I.L.R. (1955) Hyd. 25; case-law reviewed.  
5. (1893) 2 Q.B. 318, 62 L.J.Q.B. 591 (C.A.).



out his consent, to take possession of the goods in which case previous sums paid should be appropriated to rent only ; but if the hirer duly paid all the instalments and performed all other agreements, the rent should cease ; and the goods should then, but not before, become the property of the hirer. Before all the instalments were paid, Lloyd's wife sold and delivered the furniture to the defendant. In an action by the owner's assignee for detention of the goods it was held that the defendant had a good title as Lloyd had, 'agreed to buy' within the meaning of section 9 of the Factors Act.

In *Helby v. Matthews*<sup>1</sup> the circumstances were similar except that the hirer had the *option* to return the goods while remaining liable for arrears of hire. It was held that the hirer had not "agreed to buy", and the owner could recover from the pledgee of the hirer. The effect of the contract was that the owner had made an irrevocable offer to sell but the hirer had not *bound* himself to buy and so there was no mutuality of sale.

Thus the distinguished mark of a true hire-purchase agreement as distinguished from a sale, is that the hirer should have a right to terminate the agreement at his pleasure, and that the distinguishing mark of an agreement which is a sale, and not a hire-purchase agreement is that the hirer "should be *bound* to pay the value of the goods by way of instalments without any option to cancel the agreement, if he so wished before the full value of the goods is paid."<sup>2</sup>

The following extract from the Hailsham's edition of Halsbury's Laws of England, Vol. 16, in para. 754, neatly summarises the English law :

"The test is whether there is or is not a binding obligation on the part of the hirer, to buy. If the agreement does not amount to a binding obligation on the part of the hirer to complete the transaction as a purchase, but is merely an agreement to hire, with an option on the part of the hirer to purchase, it is not an agreement to buy within the Factors Act, 1889, or the Sale of Goods Act, 1893, and a purchaser or pledgee from the hirer can in such case obtain no better title than the hirer had, except in the case of sale in market overt."

"If there is reserved to the hirer power to return the goods, either during the hiring thereby determining the bailment, or after the conclusion of the hiring and before the payment of such further sum as is required to complete the purchase, the agreement is not a contract of sale but an agreement to hire with an option to buy, and even if the hirer in such a case by parting with the goods puts it out of his power to return them, he does not thereby become bound to buy."

1. (1895) A.C. 471 ; see also *Edwards v. Vaughan*, (1916) 26 T.L.R. 545 (C.A.) (sale or return).
2. See also *Mahabali Prasad v. H.N. Palmer*, A.I.R. 1932 All. 607 ; *Auto Supply Co. Ltd. v. Raghunatha Chetty*, A.I.R. 1929 Mad. 884 ; *Cole v. Naulal Morarji*, A.I.R. 1925 Bom. 18 ; (1924) 49 Bom. 172 ; 92 I.C. 191 ; *Bhimji N.*

*Dalal v. Bombay Trust Corporation* (1930) 54 Bom. 381 ; 124 I.C. 800 ; A.I.R. 1940 Bom. 306 ; *Mohomed Ismail v. Provincial Automobile Co.*, A.I.R. 1937 Nag. 198 ; *Percivals Ltd. v. London County Council* (1918) 87 L.J.K.B. 677, where there is option to purchase, the buyer is under no obligation to order goods.



"But an agreement whereby a person agrees to hire goods by paying the owner of them by stated instalments a fixed sum, which is to be the purchase price of the goods, is, in the absence of a provision enabling that person to determine the hiring, an agreement to buy the goods within the provisions of the Factors Act, 1889, and the Sale of Goods Act, 1893".<sup>1</sup>

In *Enayattullah Khan v. Jalan Trading Co.*,<sup>2</sup> there was stipulation in the contract that the owner was to seize the car in default of payment of instalments by hirer. The plea of the hirer was that by subsequent oral agreement the owner was to sell the car and to adjust the price towards the balance of instalments and to refund balance or sale proceeds to the hirer and thus it was a contract of sale. It was *held*: The plea itself conceded that the contract was of simple hire-purchase. The plea to determine the nature of the contract not taken in courts below could not be taken in appeal.

In *Kasiah v. Engineer*<sup>3</sup>, it was held:

In the case of assignment of right to use goods, the assignee becomes the trustee and is bound to protect goods. Where the assignee allows the owner to wrongfully seize goods and purchases them himself, the assignee is liable for the loss suffered by the hirer.

By a contract in writing between H.H. and a cycle manufacturing company, H.H. requested the company to supply him with a bicycle and undertook in consideration of his doing so to pay to the applicant corporation a deposit and the balance of the purchase price by instalments at the address of the applicant corporation. By an agreement in writing between H.H. and the applicant corporation H.H. agreed that in consideration of the bicycle being supplied to H.H. on the terms of the said order should H.H. make default in due payment of any instalment or instalments of the price of the bicycle the whole sum shall immediately become due and "I will, on demand, pay the same to you in London." The bicycle was supplied to H.H. on guarantee for the balance due. It was *held* that the proposed action was founded mainly, if not wholly, for the sale of goods for which payment was to be made by instalments.<sup>4</sup>

In *Drury v. Buckland Ltd.*,<sup>5</sup> at the time of a supposed purchase the purchaser entered into a hire-purchase agreement of quite common kind with a finance company. The document recorded the relationship of hire-purchase between the hirer and the owner in the form of an offer made by the hirer on a printed form signed by the hirer on May 11, 1938. On the same date a document purporting to be an invoice was signed by the dealer purporting to invoice the apparatus to the hirer. In an action by the hirer against the dealer alleging a breach of warranty of fitness of the apparatus it was contended that the transaction was a sale and not of hire and that the defendant was liable as vendor for the breach of warranty. It was *held* that the contract was one of hire-purchase and the issue of invoice did not make it one of sale and the action must fail.

1. See now 3rd Edition, Vol. 19, pp. 510, 511.

2. A.I.R. 1965 Pat. 214.

3. A.I.R. 1965 Mad. 257.

4. *Rex v. Shoreditch County Council Registrar and another*; *Ex-parte*

*Saxon Finance Corporation Ltd.* (1938) 1 K.B. 402. See also *Associated Distributors Ltd. v. Hall* (1938) 2 K.B. 83 (C.A.).

5. (1941) 1 All E.R. 269 (C.A.).



It must depend on the terms of the contract whether it is to be regarded as a contract of hiring or a contract of sale, and the terms of the contract should be interpreted as a whole.<sup>1</sup> The differences between a true hire purchase agreement and a contract of sale are important when the rights of third parties come to be considered. If the contract is contract of sale the buyer's delivery or transfer of the goods under any sale, pledge, or other disposition for value to a person taking the same in good faith, and without notice of the seller's right is as valid as it were expressly authorised by the seller even though the instalments had not been paid.<sup>2</sup> On the other hand, if the contract was merely a contract of hiring with an option to purchase or if it be stipulated in the agreement that the hirer may at any time return the goods on payment of all the rent due up to the date of their return, he is not a person who has from the outset agreed to buy the goods and dispositions of the goods for value are not valid as against the bailor of the goods,<sup>3</sup> save in so far as they may be justified as an assignment of the hirer's rights under the agreement.<sup>4</sup> In such a case if the hirer purports to sell the goods the owner will only be able to recover from the sub-purchaser who brought from the hirer the value of his *i.e.*, the owner's interest, and cannot recover the full value of goods.

The plaintiffs let a piano under hire-purchase agreement whereby the hirer had the option to purchase it by payment of a certain number of quarterly instalments, but was to remain a bailee only until the last of the instalments was paid, the hirer having the right at any time to terminate the agreement by returning the piano to the plaintiffs. The hirer paid several of the instalments, but before they were fully paid sold the piano to the defendant. In an action of detinue and conversion in the county court the defendant paid into court the amount of the remaining unpaid instalments. It was *held* that the defendant had acquired the rights of the hirer under the agreement before anything had been done to terminate it, no instalment being then in arrear, that the measure of damages was the amount of unpaid instalments, and that the plaintiffs were *not* entitled to recover the piano or its full value, but only the amount paid into court.<sup>5</sup>

The defendant proprietors of a cinematograph theatre on 21st August, 1941, agreed to buy from the plaintiff and the plaintiff agreed to sell to them, a cinematograph projector and its accessories for the sum of Rs. 4,500 on the following conditions : (1) The buyers were to pay as an advance the sum of Rs. 1,000/- which was to be treated as security for the performance by them of the contract. In the event of default on their part, the Rs. 1,000/- was to be forfeited. (2) The balance of the purchase consideration Rupees 3,500, was to be paid in ten equal monthly instalments commencing on 30th September, 1941. (3) If the buyers defaulted,

1. See *A.C. McEntire v. Crossley Brothers* (1895) A.C. 457, 467 and cases cited in note. See also *Suraj and Sons v. J.O. Brien*, A.I.R. 1931 All. 759.

2. Section 30 (3) post; *Lee v. Butler*, (1893) 2 Q.B. 318.

3. *Helby v. Matthews* (1895) A.C. 471; *Payne v. Wilson* (1895) 1 Q.B. 653; *Lewis v. Thomas* (1919) 1 K.B. 319; *Gopal Tuka Ram v. Sorabji Nusserwanji* (1904) 6 Bom. L.R. 871; *Mckenzie and Co. v. Mohammad Ali*

*Khan*, A.I.R. 1929 O, 155; (1929) 5 Luck. 510; 115 I.C. 103; *Abdul Quadeer v. Watson and Sons Ltd.*, A.I.R. 1930 Rang. 193 dissenting from *Manug Ba Oh v. Motor House Co. Ltd.*, A.I.R. 1929 Rang. 368; 7 Rang. 431; 120 I.C. 132.

4. *Belsize Motor Supply Co. v. Cox*. (1934) 1 K.B. 244; *Whiteley v. Hilt*, (1918) 2 K.B. 808.

5. *Whiteley v. Hilt*, (1918) 2 K.B. 808,



the vendor had the option to adopt one of two courses. He could forfeit the advance, insist on the return of the machine and its accessories and charge rent therefor at the rate of Rs. 452 per month for every month the articles remained in the hands of the buyers. In the alternative, the vendor could demand immediate payment of the entire balance of the purchase consideration with interest at six per cent per annum. (4) The property in the machine was not to pass to the buyer until they had paid the purchase price in full. The defendants having committed default in the payment of instalment the question was whether the plaintiff was entitled to forfeit the deposit and to insist on the return of the projector with hire at the rate agreed upon.

*Held*, that the contract was not one of hire-purchase as an essential feature of a contract for hire-purchase, namely the option given to the prospective purchaser to terminate the contract and return the chattel was absent.<sup>1</sup>

In *Bowmaker's Ltd. v. Barnet Instruments Ltd.*,<sup>2</sup> the appellants hired machine tools from the respondents under three written agreements. The tools were the property of one Smith, who sold them to the respondents in order that the appellants might ultimately obtain possession of the tools provided the hire-payments were made regularly to the respondents. After making only some of the agreed payments, the appellants converted the tools to their own use by selling them. The respondents, therefore, terminated the contract and claimed the return of the tools or, alternatively, damages for conversion. For the appellants it was contended (i) that the sale between Smith and the respondents was illegal in that it contravened the Control of Machine Tools Order, 1940, resulting in the agreements between the appellant and the respondents being affected by the illegality arising from the original sale; (ii) that the respondents' claim, therefore, should not be entertained in the ground of public policy. The respondents, whilst not relying on the hiring agreements, claimed that the property in the tools still remained in them at the date of conversion. It was *held*: (i) whether or not the agreements for sale were illegal, the respondents' right to their own property was unaffected; and (ii) no question of public policy therefore arose.<sup>3</sup>

Under the hiring agreement the hirer has right to return the goods at any time, and thereby relieve himself from any further obligation as regards the future instalments a thing which he cannot do if the contract be a contract of sale.<sup>4</sup> In the case of a contract of sale, if possession of the goods is retaken by the seller by reason of the instalments being in arrear he cannot, usually speaking, recover the arrears whereas in the case of a hiring agreement he can.<sup>5</sup>

In *M/s. Indian Finances Private Ltd. v. Sales Tax Officer, Jabalpur*<sup>6</sup>, the distinction between sale and hire-purchase was thus explained :

1. G. J. Subbarayalu v. A. R.M. A.N. Annamalai Chettiar, A.I.R. 1944 Mad. 526.
2. (1944) 2 All E.R. 579.
3. Mahabali Prasad v. H.N. Palmer, A.I.R. 1932 All. 607 : (1932) All. 781 : 141 I.C. 615.
4. Hewison v. Ricketts, (1894) 63 L.J.Q.B. 7 ; Attorney General v. Pitchard, (1928) 27 L.J.K.B. 561.

5. Brooks v. Beirnsstein, (1909) 1 K.B. 98 ; The Auto Supply Co. Ltd. v. Raghunath Chetty, A.I.R. 1929 Mad. 888 ; 52 Mad. 829 ; 121 I.C. 593 ; Abdul Quadeer v. Watson and Sons Ltd., A.I.R. 1930 Rang. 193.
6. A.I.R. 1964 M.P. 242 ; A.I.R. 1961 S.C. 440 and A.I.R. 1962 S.C. 53 followed.



In a contract of sale for a price payable by instalments the purchaser has no option of terminating the contract and returning the goods, whereas in a contract of hire-purchase the hirer has such an option and also the option to purchase the chattel which he may or may not exercise according to his sweet will and pleasure.

A hire-purchase agreement is not a contract of sale but a bailment. While the bailment continues, the property remains in the owner. But it cannot be said that there is no sale of goods as understood in the Sale of Goods Act, 1930, even when the hirer, who has obtained possession of the goods under the agreement, becomes the owner of the same after exercising the option to purchase. When the option of purchasing the goods is exercised by the hirer a contract of sale comes into existence and the hirer's possession thereafter is that of a buyer.

In *Sundaram Finance Ltd. v. The State of Kerala*,<sup>1</sup> a customer, with a view to finance his purchase, entered into agreement in the form of hire-purchase agreement with the financier. It was held on the construction of documents that the transaction was one of loan and not of sale and so not exigible to sales tax.

This was relied upon in *Shyamsunder Budna v. Manindra Nath Ghose*<sup>2</sup> in which it was held: Where the financier pays the dealer on behalf of the buyer to complete the purchase of motor car and the property in the car passes to the buyer, the financier obtaining promissory note and a hire-purchase agreement from the buyer, the transaction is merely a financing transaction and not hire-purchase.

In *Rajendra Kumar v. State of W.B.*,<sup>3</sup> the petitioner entered into a hire-purchase agreement with A regarding a motor vehicle. One of the clauses of the agreement was that if A defaulted in payment of instalment amounts, the petitioner had the right to repossess the vehicle and terminate the agreement. He retook the vehicle on default of A. It was held: On a construction of the terms and conditions of the agreement, it was really a financing agreement and the seizure clause in it was to ensure the compliance with the agreement and hence the petitioner was not the owner of the vehicle.

In *British Machinery Supplies Co. v. Devaraj*,<sup>4</sup> there was a sale of a machine under hire-purchase agreement. The hirer was in possession of the machine and had right to use the same. The hirer pledged the same, the pledgee not knowing that the hirer was not the owner of the machine but merely hirer. There was default in payment of the instalments of hire-purchase agreement but the seller did not terminate the agreement. It was held: The seller could not recover the machine from the pledgee but could claim damages for the balance of unpaid instalments due and payable under the agreement.

1. A.I.R. 1966 S.C. 1178 [with reference to Travancore-Cochin General Sales Tax Act, II of 1925, S. 2 (f)].  
2. A.I.R. 1967 Cal. 256; *Polsky v. S. & A. Services Ltd.*, (1951) 1 All E.R. 815; *Watson, In re, ex-parte, Official Receiver in Bankruptcy*, (1890) 25 Q.B.D. 27;

*Maas v. Pepper*, (1905) A.C. 102 relied upon.

3. 73 C.W.N. 436. See Yearly Digest 1969, Colmn. 2767.

4. (1966) 2 Mad. L.J. 394. Nature of hire-purchase agreement explained.



An option to buy must be distinguished from a conditional agreement to buy. In *Marten v. Whale*<sup>1</sup>, the plaintiff agreed to buy land from P "subject to purchaser's approval of the title," and in consideration the plaintiff agreed to sell a motor car to P, "completion of such sale to be carried out simultaneously" with the sale of the land. Shortly afterwards the plaintiff lent the car to P who sold it to the defendant's purchasers for value and without notice of the plaintiff's title. It was held that the defendants had a good title. Assuming the interdependency of the contract for the land, and that for the car, the plaintiff had agreed to buy the land, though conditionally on his solicitor's approval and had not merely an option; accordingly the agreement for the car was also conditional, and a contract of sale could be conditional under section 1 (2) of the Act [corresponding to section 4(2) of the Indian Sale of Goods Act, 1930], and the defendants had therefore "agreed to buy".

A delivery of goods to a bailee on the terms that if they are not returned within a fixed or reasonable time, the bailor shall have the option of treating them as sold, in which case the option if the goods are returned, rests with the bailor only, and the property passes when he exercises it.<sup>2</sup>

"On sale or return" option to sell—no contract of sale till option exercised.

**Hire-purchase—Payment of instalments—Burden of proof—Provision enabling owner to resume possession in default in payment of instalment when enforceable.**

Where the terms and the conditions attached to the agreement give an unqualified option to the hirer to terminate the hiring by returning the vehicle to the owner at any time and until the exercise of the option to purchase and the hirer is to hold the vehicle as bailee of the owner without any property or interest as purchaser therein and in the event of default in observing the conditions of the agreement the owner is to be entitled to terminate the contract of hiring and forthwith to take and recover possession of the vehicle, the transaction between the parties is at the inception one of hire, with the option to purchase at the end.

The burden lies on the hirer to prove that he has paid up the entire amount of instalments in order to entitle him to exercise the option of purchase.

In a hire-purchase agreement, the provision enabling the owner to resume possession on default in payment is enforceable, if the agreement is a *bona fide* hire-purchase agreement, and equity will not release the hirer from the effect of his default, even if nearly all the instalments have been paid and the arrears are tendered before action brought, the provision not being in the nature of a penalty.<sup>3</sup>

In *V. Dakshinamurthi Mudaliar v. General & Credit Corporation (India) Ltd.*<sup>4</sup> it was held: The distinction between a hypothecation and a hire-purchase agreement is that while the former is the species of a pledge where possession is transferred from the pawnor to the pawnee, a hire-

1. (1917) 2 K.B. 480 (C.A.): 86 L.J.K.B. 1305.

2. *Manders v. Williams*, (1849) 4 Exch. 389, 39 Digest 508, 1258, 80 R.R. 588.

See notes under S.24 of the Act.

3. *Nathulal v. Balkrishna*, A.I.R. 1955 Nag. 269 : 1955 Nag. L.J. 575.

4. A.I.R. 1960 Mad. 328.



purchase is a bailment with an option to purchase. The latter sometimes includes an irrevocable agreement to buy on instalment terms with the proviso that the title shall not pass until the instalments are paid. The transaction is compounded of the element of both the law of hire and sale and it would be wrong to assimilate it to a hypothecation of moveable property. Where the agreement is only a device or cloak, to conceal a loan, it is open to the court to ascertain the real transaction. In construing a hire-purchase agreement the substance of the agreement must be considered as a whole.

**Section 4—Hire-purchase agreement when ripens into sale—Hire-purchase agreement and sale wherein price is to be paid by instalments distinguished—Madras General Sales Tax Act, 1939, S. 2 (h), Explanation 1 is *ultra vires*.**

In *K.L. Johar & Co. v. Deputy Commercial Tax Officer, Coimbatore*<sup>1</sup>, it was held : The expression 'sale of goods' in Entry 48 of List 2 of Schedule 7 of the Constitution has the same meaning as in the Sale of Goods Act. Hire-purchase agreement is not a sale. Legislation by State Legislature making any agreement or transaction in which property does not pass from seller to buyer is beyond competence. Explanation 1 to S. 2(h) of the Madras General Sales Tax Act, 1939, is *ultra vires*.

A hire-purchase agreement is distinct from a sale in which the price is to be paid later by instalments. In the case of a sale in which the price is to be paid by instalments, the property passes as soon as the sale is made, even though the price has not been fully paid and later on paid in instalments. The essence of sale is that the property is transferred from the seller to buyer for the price whether paid at once or paid later in instalments. On the other hand, a hire-purchase agreement, as its very name implies, has two aspects. There is first an aspect of bailment of the goods subjected to the hire-purchase agreement, and there is next an element of sale which fructifies when the option to purchase, which is usually the term of hire-purchase agreement, is exercised by the intending purchaser. Thus the intending purchaser is known as the hirer so long as the option to purchase is not exercised. In the case of a hire-purchase agreement, properly so-called, the property in the goods does not pass at the time of the agreement but remains with the intending seller and only passes later when the option is exercised by the intending purchaser. The distinctive feature of a hire-purchase agreement is that the property does not pass when the agreement is made but only passes when the option is finally exercised after complying with all the terms of the agreement.

**Transfer of goods on hire-purchase or other instalment system of payment—Title in goods to pass at future date on full payment of instalments—Definition of sale in S. 2(g) of the Bihar Sales Tax Act, 1947 is wider than that under S. 4(3) of the Sale of Goods Act, 1930—Distinction.**

The word 'sale' in its legal sense imports passing of the property in the goods and, it is in this sense that the word is used in the Sale of Goods Act, 1930. Under that Act, a sale of goods and an agreement for sale of the goods are treated as two distinct and separate matters, the vital points

1. A.I.R. 1965 S.C. 1082.



of distinction between them being that whereas in the sale there is a transfer of property in the goods from the seller to the buyer, there is none in an agreement to sell. In the Bihar Sales Tax Act, the definition of sale has been enlarged and extended so as to include even a hire-purchase or other instalment system of payment, although title in the goods is to pass at a future date on the full payment of the instalments. According to this definition if the goods are transferred on "hire-purchase" or other instalment system of payment, even though (i) there is no transfer of property in the goods at the time of the actual transfer of such goods, (ii) the transfer of the property in the goods is to take place at a future date on the payment of the instalments agreed upon, and (iii) the seller retains a title to the goods as security for payment of the price, such a transaction would be deemed to be a 'sale' within the meaning of the proviso to section 2(g) of the Act.<sup>1</sup>

### Writ proceedings

In *Ratan Chand v. Special Assistant Commercial Tax Officer* (1967) 1 Mad. L.J. 352 it was held : In hire-purchase agreements, the court by perusing the documents should find out the true nature of the transaction. Such analysis cannot be done in writ proceedings. Alternate remedy for a petitioner is to file independent civil suit.

### (9) Sale distinguished from bailment.

Bailment is defined to be a delivery of goods, on a condition express or implied, that they shall be restored by the bailee to the bailor or according to his directions, as soon as the purpose for which they are bailed shall be answered or kept till he reclaims them.<sup>2</sup> In a sale property in the goods passes from the seller to the buyer ; in a bailment one person delivers possession of the goods to another person for some purpose on the agreement that the latter shall, when the purpose is accomplished return the goods or otherwise dispose them of according to the directions of the former.<sup>3</sup> Where the terms are that the bailee shall pay money or deliver some *other* valuable commodity to the bailor, and not return the identical subject-matter, either in its original or altered form, this is a transfer of property for value and not a bailment.<sup>4</sup> The test is whether the party delivering the goods is entitled to the specific return of what he has delivered.

Where corn was deposited by a farmer with a miller, to be used as part of the miller's current consumable stock, subject to the right of the farmer to claim any time in equal quantity of wheat of similar quality, or in lieu thereof, the market price of such quantity, it was held that this was a sale and not a bailment.<sup>5</sup>

The purpose for which goods may be bailed are various. The principal are the following : They may be merely deposited with a friend to keep, or lent to him for use, or left in the custody of a warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell ; or they may be pawned for money lent, with or

1. *D.V. Corporation v. State of Bihar*, A.I.R. 1957 Pat. 194.

2. See Law of Bailment by Sir Williams Jones, p. 1, Chitty on Contracts, 23rd edn., Vol. II, Chap. II, Benjamin on Sale, 8th Edn., p. 165.

3. *Dyer Meakin Breweries v. Commis-*

sioner of Sales Tax, (1972) 29 S.T.C. 69.

4. See *South Australian Insurance Co. v. Randell*, (1869), L.R. 3 P.C. 101 ; *Bentley Brothers v. Metcalfe & Co.*, (1906) 2 K.B. 548.

5. *South Australian Insurance Co. v. Randell*, (1869) L.R. 3 P.C. 101.



without a power to sell them, or let out to hire. In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only; and when any goods are *bailed*, the property still remains in the bailor.<sup>1</sup> The possession of the goods, however, is evidently for the time being with the bailee. But if, while goods are in bailment, a third person should become possessed of them and should wrongfully convert them to his own use, the right to recover possession will in some degree depend upon the nature of the bailment.<sup>2</sup>

#### (10) Sale distinguished from agency.

A contract of sale may really be a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal, though the agent may have a lien for his remuneration and other charges incurred by him. In such cases it is immaterial how the contract is described. The real point for consideration is whether the agent is to sell or buy on his own behalf or on behalf of another person; in the latter case it would be a contract of agency only. Each case, of course, may be decided on its own facts, though sometimes the distinction between a contract of 'sale or return' and a *del credere* agency is very fine. The true relationship of the parties has to be gathered as an inference of fact from the nature of contract, its terms and conditions and the terminology used by the parties is by no means decisive of the legal relationship.<sup>3</sup>

It may be noted that as against an agent there could be no action for price or for damage for non-acceptance or non-delivery, but there could be an action for accounts for proceeds of sale effected by him or for damage suffered by the principal for the agent not carrying out instructions. The essence of sale is the transfer of the title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of the goods as a debtor for the price to be paid and not as agent for the proceeds of the resale. The transferor is not concerned with any subsequent fluctuations in price and loss or gain to the goods. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and therefore entitled to control their sale, as for instance, to fix their price, to dictate the terms of re-sale or to re-sell the goods. He cannot demand the price of the goods before re-sale but only such proceeds as accrue to him on such re-sale. Whereby the terms of the contract between the Government of Mysore and a company, the company was appointed the selling agents of oil manufactured by the Government, bound to keep regular books of accounts of all oil received or sold, to remit the sale proceeds less commission to the Government Bankers liable for all moneys recoverable on sales effected without raising any question of bad debts and the Government has also the right to the maximum prices at which oil should be sold by the agents, it was *held* that the contract between the parties was one of agency and not of sale.<sup>4</sup>

1. See *Franklin v. Neate*, 13 M. & W. 481; *The Odessa*, (1916) A.C. 145, 158, 159; *Lewis v. Thomas*, (1919) 1 K.B. 319.

2. See *Williams on Personal Property*, 18th Edn., p. 58.

3. See the Author's 'Law of Agency',

p. 21. See also *Ex-parte White* cited below, followed in *Suryaparkasaraya Mudaliar v. Matheson's Coffee Works*, 21 I.C. 322.

4. *Sitaramachar v. Govt. of Mysore*, 8 Mys. L.J. 385.



A person to whom goods are sent to be sold, and who is at liberty to sell them at any price he pleases, he paying a fixed price for them to the owner, is not agent.<sup>1</sup> On the other hand, one who guarantees payment of the price for goods disposed of by him is an agent, for if he were a buyer he would be directly liable for the price, and a man cannot guarantee his own debt.<sup>2</sup>

Where the real effect of a transaction is to transfer to a person all the rights of an owner of property in return for a price the transaction will be deemed to be a sale, though it may be called an agency or guarantee.<sup>3</sup>

Where the plaintiffs were appointed "sole selling agents" for three years for all the bricks manufactured by the defendants, and the latter sought to terminate the agency at the end of two years, it was held that the relationship was one of vendor and purchaser and not that of principal and agent.<sup>1</sup> This was relied upon by the Supreme Court in *Sri T.V.T. & Firm v. Commr. Tax Officer, Rajahmundry* (A.I.R. 1968 S.C. 784, 787) in which it was observed: "As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as an agent for the proceeds of the sale. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract; its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship."

The third Explanation to S. 2 (1) (n) of the **Andhra Pradesh General Sales Tax Act, 1957**, was held not to be *ultra vires* of powers of the State Legislature, with reference to Constitution of India, Art. 245 and Sch. 7 List 2 Entry 54. "As we have already pointed out, the third Explanation to S. 2 (1) (n) of the Act must be interpreted to mean that where there is in reality a transfer of property in the goods by the principal to the agent and by the agent in his turn to the buyer, there are two transactions of sale."

The main test to determine whether a person selling goods supplied by another is his agent is whether he is supposed to be selling his own goods when the time for sale comes or whether he is supposed to be selling the goods of his principal, for the liability of an agent to render account is based on the assumption that he is dealing with money or goods entrusted

1. *Nevil, In re. White, Ex-parte*, L.R. 6 Ch. 397, 40 L.J. Bankr. 73. Cf. *W.T. Lamb & Sons v. Goring Brick Co. Ltd.*, (1922) 1 K.B. 710, C.A. See also *The Kronprinzessin*, (1917) 33 T.L.R. 292 P.C.  
2. *Ex-parte Bright*, (1879) 10 Ch. D. 566 C.A.

3. *Hutton v. Lippert*, (1883) 8 A.C. 309; *Pye v. British Automobile Syndicate*, (1906) 1 K.B. 425.  
4. *Lamb & Sons v. Goring Brick Co.* (1932) 1 K.B. 710; see also *Weiner v. Harris*, (1910) 1 K.B. 285 cited under S. 24 and *Balthazar & Sons v. Abewath*, (1919) 5 Rang. 1 P.C.



to him.<sup>1</sup> In this case an agent of a match factory entered into a contract with a third person to promote sale of matches. The latter was required to pay for the goods before he was allowed to sell them. The profits of the sale apparently went in the pockets of the latter though the agreement was silent on this point. It was held that the latter was not an agent of the former but only a favoured buyer.

In *Rohtas Industries Ltd. v. State*,<sup>2</sup> the assessee, a manufacturer of cement and some other manufacturers, entered into an agreement with the Cement Marketing Company of India. By the term of the agreement the assessee could not sell or deliver any cement to anybody except the Marketing Company, or under its direction. The Marketing Company was bound, if it sold goods, to pay to the assessee at a fixed rate per ton within a fixed time from the date of despatch. It was at liberty to enter into contracts with third parties and to fix its selling prices at its discretion and to receive payment from these third parties at any time it liked. There was also another term in the agreement which provided for the surplus profits made by the Marketing Company being divided among the manufacturers in proportion to the quantity of cement supplied by them to the order of the Marketing Company. It was held: The cement delivered, despatched or consigned by the assessee to the Marketing Company or to its order or in accordance with its direction were sales by the assessee to the Marketing Company and so liable to tax under the Bihar Sales Act, 1944.

It was observed: The essence of a contract of sale is the transfer of title to goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as an agent in a fiduciary capacity for the proceeds of the sale. The essence of agency to sell is delivery of goods to a person who is to sell them, not as his own property but as the property of the principal, and who is therefore liable to account for the sale proceeds.

In *Gordon Woodroffe & Co. (Mad.) Ltd. v. Shaik A. Majid & Co.*,<sup>3</sup> A delivered goods to B for re-sale in the U.K. The price was fixed in the contract of sale. The contract fixed the responsibility for the quality of goods on the seller. Time was made the essence of the contract. It was held that B was not a *del credere* agent of A and the contract was one of sale and not of agency.

Contracts are sometimes entered into by an indent by which one party authorises another to "place orders" on its behalf, the relation being that of principal and agent.<sup>4</sup> In *Holmes Wilson & Co. v. Bato Kristo De*,<sup>5</sup> expression "to purchase yourself or through your agents on my account and risk" was

1. *Firm Phul Chand Nemi Chand v. Aggarwal Battery Manufacturing Co.*, A.I.R. 1938 Lah. 814; see also *Livingstone v. Ross*, (1901) A.C. 327 (P.C.), 70 L.J. P.C. 58 and 191, 82 L.J.P.C. 657 (offer of an agency for sale, distinguished from an offer to sell; *Dixon v. London Small Arms Co.*, (1876) 1 App. Cas. 632 cited at p. 132, (manufacture of goods for his principal by an agent contracted with a contract for the sale of them by an independent contractor). It was held that there was no contract of agency

between the Government and the supplier of arms to the government according to certain specifications.

2. A.I.R. 1958 Pat. 414 : (1958) 9 S.T.C. 248.

3. A.I.R. 1967 S.C. 181.

4. See *Mohamedally v. Schiller Dosogue*, 13 Bom. 470., for a full discussion of law as to indent transactions and the admissibility of custom relating thereto.

5. A.I.R. 1927 Cal. 668 : (1927) 54 Cal. 549.



held to denote an agreement for agency, and wholly inconsistent with the notion that the person to whom it was addressed was invited or entitled to sell his own goods.<sup>1</sup>

When a merchant in one country orders goods to be purchased for him by a commission agent in another country the relation between them is that of principal and agent though the commission agent, when despatching goods to his principal, has some of the rights of a seller e.g. a right of stoppage in transit. When the order has been accepted by the commission agent there was a contract of agency, by which he undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer (from the commission agent to the principal) of the property at the actual cost, with the addition of the commission ; but this superadded sale is not in any way inconsistent with the contract of agency existing between the parties.<sup>2</sup> In *Cassaboglou v. Gibb*<sup>3</sup>, the plaintiff merchant in London gave orders to the defendants, commission agents in Hong Kong, to buy for him ten cases of finest "dry new crop Persian opium." Defendants could not procure the opium ordered and shipped opium of inferior quality. The plaintiff sought to make the defendants liable as vendors for the difference between the market value of the goods ordered and those actually sent ; but it was held that the plaintiff could not treat the defendants as vendor but only as agent who would be liable only for the actual loss sustained by the plaintiff through their negligence. "The contract of principal and agent is not turned into a contract of seller and buyer for the purpose of settling the damages for the breach of duty of the agent." By S. 45(2) of the Act seller includes a consignor or agent who has himself paid or is directly responsible for the price.

In *Mohammedally Pirkhan v. Schiller Dasogue & Co.*,<sup>4</sup> the commission agents were held to constitute themselves as agents to "place orders" i.e. to effect contract of purchase of plaintiffs' account with the manufacturer and that there was no relation of buyer and seller. In *Paul Beier v. Chotalal*<sup>5</sup> it was held that according to the custom of trade in Bombay, when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price nett, free godown including duty, or free Bombay Harbour, and no rate of remuneration is specially mentioned, the firm was not bound to account for the price at which the goods were sold to the firm by the manufacturers ; and it did not make any difference that the firm received a commission or trade discount from the manufacturer either with or without the knowledge of the merchant.

**"Sale"—Commission agent—Purchase for and transfer to principal—No Sale**

A commission agent when he agrees to work for his principal as the latter's agent and to obtain from him the goods which the latter wants,

1. See also *Paul Beier v. Chotalal*, (1904) 30 Bom. 1 and *Dayton Price & Co. v. Rohomotollah*, (1925) 29 C.W.N. 422.  
2. Per Blackburn J. in *Ireland v. Livingstone*, (1872) L.R. 5 H.L. 395, 403.  
3. (1883) 11 Q.B.D. 797.  
4. 13 Bom. 470. See also *Venkatachalam v. P. Iyengar*, 47 M.L.T. 312 ; *Harry*

*Meredith v. Abdulla*, (1918) 41 Mad. 1060 ; Commission agent was allowed to recover damages for breach of contract of sale and *Harilal v. Pehladi Rai*, (1929), 31 Bom. L.R. 508—could resell and recover damages.  
5. (1904) 30 Bom. 1, 23.



undertakes a duty which he has to discharge by purchasing the goods required and supplying them to his principal. The transfer of the goods purchased by him to his customer is an act done in discharge of his duty as an agent. The contract between the principal and the commission agent is not one of sale but of agency, and the transfer of the property in the goods is not a sale within the meaning of the Sale of Goods Act. Such transactions cannot therefore be assessed under Sales-tax Act.<sup>1</sup>

The relevant words of a letter signed by the plaintiff and addressed to the defendants were as follows: "We hereby request you to supply or to instruct your friends abroad to buy for and to ship, if possible, on our account and risk" and then the contract goods were set out with the terms. The defendants wrote to the plaintiff as follows: "We beg to inform you without any engagement on our part that your under-mentioned valued indent has been placed with thanks." It was *held* that the contract between the parties was one of sale and purchase, and that the defendants did not merely act as correspondents passing on the plaintiff's order to persons abroad.<sup>2</sup>

It has been held under the English law that an *award* that one party to the arbitration shall deliver goods to the other being paid a certain sum has not, even though the latter tenders the amount, the effect of transferring the property, unless the former assents to the transfer.<sup>3</sup>

### Contract for supply of goods.

A contract for the supply of goods may and will result in the supply of goods but a supply of goods will not result in the creation of contract for the supply of goods.<sup>4</sup>

### (11) Sub-section (2)—contract of sale may be absolute or conditional.

A contract of sale may be *absolute or conditional*, as the parties may please, as it is consensual. Conditions may be either *contingent* or *promissory* i.e. may be either statements or promises to be made good or performed by the party whom they are made, or collateral events or contingencies there being no promise that the event or contingency shall happen. And conditions of either kind may be *conditions precedent* or *conditions subsequent* or in the terminology of the civil law *suspensive* or *resolutive*, the former suspending the obligations of the promise until the condition is fulfilled and discharging him if it is not fulfilled; the latter providing for the dissolution for the contract on the happening of the specified event. There may be conditions *concurrent* also.

Again, such conditions may be *express*, and in certain cases may be *implied*. In *Taylor v. Caldwell*<sup>5</sup>, the defendant had agreed to give the plaintiff the use of a music hall for the purpose of contract. Before the day of performance arrived, the

1. Panna Lal v. Commr. of Sales-Tax, U.P., A.I.R. 1956 All. 710 : (1956) All. L.J. 619.

2. Radhakissen Mal v. Sohanlal, 47 C.W.N. 86.

3. Hunter v. Rice, (1812) 15 East 100; 13 R.R. 394; see Benjamin on Sale,

8th Edn., p. 4.

4. K. Lakkappa v. N.G. Narasimhegowda, A.I.R. 1954 Mys. 111, with reference to representation of People Act, 1951, S. 7 (d).

5. (1863) 3 B. & S. 826; 32 L.J. Q.B. 164, 129 R.R. 573.



music hall was destroyed by fire, and Taylor sued Caldwell for damages for breach of the contract which Caldwell, through no fault of his own, was no longer able to perform. It was *held* that such a contract must be regarded as 'subject to an implied condition that the parties shall be excused, in case before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' The principle of *Taylor v. Caldwell* was applied in *Howell v. Coupland*<sup>1</sup> to a case where the contract was to sell '200 tons of potatoes grown on land belonging to the defendant in Whaplode.' The potatoes were not in existence at the date of the contract, but the land, when sown was capable in an average year of producing far more than the quantity of potatoes contracted for. There was failure of crop from disease, and the seller could deliver only 80 tons. In an action for non-delivery of the residue, the defendant was held to be excused from further performance, there being an implied condition.

Another example of an implied form providing for discharge in certain circumstances is a contract made by a common carrier. Such a contract usually means that the carrier promises to bring the goods safely to their destination or to indemnify the owner for their loss or injury, whether happening through his own default or not. But his promise is defeasible upon the occurrence of certain excepted risks—the 'act of God' the 'king's enemies', and also injuries arising from defect inherent in the thing carried. This qualification is implied in every contract made with a common carrier and the occurrence of the risk exonerates him from liability for loss thereby incurred.<sup>2</sup>

In *Sannidhi Gundayya v. Illoori Subbayya*<sup>3</sup> the contract was for delivery of bags of rice by railway wagons. Both the parties knew that the Government had imposed wagon restrictions which interfered with easy transport. The defendant was unable to supply according to the contract and pleaded impossibility as a defence. The court held that he was discharged.

In the case of contingent contract, the obligations of one or both of the parties depend on the occurrence or non-occurrence of specified event such as the safe arrival of goods, or upon the existence of a state of affairs at the time when performance is due, or upon the existence of a state of affairs within the promisor's knowledge at the time of making of the contract without there being any *promise* or *statement* by him that the event will happen or that the state of affairs exists or will continue. In this case, if the event does not happen, or the state of affairs does not exist or continue, the non-fulfilment of such condition gives no right of action to the other party, but such party is discharged from liability.<sup>4</sup>

Contracts for the sale of goods 'to arrive' form best illustrations of contingent contracts.<sup>5</sup> The gist of the English law on this point is as follows :

1. (1876) 1 Q.B.D. 258, C.A., See also *Sannidhi Gundayya v. Illoori Subbayya*, A.I.R. 1927 Mad. 89 : (1926) 51 Mad. L.J. 663 : 99 I.C. 459.  
2. See *Lister v. Lancashire & Yorkshire Railway Co.*, (1903) 1 K.B. 878.

3. A.I.R. 1927 Mad. 89 ; 99 I.C. 458.

4. *Jackson v. Union Marine Insurance Co.*, (1874) L.R. 10 C.P. 125, at pp. 144-5.

5. See Benjamin on Sale, 8th Edn., pp. 585 to 590.



"1. Where goods are sold 'on arrival per ship A or ex ship A' or 'to arrive per ship A or ex ship A' the terms import a *double condition precedent viz.*, that the ship named shall arrive, *and* that the goods sold shall be on board on her arrival.

2. The contract may, however, show that the words 'arrival' or 'to arrive' are used only in connection with *the goods*. This is only *single condition precedent viz.* the arrival of the goods.

And *semble* that 'to be shipped', or 'on shipment per ship A on arrival', or 'to arrive', import such a single condition.

3. Where the language asserts the goods to be on board of the vessel named as '1,170 bales now on passage, and expected to arrive per ship A', or other terms of like import, or imports an engagement to ship the goods, there is a *warrant* that the goods are on board, or a promise to ship them, respectively, and a *single condition precedent*, to wit, the arrival of the vessel.

4. The condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the seller, and with which he did not affect to deal; but *semble*, the condition will be fulfilled if the goods which arrive are the same as the seller intended to sell, in the unfounded expectation that they would be consigned.

5. Where the sale describes the expected cargo to be of a particular description, as "400 tons Aracan Necrensie rice," and the cargo turns out on arrival to be rice of different description, the condition precedent is not fulfilled, and neither party is bound by the bargain."<sup>1</sup>

As an instance of condition precedent to the passing of property  
**Condition precedent.** may be taken the case where goods are delivered to the buyer on approval with a stipulation that the property is to pass only on payment of price. Until that is done, there is no completed sale, though the buyer remains in possession of the goods.<sup>2</sup> When goods are not in a deliverable state or not ascertained, the property passes only when certain other conditions are fulfilled, *e.g.* measurement, appropriation, etc.

Condition precedent must be strictly fulfilled before performance can be required from the other. But it may be waived. Where the condition is one inserted for the benefit of the parties, it may only be waived by mutual agreement. But the necessity for performing the condition precedent may be *waived* by the party in whose favour it is stipulated, either expressly or tacitly, by inference from his acts or conduct. This waiver is implied by law in all cases in which the party entitled to exact performance either hinders or impedes the other *party* in fulfilling the condition or incapacitates *himself* from performing his own promise, or absolutely refuses

1. Benjamin on Sale, 8th Edn., p. 590; see authorities cited on pages 585 to 590, on which this gist is based.

2. *Re Anglo-Russian Merchant* (1971) 2 K.B. 679; condition as to obtaining license for sale. See *Eisen v. McCabe*,

(1920) 57 Sc. L.R. 534 H.L. sale of timber subject to license. See also *Hardy & Co. v. Pound & Co. Ltd.*, (1955) 1 All E.R. 666—Licence necessary for export—whether buyer's or seller's duty to obtain,



performance, so as to render it idle and useless for the other to fulfil the condition.<sup>1</sup>

Thus, in *Mackay v. Dick*<sup>2</sup>, the defender agreed to buy for £ 1,115 a steam excavator, on the condition that it should be found capable on a fair trial of excavating 350 cubic yards of clay a day on a properly opened-up "face" of a certain railway cutting which the defender was constructing, and the defender failed to provide a properly opened-up face, as it was his part to do, notwithstanding repeated requests of the sellers, in consequence of which the machine was never fairly tried, and broke down. *Held*, that the defender was bound to pay for the machine as the sellers had implemented the condition of trial to the best of their ability, and the defender must be held to have waived the condition.

And if a party waives a condition in his favour, he must give reasonable notice if he intends to insist upon it in the future. In *Tyres v. Rosedale Iron Co.*<sup>3</sup>, the defendants were the sellers and the plaintiffs the purchasers of iron, deliverable in monthly quantities over 1871. The defendants withheld delivery of various monthly quantities at the plaintiff's request. Afterwards, in December, 1871, *the last month* for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for non-delivery the defendants pleaded; (1) that the plaintiffs were not ready and willing to accept the iron, and (2) that there was a mutual rescission of the contract to the extent of the iron undelivered during the months of postponement. *Held*, that the defendants remained liable to deliver the whole balance at some reasonable time, and not having asked for such reasonable time, they had no defence to the action.

Where the seller agrees to sell goods to be delivered by instalments on the condition that the buyer shall give security for the price, and delivers the first instalment before such security is given, he is not entitled to refuse delivery of the second instalment, on the ground that the condition has not been complied with by the buyer without giving the buyer reasonable notice of his intention to insist upon the performance of the condition.<sup>4</sup>

Thus, where the condition is divisible, to be fulfilled from time to time with reference to separate acts of performance by the other party, a waiver can be recalled, and the condition be insisted on in the future; but subject to this that the party waiving cannot repudiate the contract without reasonable notice to the other to enable him to fulfil the condition in future.

In the second class of cases conditions may be either statements or promises to be made good or performed now or in future by the party by whom they are made. In the case of contracts containing reciprocal promises, where the due performance of his contract by one party is the entire

1. See Benjamin on Sale, 8th Edn., p. 558.

2. (1881) 6 A.C. 251 H.L. (Sc.); see also *Colley v. Overseas Exporters* (1921) 3 K.B. 302 at p. 307, observations of McCardie J.

3. (1875) L.R. 10 Ex. 195; 44 L.J. Ex. 130 (Ex. Ch.).

4. *Panoutsos v. Raymond Hadley Corporation of New York*, (1917) 2 K.B. 473 (C.A.); 86 L.J. K.B. 1325.



consideration for the promise by the other party, performance of the promise first-mentioned is a condition precedent. In such cases the promise to be performed, or statement to be made good by the party making it, is a promissory condition and its non-fulfilment not only relieves the other party from all his obligations under the contract, but may also give him a right of action.

A *representation* is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it. A representation, even though contained in a written instrument, is *not an integral part of the contract*. Consequently it follows, that even if it be untrue the contract in general is not broken, nor is the untruth any cause of action unless made *fraudulently*<sup>1</sup> or unless it be material, in which case its untruth may justify a rescission of the contract.<sup>2</sup> The false representation becomes a fraud when the untrue statement was made with a knowledge of its untruth, or without belief in its truth, or recklessly with a carelessness whether it were true or false.<sup>3</sup> Whenever it is determined that a statement is a substantial part of the contract, then comes the question, is it a *condition precedent*? Or is it an *independent agreement*, breach of which will not justify a repudiation of the contract but only a cross-action of counterclaim, for damages? Or in other words, we have to ascertain whether the term that has been broken is to be regarded, as a 'condition' or as a 'warranty'.

For deciding the intention of the parties the whole contract must be looked at in the light of the surrounding circumstances.

In *Hopkins v. Tanqueray*,<sup>4</sup> the plaintiff bought a horse sold at auction without warranty. On the day before the sale, while the plaintiff was examining the horses at stable, the defendant said to him: "You have nothing to look for. I assure you he is perfectly sound in every respect." To this the plaintiff replied: "If you say so, I am satisfied" and desisted from the examination. The horse was unsound. There was no proof that the seller knew it. It was held that this antecedent representation was *no part of the contract* which was made by the buyer when he bid for the horse; that it was therefore a representation of the seller's opinion and judgment, for which he could not be made responsible, if he were honest.

In *Bannerman v. White*,<sup>5</sup> the sale was of hops by Bannerman to White. There was known objectionable practice of using sulphur in their growth. White asked if any sulphur had been used in the treatment of that year's growth. Bannerman said 'no'. White said that he would not even ask the price if any sulphur had been used. White after settling the price purchased by sample the growth of that year. The delivery corresponded with the sample, and the buyer took possession, but afterwards rejected the contract on discovering that sulphur had been used. Bannerman sued for the price. It was proved that he had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine and had afterwards mixed the whole

1. *Derry v. Peek*, (1889) 14 A.C. 337.  
58 L.J. Ch. 864.

2. See Benjamin on sale, 8th Edn., p. 554.

3. *Derry v. Peek*, (1889) 14 A.C. 337.

4. (1884) 15 C.B. 130.

5. 10 C.B. (N.S.) 844; 31 L.J. C.P. 28;  
128 R.R. 953.



growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made as to the use of sulphur was not wilfully false, and they further found that 'the affirmation that no sulphur had been used as intended by the parties to be part of the contract of sale, and a warranty by the plaintiff.' It was *held* that the defendants required, and that the plaintiff gave, his *undertaking* that no sulphur had been used. This undertaking was a *preliminary* stipulation ; and if it had not been given the defendants *would not have gone with the treaty* which resulted in the sale. The plaintiff had not fulfilled the condition, and could not enforce the sale. Erle C.J. observed :

The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty super-added; or the sale may be conditional, to be null if the warranty is broken. And upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used ; and upon this ground we agree that the rule should be discharged.

In *Behn v. Burness*<sup>1</sup>, action was brought upon a charter party dated 19th day of October, 1850, in which it was agreed that Behn's ship 'now in the port of Amsterdam' should proceed to Newport and there load a cargo of the coals which she should carry to Hong Kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23rd. When she reached Newport, Burness refused to load a cargo and repudiated the contract. Thereupon action was brought and it was *held* that the words 'now in the port of Amsterdam' associated to a condition the breach of which entitled Burness to repudiate the contract.

In determining whether a representation or statement is a condition or not, the rule laid down by Lord Mansfield, in *Kingston v. Preston*,<sup>2</sup> is "that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." The general rule is that where, from a consideration of the whole instrument it is clear that one party relied upon his remedy and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent.<sup>3</sup>

*See further notes under section 12 post.*

The rules relating to contracts in general are laid down in sections 51 to 55 of the Indian Contract Act, and in so far as they apply to contracts of sale of goods will be noticed in the Sale of Goods Act under appropriate sections.

Sections 14 to 17 of the Act lay down conditions which are implied upon the part of the seller.

If the case of a conditional promise properly so-called, namely, where the promisor's obligation becomes effective only if some state of fact exists or if and when some further event happens, his agreement is said to be subject to condition precedent. When goods are sold by weight or

Conditions precedent, concurrent and subsequent.

1. (1863) 3 B. & S. 751 ; 124 R.R. 794.

2. (1773), cited in *Jones v. Barkley*, (1781) 2 Doug. 685.

3. Per Jervis, C.J. in *Roberts v. Brett*, (1856) 18 C.B. 561, 25 L.J.C.P. 280.



measure, the weighing and measuring are suspensive conditions and if goods be sent on approval, the approval of the buyer constitutes a suspensive condition. Another class of promise is in which the promisor's duty is perfect to its inception, but latter events, according to express or unexpressed terms of the agreement, may dispense him from performance wholly or in part. In such cases, the agreement is said to be subject to a condition subsequent. Thus if goods be sold by auction with a condition that they may be resold if not paid for within twenty-four hours, the condition is resolute.<sup>1</sup>

In *The Vesta*<sup>2</sup> there was a clause in the contract which gave purchasers a right to reject the goods if they found them unsuited to their manufacturing business. It was held that the contract, truly construed, provided for a sale out and out to the buyers and consequent passing of the property to them on delivery to them, with a supplementary option to the buyers in a certain event to require the sellers to buy back the goods at a price agreed.

If A and X agree that the performance of their respective promises shall be simultaneous or at least that each shall be ready and willing to perform his promise at the same time, then the performance of each promise is conditional on this concurrence of readiness and willingness to perform; the conditions are *concurrent*. Thus in sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time. The promises are interdependent and conditional upon each other, so that if A fails to deliver, X may not only sue for damages but may also refuse to pay.

As contract of sale may be conditional, the parties may attach such consequences as they see fit to the non-fulfilment of the condition. They may stipulate that in the event of non-fulfilment both parties shall be discharged from their obligations, or that the seller shall not be bound to deliver or that the buyer shall not be bound to pay the price.<sup>3</sup>

In some cases the parties agree that on the happening of a certain event the contract will be void and the parties will be excused from making payment of taking or giving delivery. In *New Zealand Shipping Co. v. Societe des Ateliers etc.*,<sup>4</sup> contract with the builder of a ship became void (not voidable) in consequence of the builder becoming engaged in war. The stipulation that "the contract shall become void" was held to be a stipulation in favour of both parties or the contract was voidable at the option of either party, provided it was not brought about by any wrongful act or default of the party.<sup>5</sup> When the contract provided that if the seller did

1. See *Lamond v. Davall*, (1847) 9 Q.B. 1030; *Head v. Tattersall*, (1871) 7 L.R. Ex. 7.

2. (1921) 1 A.C. 774. See also *Newington v. Levy*, (1870) L.R. 6 C.P. 180; *Key v. Cotesworth*, (1852) 7 Ex. 595.

3. *Calcutta Co. v. D. Maltos* (1863) 22 L.J. Q.B. 322, at p. 328. See *Chalmers, Sale of Goods Act*, 16th

Edn., pp. 55, 56.

4. 1919 A.C. 1, 12.

5. *Nusservanji v. Volkart*, (1888) 13 Bom. 15; contract to become null and void on the ship being lost. *Hayward v. Scougate*, (1809) 2 Camp. 56; *Convas v. Bingham*, (1853) 2 E. & B. 836; price payable in any event *Hale v. Rawson*, (1858) 4 C.B.N.S. 85.



not carry out the contract the only result would be that the contract would be cancelled but that he would not be liable for damages, it was *held* not to be competent to the seller to simply refuse to carry out the contract, but he must adduce reasons justifying the refusal.<sup>1</sup> The stipulation in the contract, *viz*, "to cancel or not to cancel the sold goods for any reason depends solely upon you" did not destroy the mutuality necessary for the formation of a contract, and the party determining the contract must assign good reasons for doing so.<sup>2</sup>

A clause in an agreement for the purchase and sale of cotton provided that no suit in regard to any matter arising out of the transaction be instituted in any court save the High Court, Bombay or the Court of Small Cause at Bombay. The transactions under the contract were to be subject to the rules and regulations of the East Indian Cotton Association, under which the disputes had to be referred to arbitration. It was *held* that the clause referring to the institution of suit had no operation unless a suit was filed, in which case the court was defined and the clause in question did not oust the provision requiring arbitration under the rules and bye-laws of the East Indian Cotton Association or affect reference of disputes to arbitration.<sup>3</sup>

#### (12) Cases where general property is not transferred.

A mortgage is sometimes drafted in the form of a sale with a condition of re-sale to the seller on payment of the price paid originally, sometimes with certain additional amount as interest and sometimes without any such additional amount, the use of the article being counted as interest.<sup>4</sup> Similarly, goods are sometimes delivered or bailed in order to secure the payment of a debt but the form given to the transaction appears in the garb of a contract of sale.<sup>5</sup> So also goods are sometimes hypothecated as security of a debt but the apparent form of the transaction is that of sale.<sup>6</sup> As section 66 (3) of the Act excludes the operations of the provisions of the Act on such transactions, it is necessary always to distinguish between a contract of sale and of these contracts.

Where money is lent upon the security of goods the transaction may take one of two forms. The security may be transferred in possession of the lender to hold until the money is repaid, being *pawned* or *pledged*, or the borrower may retain the possession of the security and transfer the property in it to the lender, to the intent that if the money be repaid, the property shall be re-transferred and if it be not repaid the borrower shall give up the possession, as well as the property, to the lender, the transaction being one of mortgage.

1. *Chunilal v. Ahemedabad Fine Spg. Co.*, (1922) 24 Bom. L. R. 295.
2. *Chotelal v. Champesy Umersey & Sons*, A.I.R. 1923 Bom. 75 : (1922) 24 Bom. L.R. 877.
3. *Patel Bros. v. Shree Meenakshi Mills Ltd.*, A.I.R. 1924 Bom. 239.
4. *Keith v. Burrows*, (1876) 1 C.P.D. 722 (731) ; *Re Hardwick Exp. Hubbard*,

- 17 Q.B.D. 690 (698), C.A. ; *Re Morritt Exp. Official Receiver*, 18 Q.B.D. 222 (232) C.A.
5. *Story on Bailments*, 557 and 586 ; *Blundel Leigh v. Attenborough*, (1921) I.K.B. 383 (389).
6. *Exp. North Western Bank*, L.R. 15 Eq. p. 72 ; *Ladenburing & Co. v. Goodwin*, (1912) 3 K.B. 275.



A mortgage is sometimes called a conditional sale, but as Cave J., has pointed out, a sale with a condition for re-sale to the original seller need have nothing to do with a mortgage.<sup>1</sup> Mortgage is expressly excluded from the operation of the Act by section 66 (3).

A mortgage differs from a sale in that the transfer is defeasible upon performance by the mortgagor of the condition of mortgage. The Sale of Goods Act by S. 66 (3) excludes mortgage from the operation of the Act.

In *Backer v. Ahmed Esmail*<sup>2</sup>, it was held that a purchaser of goods from the mortgagor in possession in good faith takes the same free from mortgage. The case was decided under S. 108 of the Contract Act.

The essence of a contract of sale is the transfer of general property in goods for a price.<sup>3</sup> The essence of a contract of mortgage is the transfer of special property in goods from mortgagor to mortgagee in order to secure a debt. Transfer of property is common in both but in sale it is the transfer of general property nothing being reserved by the transfer while in mortgage it is the transfer of special property the transferor reserving for himself a right to take the goods back on payment of the debt to secure which the goods are transferred. Similarly, a buyer acquires full ownership to the property sold while in the case of mortgage the mortgagee has only a limited right of using it for the time being as the owner would have done but no power of disposition unless and until the time fixed for its redemption expires or until he becomes entitled to breach of a condition by the mortgagor to sell or get it sold under the terms of the mortgage.

There are obviously two criterions whether a particular transaction is a mortgage or sale. First is to see whether what is transferred is the general property—full ownership in the goods without any reservation or only a special property authorising the transferee to acquire full ownership only on failure of the transferor to fulfil certain conditions. The second criterion is to see whether the consideration for the transfer is payment of a price or advance of a loan or more appropriately whether the purpose of the transfer is the acquisition of the full value of the subject-matter or only the securing of a debt.

A pledge is also expressly excluded from the operation of the Act by section 66 (3). A pledge differs from a mortgage—  
**Pledge.** (1) because the mortgagor may retain possession, while a pledge must be delivered to the pledgee ; (2) because the mortgagee obtains the general property in the goods, while the pledgee only obtains a special property necessary to secure his rights.<sup>4</sup>

“A pledge of personal chattels as a rule must be accompanied by delivery of possession. It is out of the possession given him under the contract that the pledgee’s rights spring. A mortgage of personal chattels involves in its essence, not delivery of possession, but a conveyance of the title as a security for the debt. A mortgage of personal chattels may, however, be accompanied with the transfer of possession ; and mortgage of personal chattels in case where possession is retained by the mortgagor

1. *Beckett v. Tower Assets Co.*, (1891) 1 Q.B. 1 at p. 25. See also *Williams v. Burgess*, 10 Ad. & El. 499 ; *Shaw v. Jeffrey*, 13 Moo. P.C.C. 432.

2. (1927) 5 Rang. 633—cases considered.  
 3. *Halsbury*, Vol. 34 (3rd Edn.) pp. 6, 10.  
 4. See *Chalmers, Sale of Goods Act*, 16th Ed., p. 58.



may, and commonly do, provide that on default the mortgage may take that possession which is until default, withheld from him."<sup>1</sup>

In the absence of express agreement as to the sale of pawned goods, the pawnee has the power of sale where a day has been fixed for payment of the amount due and default has been made in payment at the time appointed ; where no day has been fixed for payment, the pawnee has no power to sell without proper demand and notice, but it seems that after such demand and notice he may sell.<sup>2</sup>

In India a mortgage of goods and a pledge have the same meaning so far as their legal consequences are concerned, as mortgage has always been regarded as transferring only a special official property and not the general property of full ownership.

*See also notes under section 66(3).*

Here the property in goods charged for the payment of money remains with the hypothecator who also retains possession of them.<sup>3</sup> Hypothecation of goods has been recognised in this country though there is no provision in the Contract Act to this effect.<sup>4</sup>

The description of the parties of buyer and seller in the contract does not necessarily make the contract one of sale if the intention of the seller was not to transfer the general property to buyer.<sup>5</sup>

In *Bowes v. Foster*<sup>6</sup>, there was a pretended sale to defeat the creditors. It was held that the property in the goods did not pass to the buyer and seller was not precluded from showing that the transaction was not real but a pretended sale.

### (13) Sub-section (3)—sale and agreement to sell distinguished.

Sub-section (3) brings out a clear distinction between the two classes of contracts, viz., actual sales and agreement for sale. An agreement to sell or an *executory* contract of sale, as is often called in English law, is a contract pure and simple and no property passes ; whereas a sale or as it is called for distinction, an *executed* contract of sale is a contract plus a conveyance. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* also is transferred.

In *State of Bombay v. United Motors (India) Ltd.*<sup>7</sup>, the Supreme Court observed : The expression "sale of goods" is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing, there is no sale. The following are some of them :

1. Per Cotton L.J. In re Morritt (1886) 18 Q.B.D. at p. 232.
2. Johnson v. Stear, 15 C.B. (N.S.) 830 ; Pigot v. Cubley, ibid 701. The Odessa, (1916) A.C. 145, 158, 159.
3. See Shrish v. Mungri, (1904) 9 C.W.N. 14.
4. Narasiah v. Venkataramiah, (1918) 42

- Mad. 59—the bona fide purchaser is not affected by hypothecation.
5. See Weiner v. Harris, (1910) 1 K.B. at p. 290.
6. (1858) 2H. & N. 779.
7. A.I.R. 1953 S.C. 252 : (1953) S.C.R. 1069.



(1) the existence of goods, which form the subject-matter of the sale, (2) the bargain or contract which, when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title. In *Poppatlal Shah v. State of Madras*<sup>1</sup> also the Supreme Court observed : The expression "sale of goods" is a composite expression consisting of various ingredients or elements. Thus, there are the elements of a bargain or contract of sale, the payment or promise of payment of price, the delivery of goods and the actual passing of title, and each one of them is essential for a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property. The word "sale" in its legal sense imports passing of property in the goods and it is in this sense that the word is used in the Sale of Goods Act. In the popular sense, however, it signifies the transaction itself which results in the passing of the property.<sup>2</sup>

In *Sahadeo Singh v. Kuber Nath*<sup>3</sup>, the Allahabad High Court held : There is a well-understood distinction between a contract for sale and a contract to sell or for sale. The former is an executed contract and the latter is an executory contract. Sale creates a *jus in rem* as it passes ownership immediately when it had been executed, while a contract to sell is *jus ad rem*, for it only creates an obligation attached to the ownership of property not amounting to an interest therein. It is not always that ownership passes on the execution of a deed of sale ; when the ownership passes is a question of intention of the parties. They may intend that ownership would pass not immediately on execution of the deed, but on a subsequent date on the happening of a certain event. This postponement of the passing of title does not convert a contract to sell into a contract for sale. The criterion to decide whether there is a sale or merely a contract for sale is whether another deed would be required to pass the title or ownership. Under the Transfer of Property Act there must be a deed transferring ownership of immovable property which is not in the vendor's possession. If there is only a contract for sale, no ownership would be transferred unless another deed for sale is executed. A contract for sale simply gives a right to the contractee to a deed of sale. But in the case of a sale with postponed transfer of title that deed itself transfers the title on happening of the particular event and another deed to transfer it is not required and would even be meaningless.

In *Madholal v. Official Assignee of Bombay*<sup>4</sup>, A who was indebted to a certain bank pledged shares of a company held by him with the bank with power to the bank to sell them. A notice of demand was sent to A by the bank in April 1940. A who had no means to meet the demand saw B, the Chairman of the bank, who agreed to take over liabilities and securities of A. On 6th July, 1940, B sent his offer to the bank about A's shares and the bank accepted the same on 10th July, 1940. Bank

1. A.I.R. 1953 S.C. 274 : (1953) S.C.R. 677.

2. See Public Prosecutor v. Sannidhi Srinanganayalkulu, A.I.R. 1949 Mad. 679—A sale would nonetheless be a sale though the purchase price was not immediately paid, on the delivery of the goods. See too *Indian Sugars and*

*Refineries v. Mysore State*, A.I.R. 1968 Mys. 332—Price is an essential element of contract of sale though it may come into existence even where price is not fixed by contract between the parties.

3. A.I.R. 1950 All. 632.

4. A.I.R. 1950 F. C. 21.



contacted A on telephone and later on 12th July, 1940, informed A by a letter about the transfer and that he had ceased to be liable to the bank. B executed necessary documents in favour of the bank and necessary entries were made in bank's register in the accounts of both A and B. It was contended that no sale took place as there was conspiracy between A and B to execute these documents and there was no intention to give effect to them. It was *held* that the documents in the case clearly evidenced a concluded sale of shares in favour of B and it could not be imagined that all these things happened as result of conspiracy.

In *Daya Shankar Mehrotra v. Union of India*,<sup>1</sup> it was *held*: There was sale of gram dal to Government at quoted rates, property in the goods passing to the buyer only after the goods were inspected and approved. Notification by Government fixing price of dal was issued before the goods were inspected and approved and accepted. It was held that the transaction was an agreement to sell till goods were approved. Notification applied to the contract of sale so that price was payable according to the notification and not according to the quoted rates.

If trees are sold with the object of being cut and removed within a reasonable time, it is a sale of moveable property; if, on the other hand, there is a transfer for the period during which the transferee is entitled to appropriate the produce, it is not a transfer of timber but a lease of immoveable property.<sup>2</sup>

The distinction is important in more ways than one. Where there is only an agreement to sell, the goods which form the subject-matter of the contract remain the property of the seller till the contract is executed by passing the property at some future time or subject to the fulfilment of some condition and he can dispose them of as he likes; they may be taken in execution of his debts, and if he becomes bankrupt, they pass to his trustee in bankruptcy. Where an agreement to buy is broken, the seller's normal remedy is an action for unliquidated damages.<sup>3</sup> If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller and may sue for damages. If there be an agreement for sale and the goods are destroyed, the loss, as a rule, in the absence of express agreement, will be borne by the seller.

On the other hand, where there is an actual sale, the property in the goods forming subject of the contract passes to the buyer under the contract, that is to say, the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller. If the buyer makes default, the seller may sue for the contract price. If there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also the usual proprietary remedies in respect of the goods themselves, such as the action for conversion and detinue. In many cases, too, he can follow the goods into the hands of third parties.<sup>4</sup> In the case of sale, if the goods are destroyed, the loss unless otherwise agreed, falls upon the buyer, though the goods have never come into his possession; they are liable to satisfy his creditors. On the other hand, he is entitled to

1. (1966) 68 P.L.R. 57 (Delhi Branch).  
2. *Dan Singh v. Firm Janki Saran Kailash Chandar*, A.I.R. 1948 All. 396.  
3. For an exception, see section 55 (2) post (price payable on a day certain

irrespective of delivery.)  
4. *Chalmers, Sale of Goods Act*, 16th Edn., p. 59. Ss. 55, 56, 57 and 58 of the Act.



all accretions and profits incident to the goods, and has, subject to any special contract in that behalf with the seller, full power to deal with them.<sup>1</sup>

When the purchaser obtains the goods under the terms of the agreement, the sale becomes complete. When the goods agreed to be sold are not the existing property of the seller, the beneficial interest (but not the legal property) passes to the buyer without further conveyance the moment they come into being, if they can be then identified as the goods agreed to be sold,<sup>2</sup> and the agreement need not so specifically describe the goods as to make them easily identifiable; it suffices if, on coming into existence, they answer the description in the agreement so as to be capable of being identified as the goods assigned.<sup>3</sup>

The result is, therefore, that save as against a transferee who acquires the legal interest for value and without notice of the prior equitable interest, the mere agreement to sell transfers the property in the goods to the purchaser. To get a title against everybody, the purchaser must acquire the legal interest as well.<sup>4</sup>

The passing of the property in the goods is of paramount importance in two respects. Firstly, as between the parties, the risk *prima facie* passes with the property under S. 26 of the Act, and the passing of the property may determine their right of action, e.g., whether, where no time for payment is specified, the seller should sue for the price or for damages for non-acceptance (See Ss. 55, 56). Secondly, the rights of purchaser from the buyer, trustees in bankruptcy, and other third parties may stand or fall upon the fact of the passing of the property to the buyer.

A sale would be deemed complete when the goods sold are accepted by the buyers (customers) and the sale price is received by the seller (*Hindustan Handloom Factory v. Firm Rameshwar Dayal Sadhu Ram*, 1974 Cur. L.J. 577). Under the Act, normally a transaction of sale is effected only where in pursuance of a contract of sale the transfer of the property in the goods takes place on payment of price. There are exceptions to this rule. Sections 19 to 24 of the Act embody cases of exception (*Madanlal Agarwala v. Union of India*, 1974—I C.W.R. 365).

In *C.S. Bureau v. I. T. Commissioner*, W.B., A.I.R. 1973 S.C. 376, 379, the Supreme Court held: It cannot be disputed that sale by an auction is a sale as contemplated by the Sale of Goods Act, 1930 (3 of 1930). Section 4 of that Act provides, *inter alia*, that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called sale. Further, according to Section 64 of that Act, in the case of sale by auction where the goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.

1. See Benjamin on Sale, 8th Edn., pp. 297, 386, and the authorities cited thereunder.  
2. *Holroyd v. Marshall*, (1862) 10 H.L. Cas. 191.

3. *Tailby v. The Official Receiver*, (1888) 13 App. Cas. at p. 53.  
4. *Joseph v. Lyons*, (1885) 15 Q.B.D. 280.



When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory contract *i.e.*, an agreement to sell. **Goods not specified.** "If A buys from B ten sheep generally, to be delivered hereafter, or ten sheep out of flock of fifty, whether A is to select them, or B is to choose which he will deliver, or any other mode of separating the ten sheep be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract*; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B, and to become the property of A."<sup>1</sup> "Till the parties are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the seller would fulfil his part of the contract by furnishing any parcel of goods answering that description, the buyer could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold."<sup>2</sup>

But, on the other hand, the goods sold may be specific, that is **Specific goods.** "identified and agreed upon, at the time a contract of sale is made," and in this case it is competent for the parties to transfer the property by the contract itself. This is what is often called a "bargain and sale" or an executed contract of sale.

In *D.S. Sahni v. Faqir Singh*,<sup>3</sup> the appellant appointed the respondent his agent for sale of tractors, diesel engines, etc. on a commission of 2½ per cent, on the price of goods sold in the State of Jammu and Kashmir. A contract for sale of the tractor was obtained by the respondent as the agent of the appellant on 20-3-1954. In pursuance of this contract the tractor was actually supplied to the purchaser on 25-3-1954 but the period of agency of the respondent had terminated on 24-3-1954. It was *held*: The tractor in question undoubtedly fell within the definition of 'specific goods' and was in a 'deliverable state'. **Unconditional contract of sale of specific goods in deliverable state.** The contract of sale was unconditional in character. It was, therefore, beyond doubt that the property in the tractor passed to the buyer when the contract of sale was made on 20-3-1954 by the respondent as the agent of the appellant. The mere circumstance that the tractor was physically delivered to the buyer only on 25-3-1954 could not have the effect of postponing the passing of the property in it to the buyer. It followed that under the contract of sale, dated 20-3-1954, the property in the goods was transferred from the seller to the buyer, and consequently there was a sale in the eye of law on that date. The respondent was therefore, clearly entitled to the stipulated commission on the sale of the tractor which took place on 20-3-1954.

Further, the contract concluded by the respondent with the buyer was the basis for the sale. The respondent established the relation of vendor and purchaser between the parties, and it was in pursuance of this relation that the sale took place. It was the agent who not only negotiated the sale and induced a contracting mind in the buyer, but also actually concluded a binding and enforceable contract for the benefit of his principal.

1. Benjamin on Sale, 8th Edn., p. 298 ;  
see also section 18 of the Act.

2. Blackburn on Sale, 3rd Edn., p. 132.  
3. A.I.R. 1960 J. & K. 6.



In the circumstance, it was not valid answer for the principal to turn round and say that at the time of the actual sale of goods the agency had terminated. Hence even if it was held that the actual sale took place after the agency had terminated by efflux of time, the agent was entitled to his commission. It was a matter of convenience for the parties to arrange when or where he took delivery of the goods in respect of which the property had already passed to the buyer. In such a case it was erroneous to assume that delivery alone brought about the sale.

In *Manoharlal v. State of M.P.*,<sup>1</sup> by three unregistered documents, the plaintiff purported to acquire from the proprietors of certain villages for consideration the right to rear and pluck for some years myrobalan in their forest and to take away the myrobalan so obtainable. By virtue of the provisions of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, the villages vested in the State Government who thereafter had all myrobalan obtainable from the forests of those villages auctioned in favour of third persons. Thereupon the plaintiff served the usual notice to and filed a suit against the State Government for compensation. It was *held* : The transactions which the plaintiff made with the several proprietors were merely executory contracts of sale or agreements to sell under sub-section (3) of S. 4 of the Sale of Goods Act, 1930. Since the property in the goods forming the subject-matter of the several contracts had not passed, the contracts created only a *jus in personam* and not a *jus ad rem* as in the case of an actual sale, which is often called a bargain and sale. That being so, the plaintiff had no proprietary remedies in respect of the subject-matter of the contracts. Also the defendant (the State Government) who was not a party to those contracts, was not bound by them. In this view of the matter, the claim for compensation against the defendant must fail on this ground.

It was observed in the above case : Goods are in potential existence when they are the natural product, or expected increase, of something owned or possessed by the seller at the time of the contract. Even if the concept of the potential existence of goods, the implications of which have not received universal acceptance, be imported into India it is obvious that the property in such goods passes only when they come into existence. This has to be considered in the light of the Indian Statute law to determine whether a transaction involving the sale of goods, having potential existence, should be regarded as a sale of goods or merely an agreement to sell.

It is clear from sub-section (3) of S. 4 of the Sale of Goods Act that there can be no sale of goods until the property in the goods is transferred to the buyer. The words 'where the transfer of property is to take place at a future time' are not restricted in operation to future goods in respect of which there is a specific provision in sub-section (3) of S. 6. So far as the question of the passing of the property in the goods is concerned, it makes no distinction between potentially existing goods and other future goods and lays down in effect that there can be no present sale of goods in potential existence because the property in such goods cannot be transferred until they are in existence.

1. A.I.R. 1959 M.P. 120.



Whether a contract amounts to actual sale or an agreement to sell depends on what the parties intended to make it. If that intention be clearly and unequivocally manifested, *cadit quaestio*, but as the parties frequently fail to express their intentions, or they manifest them imperfectly, certain rules have been laid down by which the intention of parties may be ascertained, and in most instances these furnish conclusive tests. These are contained in sections 18, 20 to 22, 24 and 25 of the Act.

When there has been no manifestation of intention, the law presumes that the contract is an actual sale if the specific thing be agreed on, and it be ready for immediate delivery ; but that the contract is only executory when the goods have not been ascertained,<sup>1</sup> or if, when ascertained, something remains to be done to them by the seller, either to put them into a deliverable state,<sup>2</sup> or to ascertain the price.<sup>3</sup> "In the former case, there is no reason for imputing any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of those things, as a condition precedent.<sup>4</sup> Of course, these presumptions yield to proof of a contrary intent (reference is to specific goods), and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the seller's possession and is not ready for delivery, as an unfinished ship or which has not yet been weighed or measured as a cargo of corn, in bulk, sold at a certain price per pound or per bushel."<sup>5</sup>

It has been *held* that it is not open to a party to take up for the first time in appeal or revision, the plea that an agreement is not a sale but only an agreement to sell when there has been no suggestion of it in the trial court.<sup>6</sup>

In *Gannon Dunkerley & Co. v. State of Madras*<sup>7</sup>, it was *held* : 'Sale of goods' means a contract, whereby the property in the goods is actually transferred by the seller to the buyer. It is not an executory contract but an executed contract and the transfer of the property in the goods is for a price *i.e.* for money consideration. As price is an essential element of a contract of sale, barter is ruled out from a transaction of goods. The subject-matter of the contract of sale may be either existing goods or future goods. Goods may be ascertained goods or unascertained goods; property is not transferred in the case of unascertained goods until the goods are ascertained and appropriated to the contract while in the case of specific or ascertained goods, the property is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Affirming this decision, the Supreme Court observed in *State of Madras v. G. Dunkerley & Co.* (A.I.R. 1958 S.C. 560, 566) : "Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring

1. Section 18 of the Act.

2. Section 21 of the Act.

3. Section 22 of the Act.

4. See Sections 19 to 25 of the Act.

5. Benjamin on Sale, 8th Edn., p. 299,

6. Mohammad Ismail v. Provincial Automobile Co., A.I.R. 1937 Nag. 198 : 171 I.C. 781.

7. A.I.R. 1954 Mad. 1130.



title to goods which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer was not money but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale."

In the case of a sale across the counter for cash or in an auction sale, the agreement to sell and the passing of the property in the goods sold take place simultaneously. Nevertheless, an agreement to sell does exist in these also. Sub-section (1) of S. 64 of the Act clearly shows that there is a contract of sale in the case of auction sales also, however momentary its existence may be.<sup>1</sup>

**Sections 4 (3) and 42—For "sale", acceptance of goods necessary—Evidence of acceptance—Obtaining of Railway Receipt or taking delivery not conclusive—Matter not covered by Section 42 of the Act.**

In *Sugar Agents Ltd., v. Firm Gordhan Das Anant Ram and Co.*,<sup>2</sup> A & B were firms dealing in sugar. B agreed to supply certain number of bags of sugar of certain quality to A at different places. Accordingly on payment of some advance by A, B despatched some bags to Bombay. When A's agent at Bombay obtained the railway receipt through Bank it was discovered that the sugar was not of the quality stipulated. A informed B that (i) he was rescinding the contract, (ii) that he was holding the goods on a temporary basis, and (iii) that he proposed to sell the goods on B's behalf. Upon B's failure to remove the bags, A asked his agent to sell them by auction with a view to reduce losses. The sale resulted in loss. A brought a suit for refund of the advance and for damages together with interest thereon.

It was *held* : (i) To constitute 'sale' acceptance of goods by vendee was essential. In this case since there was no acceptance of goods by A, there was no 'sale' within the definition of S. 4 (3) of the Act. The title to the goods did not vest in A by merely obtaining the railway receipt. A could reject the goods even after paying the price and obtaining the railway receipt. Delivery of the goods to A's agent was not conclusive evidence of acceptance, for delivery of goods may take place even without acceptance.

(ii) S. 42 of the Act had no application to the case. S. 42 deals with three different situations referred to in that section. The case was not covered by any part of S. 42. A's conduct showed that sugar bags were not accepted by him. No completed transaction of sale under S. 4 (3) had therefore taken place.

(iii) A's position was analogous to that of an agent of B and he could sell the rejected goods on behalf of B, who was the owner.

1. *Ballabh v. State of M.P.*, A.I.R., 1961 Madh. Pra, 274 (F.B.).      2. A.I.R. 1966 All. 595.



(iv) Since the goods were sold to reduce losses, A could recover money paid by him as advance together with loss incurred in the sale of the goods and the interest on money wrongly retained by B, the seller.

**Sale and agreement to sell—Distinction—Madras General Sales Tax Act, 1939, Section 2 (b), (c), (h) and (i).**

The assessee entered into an agreement with the Jute Mills for the purchase of gunnies at a specified rate which were to be delivered on a particular date and they paid some amount by way of an advance to the Mills. Before the date fixed for the delivery the assessee entered into separate contracts with third parties for the sale of the goods contracted to be purchased by the assessee from the Mills. In pursuance of such contracts of sale, the third party took delivery of the goods direct from the Mills paying the balance of the price to the Mills on the strength of Mill letters passed on to them by the assessee. It was held : The documents pertaining to the transaction contained all the ingredients constituting a sale, *i.e.* existence of goods, payment or promise to pay the price, passing of title in the goods and so on. The goods were in existence, only the delivery of the goods was postponed to a subsequent date. Even assuming for the sake of argument that goods were not in existence at the time of the contract, at a latter date the goods were delivered to the third person. If this was so, then that person would acquire a right from the date of the delivery of the goods and the original contract would become complete. It was not an authorisation letter to take delivery of the goods that was sought to be assessed. It was the transaction of sale between the assessee and the third party that has in fact been assessed. In that contract, the assessee was described as the seller and the third party as the buyer and all the ingredients of sale were present. It was not a case of an assignment of contract but a regular transfer of the right in the goods for a higher consideration. The transaction between the assessee and the third party was one of sale of goods. It was a misnomer to call the transaction kucha delivery order or delivery of a mill letter. There were two independent contracts of sale. The theory of a single sale could not be reconciled with the existence of two distinct contracts in which the assessee played two different roles, in one capacity as a buyer and in the other as a seller.

Though section 4 of the Sale of Goods Act, 1930, groups both sales and agreements to sell under the single genuine name of "contracts of sale," it treats them as separate categories, the vital point of distinction between them being, that whereas in a sale there is a transfer of property in the goods from the seller to buyer, there is none in an agreement to sell. Where the contract is to sell future goods and under S. 6(3) of the Act even if the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods, there can be no transfer of title to the goods until they actually come into existence, and even then the conditions laid down in S. 23 of the Act should be satisfied before the property in the goods can pass.<sup>1</sup>

In *Sales Tax Officer v. Budh Prakash Jai Prakash*<sup>2</sup> it has been held :  
**Forward contracts** Section 3 of the U.P. Sales Tax Act, 1948, provides for a tax being imposed at three pies in the rupee on the turnover of the assessee, and "turnover," is defined in section 2 (i) as the

1. *Bhimayya v. Government of Andhra*,  
 (1957) An. L. T. 58 ; (1957) 8 S. T. C.

167,  
 2. A.I.R. 1954 S.C. 459 ; 1954 S.C.J. 573.



“aggregate of the proceeds of sale by a dealer,” and that would consist of the price and any charges paid at the time of the delivery of the goods, as provided in Explanation 1. The substance of the matter is that the sales-tax is a levy on the price of the goods, and the reason of the thing requires that such a levy should not be made unless the stage has been reached when the seller can recover the price under the contract. It is well settled that an action for price is maintainable only where there is a sale involving transfer of the property in the goods to purchaser. Where there is only an agreement to sell, then the remedy of the seller is to sue for damages for breach of contract and not for the price of goods. “The position therefore is that a liability to be assessed to sales tax can arise only if there is completed sale under which price is paid or payable and not when there is only an agreement to sell, which can only result in a claim for damages. It would be contrary to all principles to hold that damages for breach of contract are liable to be assessed to sales tax on the ground that they are in the same position as the sale price.

“The power conferred under entry 48 to impose a tax on the sale of goods can therefore be exercised only when there is a sale under which there is transfer of property in the goods and not when there is a mere agreement to sell. The State Legislature cannot, by enlarging the definition of ‘sale’ as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of ‘sale’ in section 2 (b) of the (U.P. Sales Tax Act) Act IV 1948, must, to that extent, be declared “*ultra vires*”.<sup>1</sup>

It was observed in the above case : Under the statute law of India that is, the Sale of Goods Act, 1930, based on English law on the subject, a sale of goods and an agreement for the sale of goods are treated as two distinct and separate matters, the vital point of distinction between them being that where in a sale there is a transfer for property in the goods from the seller to the buyer, there is none in an agreement to sell. Therefore there having existed at the time of enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression “sale of goods” in Entry 48 in senses in which it was used in legislation both in England and India and to hold that it authorises the imposition of tax only when there is a complete sale involving transfer of title, and not when there is a mere agreement to sell.

**(14) Sub-section (4)—agreement to sell passing into sale.**

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.<sup>2</sup>

Here again, the parties may make whatever bargain they please, and the law will give effect to it. Where the parties express their intention clearly, no difficulty arises. The contract may pass the property at once, or at a future time, or contingently on the performance of some condition. But in many cases the parties either form no intention on the point, or fail to express it. To meet such cases rules have been provided in sections 20 to 25 of the Act.

1. Per Venkatarama Ayyar J.

2. Sub-section (4) of section 4 of the Act.



The following observations of Parke J. in *Dixon v. Yates*<sup>1</sup> will be instructive :

“I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery.....Where there is sale of goods *generally* no property in them passes till delivery<sup>2</sup> because until then the very goods sold are *not ascertained*. But where by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very *appropriation* of the chattel is *equivalent to delivery* by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.”

**(15) Plea that contract was not one of sale but an agreement to sell—if open for first time in revision—Contract held of sale and not of hire or agreement to sell.**

Vendee executed an agreement described as a hire-purchase agreement in favour of vendor by which he received a car and agreed to pay Rs. 1,320 for it, Rs. 285 down and the balance by 12 monthly instalments. During the continuance of the so-called hiring contract the vehicle was to remain the sole property of the owner (vendor) and on default in payment of any instalment the entire price was to become due and the owner had the power to seize the vehicle. On failure of the vendee to pay, the vendor seized the car and sold it.

*Held*, the vendee bound himself to pay Rupees 1,320 for the car and there was no term in the contract enabling him to return the car at any time and thereby relieve himself from any further obligation for the remaining instalments. Under the contract, he was bound to pay the whole price and so the contract was a contract of sale and not of hire and the vendor was not entitled to seize and sell the car.<sup>3</sup>

*Held also*, the contract could not be called merely an agreement to sell as the vendor could not enforce an agreement to sell, if he himself had seized the car from the vendee.

It was also suggested that a plea that an agreement is not a sale but merely an agreement to sell cannot perhaps be raised for the first time in revision when there has been no suggestion of it in the trial court.

**(16) Sale of shares of a company.**

**Agreement that vendor shall be entitled to post dividends does not detract from the transaction as a sale.**

A clause in an agreement of sale of shares provided that the vendor shall be entitled to the dividends that may be declared by the company and payable on those shares in respect of any past period prior to and in respect of the period ending on 31st December, 1952. It also provided that the purchaser will account to the vendor for any such dividends that

1. (1833) 5 B. & Ad. 313, at p. 340 ;  
2 L.J.K.B. 198, 39 R.R. 489.

2. Or rather appropriation.

3. *Mohammad Ismail v. Provincial Automobile Co.*, A.I.R. 1937 Nag.

198 : 171 I.C. 781 ; *Lee v. Butler*,  
(1893) 2 Q.B.D. relied on ; *Helby v. Matthews*, (1899) A.C. 471 distinguished.



may be received by it. It was thus a special provision for the dividends for the special limited period as set out there. It was held that the retention by the vendor of such dividends or the conferment of the right to get dividends on the vendor did not detract from the transaction as a sale. In an arrangement for the sale of shares it is perfectly conceivable to have such provisions of dividends being made particularly in respect of the time prior to the sale.<sup>1</sup>

**Agreement that before effecting delivery of shares vendor may call upon purchaser not to resell shares except at such time and at such price as may be mutually agreed upon—Transactions being a sale not affected.**

A clause in an agreement of sale of shares provided that before effecting delivery of the shares the vendors may call upon the purchaser not to resell all or any of the said shares except at such time and at such prices as may be mutually agreed between the parties. It was *held* that before the sale had become complete by delivery the vendor was given the right to call upon the purchaser not to resell those shares, and this provision was not inconsistent with a sale.

It was observed : It is well known in the law of sale of property and certainly of moveables like shares that before a purchaser gets possession the seller has certain rights well recognized in law, such as a right to lien, and the right of stoppage *in transitu* and recovery of the articles sold. A sale under S. 4(2) of the Sale of Goods Act may be either conditional or absolute and a sale does not become any the less a sale because the seller before delivery reserves a condition that the purchaser should not resell.<sup>2</sup>

**Before delivery of shares vendor given right to call upon purchaser not to resell—In the event of vendor exercising this right purchaser to be released from obligation to make payment of purchase price but in lieu thereof to pay sum equivalent to price released by resale less costs and brokerage—This does not convert purchaser into a broker.<sup>1</sup>**

### (17) Quasi-contracts of sale.

The Act deals only with contracts of sale, properly so called. But in certain transactions, independently of the volition of the parties, the law annexes consequences, similar to those which result from a contract of sale express or implied and its performance though they are not contracts of sale. In these cases the law transfers title to goods or imposes an obligation upon the owner to transfer it irrespective of any agreement of the parties. Such transactions may be called *quasi-contracts* of sale. The following are chief examples of *quasi-contracts* :

<p>Satisfied judgment in trover, trespass and detinue.</p>	<p>In trover or trespass to goods, when the substance of the action is conversion, judgment recovered by the plaintiff for damages estimated on the footing of the full value of the goods and satisfied, either voluntarily by the defendant or by execution, operates as a sale of goods by</p>
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1. Indian I. & S. Co. v. Dalhousie Holdings Ltd., I.A.I.R. 1957 Cal. 293.

2. Indian I. & S. Co v. Dalhousie Holdings, Ltd., A.I.R. 1957 Cal, 293,



the plaintiff to the defendant as from the time when the judgment is satisfied.<sup>1</sup>

In detinue, the plaintiff is entitled to a return of the goods themselves and damages for their detention<sup>2</sup>; but if the goods cannot be returned, the damages should include their value, and in that case upon judgment being satisfied, but not before, the property passes.<sup>3</sup> An unsatisfied judgment does not transfer the property in any of these cases.<sup>4</sup> The question where the property does or does not pass depends upon the nature of the damages recovered. If in any case damages are assessed to include the full value of the goods, it is clear that on payment of the damages the property passes. The general rule has been stated to be that where the defendant has an interest in the goods and chattels converted then the measure of damages is the value of the plaintiff's interest as between himself and the defendant.<sup>5</sup>

As a result of it, if the conversion complained of is a wrongful sale by the defendant to a third party, the purchaser from the defendant obtains an absolute title to the goods, when the defendant satisfies the judgment. As between himself and his seller he has a title by estoppel and the general principle of law is that when the interest accrues it feeds the estoppel, and his seller, by satisfying the judgment, having become entitled to the goods the sub-purchaser has the advantage of that and acquires an indefeasible title against the whole world.

If the true owner sues under the Specific Relief Act, 1963, for recovery of the goods themselves and the court, instead of ordering the return of goods, awards their value as compensation, and the compensation is paid, the property will vest in the defendant. In England, as in India, the power of the court to order the return of the goods is discretionary, and usually when the goods are articles of commerce and readily obtainable in the market, compensation in damages is regarded as an adequate remedy.<sup>6</sup>

*See also notes under section 68 post.*

When one person has wrongfully obtained possession of, or dealt with the goods of another, the owner of the goods may waive the tort and recover the value of the goods as on a sale by himself to the person.<sup>7</sup> Thus where a plaintiff has been induced, by the fraud of a third person, to sell goods to an insolvent buyer, and such third person has afterwards obtained the goods himself, the plaintiff may waive the tort, and treat the transaction as a sale to such third person.<sup>8</sup> So also, when one person has wrongfully obtained possession of the goods of another, as when they have been sold to him by a third person who had no right to sell them, the owner of the goods may waive the tort and treat the transaction as a sale by himself to the person who

1. *Cooper v. Shepherd*, (1846) 3 C.B. 226; *Brinsmead v. Harrison*, (1871) L.R. 6 C.P. 584 (trover); *Holmes v. Wilson*, (1839) 10 A. & E. 503, notes at p. 511, 50 R.R. 4492.  
2. *Eberle's Hotels Co. v. Jonas*, (1857) 18, Q.B.D. 459.  
3. *Ex-p Drake*, (1877) 5 Ch. D. 866.  
4. *Ibid.*; see also *Bradley v. Ramsay & Co.*, (1912) 105 L.T. 771, C.A.; *Ellis v. John Stenning & Son* (1932) 2 Ch.

81.  
5. Per Channel J. in *Belsize Motor Supply Co. v. Cox*, (1914) 1 K.B. 244.  
6. *Whiteley v. Hilt*, (1918) 2 K.B. 808 at pp. 818, 829, C.A.; *Cohen v. Roche*, (1927) 1 K.B. 169, at pp. 179-181. See also *Williston on Sales*, Revised Edn., Vol. I, S. 4 pp. 5, 6.  
7. *Rice v. Reid*, (1900) 1 Q.B. 54, C.A.  
8. *Hill v. Perrott*, (1810) 3 Taunt. 274.



has got the goods.<sup>1</sup> As against the person who, having thus wrongfully sold the goods, has received the price, "the owner may waive the tort and recover the proceeds in an action for money had and received."<sup>2</sup> "If the servant of a company," says Lord Sumner, "acting *ultra vires* of the company converts a stranger's chattel, and having sold it, pay the proceeds into the company's account as its servant, I suppose an action for conversion would lie against the servant, and for money had and received against the company."<sup>3</sup>

It would seem that it is not open to the owner in all cases to elect to treat that transaction as a sale, unless the other party assents.<sup>4</sup> But if the defendant has sold the goods, or in any way admitted, that the plaintiff is entitled to sue him in contract, the plaintiff may do so and waive the tort.<sup>5</sup> And if the defendant has sold the goods, the inference will be drawn that he agreed to pay the plaintiff a reasonable price for them.<sup>6</sup>

Another illustration of the principle stated is the case where a person fraudulently induces a sale to an insolvent or infant, and then obtains possession of goods. Such a case is explainable on the principle that the person in possession cannot by his own wrong set up a sale to the insolvent or infant, who is thus treated as the fraudulent person's agent to buy.<sup>7</sup>

An election of this kind when once made is final. Where the owner brings an action for the price of the proceeds of the sale and recovers judgment, he cannot afterwards, even though the judgment remains wholly unsatisfied, treat the transaction as tortious and sue for damages for conversion or for the recovery of the goods.<sup>8</sup>

It is not always easy to determine whether the plaintiff's acts do or do not amount to an election. The rule has been frequently stated that if the plaintiff bring an action for money had and received, that is in point of law a conclusive election to waive the tort. This, however, is not a hard-and-fast rule: for evidence may be given of the owner's intention not to waive the tort, as, for example, where he sues in tort and in the *alternative* for money had and received. Where "an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act....the question whether the tort has been waived becomes rather a matter of fact than the law."<sup>9</sup>

There may be a sale by estoppel too. When the owner of the goods by his words spoken or written or by his conduct makes others believe that he has sold the goods to another and that other deals with them as his own to the prejudice of such others who happen to deal with him, the owner is estoppel from denying the fact of

1. See *Dickinson v. Naul* (1883) 4 B. & Ad. 638; *Allen v. Hopkins*, (1844) 13 M. & W. 94.  
 2. See *Arnold v. Cheque Bank*, (1876) 1 C.P.D. 578 at p. 585.  
 3. *Ait. General v. De Keyser's Hotel* (1920) A.C. 503, at p. 556; see *Chalmers Sale of Goods Act*, 16th Edn., p. 31.  
 4. Per cur, in *Bennet v. Francis*, (1801) 2 Bos. & P. 550, 3 R.R. 644.  
 5. *Ibid.*  
 6. *Nicol v. Hennessey*, (1896) 1 Com. Cas. 410; 12 T.L.R. 485; see also

*Benjamin on Sale*, 8th Edn., p. 94.  
 7. *Selway v. Fogg*, (1839), 5 M. & W. 83; see *Halsbury, Laws of England*, 3rd Edn., Vol. 34, pp. 18, 19.  
 8. *Smith v. Baker*, (1873) L.R. 8 C.P. 350; *Verschures Creameries v. Hull & Netherland S.S. Co.*, (1921) 2 K.B. 608 C.A., cf. *Bradley v. Ramsay & Co.* (1912) 106 L.T. 771 C.A.  
 9. Per Bovil C.J. in *Smith v. Baker*, *supra* at pp. 355-6; *Rice v. Reed* (1900) 1 Q.B. 54 C.A., see *Benjamin on Sale*, 8th Edn., p. 94.



sale or asserting to the contrary against the persons so prejudiced.<sup>1</sup> Suppose a defendant sells specific goods to one person, and the documents of title to the goods to another person, he would be liable to both though a doubt might arise as to which person would be entitled to the goods themselves. So too, a person holding himself out as the buyer may be liable as such.<sup>2</sup> Conversely, a person who stands by and lets his goods be sold is bound by the sale.<sup>3</sup>

The subject has been dealt with subsequently under appropriate sections of the Act.

**(18) Constitution of India, Sch. 7, List II, Entry 54—Meaning of “sale of goods”—Whether the same as in S. 4 of the Sale of Goods Act, 1930.**

Entry 54 of List II of Seventh Schedule to the Constitution of India (corresponding to entry 48 of List II of Seventh Schedule to the Government of India Act, 1935) provides for ‘taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92 A of List I.’ Entry 92 A of List I provides ‘for taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.’ The Central Sales Tax Act, 1956 (Act 74 of 1956) has been enacted under the said Entry 92 A of List I of Seventh Schedule and the various Sales Tax Acts in force in the various States have been enacted either under Entry 54 of List II of the Seventh Schedule to the Constitution or the corresponding provision in the Government of India Act, 1935, referred to above.

In *State of Madras v. Gannon Dunkerley & Co.* (A.I.R. 1958 S. C. 560 : 1959 S.C.R. 379), the Supreme Court held that the phrase “sale of goods” in Entry 48 of List II, Schedule VII of the Government of India Act, 1935, must be interpreted in the legal sense which it had in the Indian Sale of Goods Act, 1930, that the Provincial legislature had no power to tax a transaction which was not a sale of goods in that sense and that in order to constitute a sale there must be an agreement for sale of goods for a price and the passing of property therein pursuant to such an agreement. Referring to it the Supreme Court held in *State of Maharashtra v. Champalal*, (1971) 1 S.C.R. 46, 47, 48 : “The expression ‘sale of goods’ in Entry 54 List II of Sch. VII of the Constitution has the same connotation as it has in the Sale of Goods Act, 1930. The Court in *The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*,<sup>4</sup> observed that the expression ‘sale of goods’ was, at the time when the Government of India Act, 1935, was enacted, a term of well-recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic and must be interpreted in Entry 48 in List II in Sch. VII of the Act as having the same meaning as in the Sale of Goods Act, 1930 : see also

1. Chalmers 16th Edn. pp. 31, 32 ; Halsbury, Vol. 34. (3rd Edn.), p. 19. See also Ss. 5(2) and 27 of the Act, and S. 3 of the English Act.  
2. Cornish v. Abington, (1859), 4 H & N. 549.  
3. Waller v. Drakeford, (1853) 1 E. & B. 749 ; Cohen v. Mitchell (1890) 25 Q.B.D. 262 C.A. ; sale by bankrupt, trustee not intervening : see Chalmers

Sale of Goods Act, 16th Edn., pp. 31, 32, 132.  
4. (1959) S.C.R. 379 : A.I.R. 1958 S.C. 560 cited at p. 136 *ante*. See also Deputy Commercial Tax Officer v. Enfield Indian Ltd., A.I.R. 1968 S.C. 838 ; K. L. Johar and Co. v. Deputy Commercial Tax Officer, A.I.R. 1965 S.C. 1082.



*Pandit Banarsi Das Bhanot v. The State of Madhya Pradesh*.<sup>1</sup> The expression 'sale of goods' in Entry 54 in List II of Sch. VII of the Constitution has also the same meaning as that expression had in Entry 48 in List II of the Government of India Act, 1935. The State Legislature may not therefore extend the import of the expression 'sale of goods' so as to impose liability for tax on transactions which are not sales of goods within the meaning of the Sale of Goods Act."<sup>2</sup>

**Lump-sum building contract—Supply of materials by contractor—Does not amount to "sale of goods"—Constitution of India, Art. 254, Sch. VII, List II, Item 54—Government of India Act, 1935, S. 107, Sch. VII, List II, Item 48—Bengal Finance (Sale Tax) Act (6 of 1941) (as amended by Act 19 of 1954), Ss. 2(b), (d), (g), and (h) and 26(1).**

**Rule (2) of Rules under S. 26(1)—Validity.**

In *D. Sarkar and Bros. v. Commercial Tax Officer*<sup>3</sup> it was held :

The expression "sale of goods" is a composite expression consisting of various ingredients, or elements. Thus there are elements of bargain, a contract of sale, payment, or promise of payment of price, the delivery of goods and the actual passing of title, and each one of them is essential to a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property.

In the absence of a contract to the contrary, the supply of materials by a contractor, who agrees to build a house (or any other structure) or repair the same, does not amount to sale of such material and such supply does not come within the conception of transaction known as sale of goods.

*See also notes on pages 135 to 137 ante.*

**Madras General Sales Tax Act, 1939.**

In *Haji P.K. Moidoo Bros. v. State of Madras*<sup>4</sup>, it was held :

It is clear from the provision of S. 2 (h) of the Madras General Sales Tax Act, 1939, and S. 4 (1) and (3) of the Sale of Goods, Act, 1930, that without an actual transfer of the property in the goods, that is to say, without an actual transfer of the ownership in the goods by the seller to the purchaser, there can be no sale at all. The question whether there has been a sale or not cannot be answered without considering whether the property in the goods has been transferred by the seller to the buyer, that is not a pure question of fact but a mixed question of law and fact and can be gone into by the High Court in revision.

A mere appropriation by the seller without the consent of the buyer, either express or implied, would not pass the property in the goods from the seller to the buyer.

If there is no assent to the appropriation by the buyer even the despatch of the appropriated goods through the railway to the buyer will not

1. (1959) S.C.R. 427. See also *Deputy Commercial Tax Officer v. Enfield Indian Ltd.*, A.I.R. 1968 S.C. 838—Transaction lacking element of transfer of property; Legislature incompetent to make it sale by deeming clause in taxing statute.

2. In view of this, the decision of the Rajasthan High Court in *Bhuramal v. Rajasthan State*, A.I.R. 1957 Raj. 104

is no longer good law.

3. A.I.R. 1957 Cal. 283; *Banarsi Das v. State of M.P.* (1955-66) S.T.C. 93 (Nag.) dissented from. See also to the same effect *Manji Khimji Patel v. Union of India*, A.I.R. 1959 Bom. 236 under C.P. & Berar Sales Tax Act, 1947, S. 2(g).

4. A.I.R. 1959 Ker. 29 (F.B.): I.L.R. (1958) Ker. 1001.



effect a transfer of the property in the goods when the goods are consigned to 'self' ; for, in the case, until R. Rs. are endorsed and transferred to the buyer, the seller has complete domination over the goods and can do anything with them as he chose, cancelling even the intended delivery to the seller.

**Bihar Sales Tax Act, 1947, Ss. 2(g) and 4—Contract involving skill and labour.**

In *M. Ghosh v. State of Bihar*,<sup>1</sup> it was *held* : In order to see whether an agreement amounts to a contract for sale of goods or merely involves exercise of skill and labour, one has to look at the substance of a contract in each case and ascertain if the contract is for supply of finished goods or whether it is an agreement for exercise of skill and labour for the production of article and it is only ancillary that some material would pass from the artist to the customer. Applying this test, the essence of a contract between a **photographer and the customer** is the supply of finished goods and there is not a mere agreement for the exercise of skill and labour for the production of the photographs. Such a contract amounts to a contract for sale of goods within the meaning of Sale of Goods Act and the Bihar Sales Tax Act. The photographer is liable to pay sales tax with regard to sale of photographs of customers taken by him for the supply of printed copies of photographs to them on payment.

**Sections 4, 9—Contract for assembling and installing machinery plants—Supply of goods in execution of contract—Liability to pay sales tax—Bihar Sales Tax Act, 1947 (XIX of 1947), Ss. 2(g), 13.**

Where a contract for assembling and installing machinery, plants and accessories, contained an express provision to the effect that all materials and plant brought by contractor from outside India on the site in Bihar would, immediately they are brought upon the site, become the owner's property, it was *held* : There was a sale in its legal sense of the materials supplied and used in the execution of the contract and therefore the sale was liable to be taxed. The contention that because definite price of such article was not fixed in the deed of contract, there was no sale of goods liable to be taxed, cannot be accepted, because the price of the articles could be gathered from the books of account of the assessee.<sup>2</sup>

**Sections 4, 18, 23—Contract for sale of unascertained goods—Time and place of passing of property—C.P. & Berar Sales Tax Act, 1947, Ss. 2(g), 4.**

The respondent deals in matchwood called "Sawar". His place of business is situate at Channa in the erstwhile Central Provinces. In January, 1948, the respondent entered into an agreement with the Western India Match Co. Ltd. (popularly known as "WIMCO") for the supply of a minimum quantity of 2,500 tons of Sawar logs during the season 1947-48 and in subsequent years. The goods to be supplied under the contract were to be despatched by the respondent from Railway Stations in the Central Provinces. The goods were to be measured under the supervision of the Company's Factory Manager at Ambernath in the Province of Bombay on arrival of the goods at the Factory. The prices of the logs to be supplied were specified as "F.O.R., Ambernath." It was *held* : (1) The contract was for sale of unascertained goods and consequently the property

1. A.I.R. 1961 Pat. 272. See also *Camera House v. State*, A.I.R. 1969 Bom. 437 cited at p. 133 *ante*.

2. *Coke Oven Construction Co. v. State of Bihar*, (1958) 9 S.T.C. 639 (Pat.).



in them could not, under S. 18 of the Sale of Goods Act, 1930, pass unless and until the goods were ascertained. (2) On a proper construction of the contract as a whole, it is clear that the respondent gave in advance its assent to WIMCO'S appropriation of the goods at Ambernath, and consequently the property in the logs passed to the buyer at Ambernath. The sales in question did not take place in the Central Provinces and Berar and consequently were not "sales" within the meaning of the C.P. and Berar Sales Tax Act, 1947, and therefore, were not liable to tax. (3) Explanation II to S. 2(g) of the Act did not apply.<sup>1</sup>

**U.P. Sales Tax Act, 1948, S. 2(c), (d), (h), (i), S. 3.**

There was a contract for building up of railway coaches. Necessary material and fittings were to be supplied by the contractor. The contract was one entire and indivisible. The supply of material in the process of construction was not liable to sales tax.<sup>2</sup>

**Section 4—"Sale"—Punjab General Sales Tax Act, 1948, S. 2(h).**

In *Associated Hotels India Ltd., Simla v. Excise and Taxation Officer*,<sup>3</sup> there was a transaction between hotelier and resident customer according to which the hotelier made consolidated charge for residence, service and supply of food. No rebate was allowed if food was not taken. The question was whether supply of food amounted to "sale". It was held :

On facts, the supply of food did not amount to "sale" but service. The transaction was an indivisible contract of multiple service and did not involve any sale of food. The taxing authorities were also not empowered to split up composite contract so as to make out an agreement of sale, where in fact none existed. The burden of proving that supply of food amounted to sale was on Revenue.

Supply of meals or other eatables to casual or non-resident visitors in the restaurant amounted to "sale" within the meaning of S. 2(h) of the Punjab Act.

**Section 4—Ingredients of "sale"—Transfer of property in goods essential—Description of transaction of parties immaterial—U.P. Sales Tax Act, 1948, S. 2(h).**

In *Commr. of Sales-tax v. Jiwan Das Fair Price Shop Food Grain Dealer*<sup>4</sup>, it was held : Sale means transfer of property in goods for cash or for valuable consideration by any person and need not necessarily be by the owner of the property. Whether the property is transferable or not depends on the intention of the parties delivering the goods and such intention is to be gathered from agreements. The description given to the transaction by the parties is not decisive but if the intention to transfer the property is present, the transaction is sale. If the contract contains a provision for sale and purchase of property which purpose is manifested by other provisions, then the contract is one of the sale and title passes upon delivery notwithstanding the fact that the agreement suggests the relationship of principal and agent. In deciding the nature of agreement the ultimate intention of the parties will have to be ascertained.

1. Commissioner of Sales-tax, Eastern Division, Nagpur v. Husenali Adamji and Co., A.I.R. 1959 S.C. 887.  
2. M/s. Kays Construction Co. v. Judge (Appeals) Sales-tax, Allahabad, (1962)

13 S.T.C. 302 (All.)  
3. A.I.R. 1966 Punj. 449; 68 P.L.R. 319.  
4. 1966 All. L.J. 302. See Yearly Digest, 1966, Colmn. 2340.



**Section 4—Distribution of cloth by syndicate to its members at a profit under a resolution is a “sale”—U.P. Sales Tax Act, 1948, S. 2(h)—Central Sales Tax Act, 1956, S. 2(g).**

In order to be a ‘sale’ within the meaning of section 2(h) of the U.P. Sales Tax Act, the conditions that are required to be fulfilled are : (1) that there should be a transfer of property in goods ; (2) that such transfer should be for valuable consideration. Where a syndicate resolves to distribute cloth to its members at a price, covering a profit, the transaction is a ‘sale’ and not a ‘distribution of assets’ in specie. Such a resolution implies the existence of an offer by the syndicate and acceptance by its members and is also a ‘sale’ within the meaning of S. 4 of the Sale of Goods Act.<sup>1</sup>

**Section 4—Bombay Sales Tax Act, 1953, S. 26(3).**

In the case of allotment of goods of a firm amongst partners on its dissolution, and absence of money consideration, there is no “sale.”<sup>2</sup>

**Section 4—Madras General Sales Tax, 1939.**

Business in studio photography amounts to sales.<sup>3</sup>

**Transfer of title of goods under statutory compulsion or control.**

In *I. S. & W. Products v. State of Madras*<sup>4</sup>, it was held that the sale transactions of iron and steel products to various buyers in pursuance of the orders of the Controller exercising powers under the **Iron and Steel (Control of Production and Distribution) Order, 1941**, are liable to levy of sales-tax under the Madras General Sales Tax Act, 1939, S. 2(h) and the levy is not outside the powers of the State Legislature under Entry 54 List II, VII Schedule of the Constitution of India. It was observed : In order to constitute a valid sale, there must be concurrence of the following elements, viz. (1) parties competent to contract, (2) mutual assent, (3) a thing the absolute or general property in which is transferred from the seller to the buyer, and (4) a price in money paid or promised. Although the orders of the Controller imposed certain restrictions on the sellers and the prospective buyers, and they could negotiate only in respect of matters not controlled by the Order or prescribed by the Controller, it could not be contended that the transactions were completely regulated and controlled by the Controller leaving no room for mutual assent.

In *Commr., Sales Tax v. Ram Bilas Ram Chand* (A.I.R. 1970 All. 518 F.B.) it was held : The sales made to the Regional Food Controller under the **U.P. Wheat Procurement (Levy) Order, 1959**, must be held to be sales as contemplated by the Indian Sale of Goods Act, and therefore, sales within the meaning of section 2(h) of the U. P. Sales Tax Act. That being so the assessee was liable to pay sales tax on such sales. “The transactions may take place within the limits set by or even as a consequence of a regulatory order. They are, therefore, sales in ultimate analysis. The

1. Kanpur Kapra Committee V. Commr. of S.T. (1966) 17 S.T.C. 10.

2. State of Gujarat v. Ramanlal Sankal Chand & Co., A.I.R. 1965 Guj. 60.

3. B.V. Bhatta v. State of Madras (1965) 16 S.T.C. 441. See also Camera House v. State, A.I.R. 1969 Bom. 437 cited at p. 133 ante.

4. A.I.R. 1968 S.C. 478. See to the contrary Indian Steel and Wire Pro-

ducts Ltd. v. D.N. Roy, 68 C.W.N. 998 and Indian Steel and Wire Products Ltd. v. State of W.B., 68 C.W.N. 401, under the Bengal Finance (Sales Tax) Act, 1941, S. 2(g)—no independent volition and therefore, no “sale”. The same view was held in S.K. Roy v. Additional Member, Board of Revenue, A.I.R. 1967 Cal. 338.



case before us is governed by the ratio decidendi of the latter type of cases. The dividing line between the two types of cases may appear to be very thin sometimes, but it is there."

In *Indian Sugars and Refineries v. State of Mysore*, A.I.R. 1968 Mysore 332 it was held : If the transfer of title in goods from one person to another is brought about by compulsion of a statute and there is total absence of consensus between the parties, there is no sale within the meaning of the Sale of Goods Act. But even if there is some compulsion of law which imposes restrictions on freedom of contract, so long as mutual assent between the parties is not completely excluded, a sale within the meaning of the Sale of Goods Act is still possible. On this basis, there exists a sale between the growers and a sugar factory in spite of the restrictions placed under the provisions of the **Mysore Sugarcane (Regulation of Supply) Order, 1963**, and under the subsequent orders regulating supply of sugarcane made in exercise of the powers conferred by Clause 4 of the Sugarcane Control Order, 1955, and by Clauses 5, 7, 8 and 9 of the Sugarcane (Control) Order, 1966, and the levy of tax on purchase of sugarcane under the Mysore Sales Tax Act, 1957, is valid.

In *Andhra Sugar Ltd. v. State of A.P.*, A.I.R. 1968 S.C. 599, on examining the provisions of the **Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961**, the Supreme Court found that a cane grower in a factory zone was free to sell or not to sell his sugarcane to the Factory ; that he might consume it or may process it into jaggery and then sell the finished product ; but if he offered to sell his cane, the occupier of Factory was bound to enter into an agreement with him on the prescribed terms and conditions and to buy cane pursuant to the agreement in conformity with the instructions issued by the Cane Commissioner. It was held : Under the said Act, a cane grower makes an offer to the occupier of the factory directly and the latter accepts the offer. The parties then make and sign an agreement in writing. There is thus privity of contract between the parties. The contract is a contract of sale and purchase of cane though the buyer is obliged to give his assent under the compulsion of a statute. Purchase of sugarcane under such an agreement can be taxed by the State Legislature under Entry 54 of List 2, Sch. 7, Constitution of India, read with Art. 246 of the same.

**Section 4—Government of India Act, 1935, Sch. 7 List II Entry 48 (Corresponding Constitution of India, Sch. 7, List II, Entry 54)—**Word "sale in the entry has the same meaning as given in Sale of Goods Act, 1930. (See, *C.S. Bureau v. I.T. Commr., W.B.*, A.I.R. 1973 S.C. 376, also cited at p. 162 ante.

**Section 4—Hire-purchase agreement—Travancore-Cochin General Sales Tax Act, (II of 1925), S. 2 (f).**

A customer, with a view to finance his purchase, entered into arrangement in the form of hire-purchase agreement with the financier. It was held on the construction of documents that the transaction was one of loan and not of sale and so not exigible to sales-tax.<sup>1</sup>

**Section 4—Sales made by clubs registered or unregistered to their members—Mysore Sales Tax Act, 1957, as amended by Mysore Act No. 9 of 1964.**

Both on principles and on authority, when a registered club supplies any article to any of its members, in law there is no "sale". The State

1. *Sundaram Finance Ltd. v. The State*

of Kerala, A.I.R. 1966 S.C. 1178.



Legislature is not competent to enact any law imposing sales-tax on such supplies. Hence, Ss. 2(1) (k) and 2(1) (t) of the Act to the extent they attract supplies made by clubs registered as well as unregistered, to their members, to tax under the Act are *ultra vires* the powers of the State Legislature and consequently void and inoperative.

It is well settled that the term "sale of goods" in Entry 54 should be understood in the same manner as it is understood in section 4 of the Sale of Goods Act, 1930. In transaction of sale of goods which is liable to tax, there must be concurrence of the four elements, viz. (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised.<sup>1</sup>

**Co-operative Society supplying refreshments to its members.**

In *Deputy Commercial Tax Officer v. Enfield India Ltd.*, A.I.R. 1968 S.C. 838, the Supreme Court held: Where a co-operative society supplies refreshments to its members for price, property in refreshments is with the society and the transaction amounts to sale, and the turnover is taxable under the Madras General Sales Tax Act, 1959. It was observed: The property in law is the property of the society. The transaction is one in which the legal owner of property transfers it to another pursuant to a contract for a price, and that transaction must be regarded as a sale. It cannot be urged as a proposition of law that when a co-operative society supplies to its members, refreshments for a price under a scheme for distribution or supply of refreshments, the transaction can in no event be regarded as a sale of the refreshments supplied for a price.<sup>2</sup>

**(19) Miscellaneous Cases**

**(1) Ship-building contract.**

Although a ship-building contract is in form a contract for the construction of the vessel, it is in law a contract for the sale of goods.<sup>3</sup>

**(2) Section 4—Hire-purchase agreement or sale.**

In *S. K. Verma v. S. P. Misra*,<sup>4</sup> the applicant and the opposite parties entered into an agreement which provided as follows:

"We the undersigned have this day taken a brand new Hind gents cycle complete with Dunlop tyres and tubes, Dunlop saddle, original fittings, back carrier, ball and gear cover on hire at Rs. 12/8/- per month from the Alliance Agencies, Lucknow. It has been agreed as follows: 1. That the hirers will pay the hire in advance within first week of each month. 2. That if the hire is paid regularly without any break for a period of 12 months, and when a total sum of Rs. 148/- has been paid, the amount of hire paid will be treated as sale money, and the hirer will automatically become the owner of the bicycle."

It was held: There was no provision in the agreement leaving it open to the defendants to return the cycle at any time they liked and

1. *Century Club, Cubbon Park, Bangalore v. State of Mysore*, A.I.R. 1967 Mys. 25.

2. It is to be noted that this decision was under the Madras General Sales Tax Act, 1959, while *Y.M. 1. Association v. C.T. Officer*, A.I.R. 1964

Mad. 63 cited at p. 20 ante was under the Madras General Sales Tax Act, 1939.

3. *McDougall v. Aeromarine of Emsworth Ltd.* (1958) 1 W.L.R. 1126.

4. A.I.R. 1959 All. 498.



to discontinue paying the hire. In the absence of such a clause in the agreement, the agreement was capable of only one interpretation and that was that the cycle in question was being sold to the defendants and they were to pay the price of Rs. 148/- in twelve monthly instalments. In the agreement the plaintiff too did not reserve to himself the right to terminate the agreement and to take back the cycle at the time he liked. There was no term providing for a right of seizure after forfeiting the payments already made as hire.

It was observed: The test for determining the distinction between an agreement of sale and agreement for hire-purchase is clear. It is whether a real option has been given to the alleged hirer to terminate the agreement at any time he likes. If such an option has been given to him, the transaction must be interpreted, as that of hire-purchase. If, on the other hand, there is no such option and the alleged hirer has to pay the entire amount, the transaction must be held to be a sale.

**(3) Sale of goods—Licence necessary for exports—Where buyers' or sellers' duty to obtain.**

In *A. V. Pound & Co. v. M. W. Hardy & Co.*,<sup>1</sup> it was held: The sellers could only succeed if they established a breach of contract by the buyers and this they failed to do because (i) in the circumstances no obligation on the buyers to obtain an export licence should be implied and (ii) when the contract could not be carried through in the manner contemplated by both parties thereto there was no obligation on the buyers to nominate a port of destination for which an export licence could be obtained.

**(4) Sale of Goods Act, 1930, Ss. 4, 5, and 19—Imports and Exports (Control) Act, 1947, S. 5—Imports (Control) Order, 1955, clause 5(iv)—Jurisdiction of Court to try the offence—Criminal Procedure Code, 1898, Ss. 177, 182.**

In *State (Delhi Administration) v. Sinha Govindji*,<sup>2</sup> it has been held: Where the actual user's licence under the Imports and Exports (Control) Act is issued at Madras to a firm at Bellary with its office at Bombay and the goods obtained under that licence, offered by the Bombay Office for sale to a firm at Delhi after receipt of letter of acceptance of such offer, Delhi Courts have jurisdiction to try the case.

**(5) Sale of Goods Act, Ss. 4, 30(2) and 19—Trusts Act, Ss. 81 and 88—Penal Code, Ss. 409 and 495—Contract Act, 182 and 148.**

In *Ghasiram v. The State*,<sup>3</sup> the accused was a retailer, who by an agreement with the State Government entitled 'Agreement for distribution of wheat through Fair Price Shops', had agreed to sell wheat during shop-hours to consumers within his zone at a certain retail rate fixed by the Government. The wheat was delivered by the Government to the retailer on his deposit of the price of wheat at the agreed whole-sale rate. At one stage, by night-time the retailer removed some bags of wheat from the

1. (1956) 1 All E.R. 639; *Brandt. & Co. v. H.N. Morris & Co. Ltd.*, (1917) 2 K.B. 784 distinguished.

2. A.I.R. 1967 Delhi 88.  
3. A.I.R. 1967 Cal. 568.



shop and thereafter, possibly apprehensive of adverse consequences brought them back to his shop. The retailer was charged under S. 409, Indian Penal Code. It was held : *Per Full Bench*—The accused must be acquitted even of the offence of attempt to commit criminal breach of trust. *Per majority* (i) The retailer by virtue of the agreement could not be regarded as an agent of the Government in respect of the wheat received by him under the agreement. (ii) The property in the stock of wheat received by the retailer-accused under the agreement did pass to him.

**(6) Section 4—Company transferring its buses to firm constituted of same persons for a certain consideration amount to “sale”—Income-tax Act, 1922, Ss. 10(2)(vi-b), 35(11).**

In *Chittoor Motor Transport Co. (P.) Ltd. v. I.T. Officer, Chittoor*,<sup>1</sup> the Company was doing transport business. On May 27, 1959, the three shareholders of the Company entered into a partnership. On June 30, 1959, the Company passed a resolution transferring a number of motor buses including the four in respect of which development rebate had been claimed to the partnership firm for a sum of Rs. 252,000/-. The Company was not wound up and was still in existence and carrying on business as a transport company. It was held that if one looked at the resolution dated June 20, 1959, it was quite clear that it was a sale for consideration of a number of buses by the limited company to the partnership. It would be a sale under the Sale of Goods Act and it would be a sale in any other proper meaning which might be given to the word ‘sale’. The Court was not concerned whether any profit resulted to the assessee but whether the assessee had sold or transferred these buses to the partnership. Whether the transaction resulted in profit to the Company or not, the transaction came within the purview of the latter part of S. 10(2)(vi-b) of the Income-tax Act, 1922.

**(7) Section 4—Passing property—Constituted sale—Property passing in Kerala State—Delivery in pursuance of sale in Madras State did not form component part of such sale—Madras Sales of Motor Spirit Taxation Act, 1939, S. 3(1).**

In *Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. State of Madras*,<sup>2</sup> it was held on facts, that in the absence of any definition of ‘sale’ in the Madras Sales of Motor Spirit Taxation Act, the expression must be construed only in the light of the Sale of Goods Act or the legal connotation of that expression as understood. Under the Sale of Goods Act, it is the passing of property that marks a sale. This incident of sale in the present case took place at Ernakulam. The Act did not fix delivery in pursuance of sale as taxable event. Even otherwise there was an effective delivery at Ernakulam and thereafter the goods were transported as the property of the purchasers. That the fact that they took delivery of the goods from the common carrier at Madras did not make that delivery a component part of the sale transaction. There was no inter-State element at all, the sale being completed at Ernakulam and the subsequent transaction of the goods not being a part of the sale transaction.

1. A.I.R. 1966 S.C. 570.

2. A.I.R. 1965 Mad. 529.



**(8) Section 4—Melpattam—Kerala Agriculturists Debt Relief Act, 1958.**

Where there is grant of right to enjoy only usufruct of trees for specified period for a pattam or rent fixed and payable in advance, the transactions were melpattams and not sale of existing and future goods.<sup>1</sup>

**(9) Section 4—East Punjab Control of Bricks Supplies Act, 1949, S. 3—Punjab General Sales Tax Act, 1948, S. 2(h).**

It was held in *Jaswant Singh v. Excise and Taxation Officer*,<sup>2</sup> with reference to S. 3 of the East Punjab Control of Bricks Supplies Act, 1949: The provisions of the Punjab Control of Bricks Supplies Order, 1956, issued under section 3 of the Punjab Control of Bricks Supplies Act, 1949, show that the manufacturer or dealer has no freedom of contract and he can exercise no volition in the matter of supply of the quantity or of the period when it is to be supplied. The price is also controlled. As soon as the permit is produced before the manufacturer, he is bound to supply the bricks in accordance with the permit and he can neither refuse to supply the quantity which is contained in the permit nor vary the same. The element of volition, mutuality and freedom of negotiation is lacking and cannot therefore be regarded as sale within the meaning of S. 2(h) of the Punjab General Sales Tax Act, 1948.

**(10) Section 4—Allotment of goods to partners on dissolution of firm—Sale—Bombay Sales-Tax Act, 1953, S. 26(3)—Validity.**

In *State of Gujarat v. M/s. Ramanlal S. & Co.*,<sup>3</sup> there was allotment of goods of the firm amongst its partners on its dissolution. There was absence of money consideration. It was held that it was not a sale within the meaning of S. 4 of the Sale of Goods Act, 1930. It was further held that S. 26(3) of the Bombay Sales-Tax Act, 1953, in so far as it treats it as a sale for purposes of taxation is *ultra vires* of powers of State Legislature under Sch. 7, List II, Entry 54 of the Constitution.

**(11) Hire-purchase contracts ripening into contracts of sale—M.P. General Sales-Tax Act, 1958, S. 2(n), Explanation 1.**

In *M/s. Indian Finances Private Ltd. v. Sales Tax Officer, Jabalpur*,<sup>4</sup> it was held: Explanation 1 to S. 2(n) is *ultra vires* as it attempts to enlarge the definition of 'sale' bringing within its scope hire-purchase transactions. But the petitioners are dealers under the Act. When hire-purchase contracts entered into by them ripen into contracts of sale, the petitioners would be liable to be assessed to tax.

**(12) Right to exhibit film—Transfer of, by owner of film to distributor—Whether lease or sale.**

In *Malyappan v. Commr. of Commrl. Taxes*, A.I.R. 1969 Mad. 284, it was held on the facts of the case: Where the owner or producer of a

1. *Ravarichandiyil Krishnan Nair v. Thayyullathil Abdul*. A.I.R. 1965 Kerala 39 (F.B.).  
2. A.I.R. 1967 Punj. 359.  
3. A.I.R. 1965 Gujarat 60.  
4. A.I.R. 1964 M.P. 242; Commercial

*Credit Corporation (1943) Ltd. v. Dy. Commercial Tax Officer*, A.I.R. 1958 Mad. 561; *Kishan Prasad and Co. v. Assessing Authority Ambala*, (1961) 12 S.T.C. 711; I.L.R. (1961) 2 Punj. 461 dissented from.



film, instead of exhibiting the film himself, by entering into an agreement, confers upon another party the right to have the film exhibited for a certain period as a distributor together with the ancillary right of making or causing to be made positive prints for purposes of exhibition, the agreement is that of a lease and not sale, even though the right comes within the definition of goods under section 2(j) of the Madras General Sales Tax Act, 1959.

**(13) M.P. General Sales Tax Act, 1958, S. 2(n)—Photographer taking photographs.**

In *B.C. Kame v. Assistant Sales Tax Officer*<sup>1</sup>, it was held : The transaction of a photographer taking customers' photographs, preparing final positive prints, and supplying the same to the customers is not a "sale" of manufactured finished product. It is a contract of work and labour and receipt of consideration for the same is not taxable to sales tax. The fact, that the process of preparing photographs is not so simple and of pure skill as painting a portrait but complicated instruments like a modern camera and chemical process like developers are used therein, cannot make any difference to the nature of the contract.

**(14) C.P. and Berar Sales Tax Act, 1947, S. 2(g), Expl. II—"Sale"—Place of sale.**

Under the Sale of Goods Act, 1930, "sale" would ordinarily take place where the goods are by mutual agreement appropriated towards the contract. Explanation II to sections 2 (g) of the C.P. and Berar Sales Tax Act, 1947, however, prescribes for the purposes of the Act a fictitious situs of the sale. If at the date of the contract of sale, goods are actually within the province, the sale wherever it takes place, is deemed by a legal fiction, to take place within the province. The condition of liability to tax is the existence of goods within the province at the date of the contract of sale.<sup>2</sup>

**(15) Orissa Sales Tax Act, 1947, S. 2(g)—Conditions necessary to constitute a "sale".**

In *Indal Employees' Co-operative Society Ltd. v. State of Orissa*<sup>3</sup>, it was held : The term "sale of goods" occurring in Entry 54 of List II of Sch. VII to the Constitution of India means the same as is understood in S. 4 of the Sale of Goods Act, 1930. A transaction of sale of goods to be liable for tax must satisfy the following elements : (1) there must be two parties who are competent to contract ; (2) there must be mutual assent ; (3) the absolute or general property in the goods is transferred from the seller to the buyer ; and (4) a price in money is paid or promised. If it only amounts to a release by a joint owner of his interest in the property in favour of another joint owner even for a price, it cannot be considered a sale.

1. 1971 M.P.L.J. 582 See Yearly Digest, 1971, (August issue) Colmn. 1473. Distinction between "sale" and "works contract" pointed out. A.I.R. 1961 Pat. 272 Diss. A.I.R. 1969 Bom. 437 relied on.  
2. *Anwarkhan Mahboob, Company v.*

*Commr. of Sales Tax. U.P.*, 1971 M.P.L.J. 578 (S.C.). See Yearly Digest, 1971 (August issue) Colmn. 1472.  
3. *I.L.R. (1968) Cut. 378 : 34 Cut. L.T. 745. A.I.R. 1958 S.C. 560 followed. See Yearly Digest 1969, Colmn. 2830,*



**(16) Transaction between two partnerships having identical partners.**

In *Mahendra Kumar Ishwarlal & Co. v. State of Madras*, A.I.R. 1968 Mad. 241 it was held: To constitute a sale there must be two different persons, the term 'person' being used in its ordinary sense. When there is transfer of goods between one partnership and another and the partners of the two firms are identical, it will really be a case of one person transferring goods to himself. There is, therefore, no "sale" within the meaning of the Madras General Sales Tax Act, 1959 or the Central Sales Tax Act, 1956. The fact that there is a difference in the shares of the partners in the two firms will have no relevance in this respect, as all the partners have got a common right of ownership in the property dealt with.

**(17) Rescission of contract of sale.**

A purchaser cannot refuse to comply with the contract of sale or even ask for rescission on the ground of misapplication by trustee of moneys already paid (*Joseph Carlos v. Stanislaus Costa*, A.I.R. 1968 Mad. 161).

**(18) Auctioneer auctioning pledged goods.**

In *D.C. of Commercial Taxes, Madras v. Dayanand Corporation, Madras*, (1968) 21 S.T.C. 346, it has been held under the Madras General Sales-Tax Act, Ss. 2(g) and 2(n): Where an auctioneer auctions pledged goods by acting as broker and the possession of goods is with the pawnee, the transaction by the auctioneer is not sale. Auctioneer is not a "dealer" and such transactions are not taxable to sales-tax.

**(19) Prevention of Food Adulteration Act, 1954.**

Sale of any article of food for analysis is sale within the meaning of S. 2 (xiii) of the Prevention of Food Adulteration Act, 1954. (*Public prosecutor, A.P.v.K. Subbu Rao*, 1968 Cr. L.J. 278 (A.P.).

**Formalities of the Contract**

**5. (1)** A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

**Synopsis**

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|---|--|
| (1) <i>Formation of the contract of sale —old law—charges effected.</i> | (2) <i>Formalities required for making a contract of sale,</i> |
|---|--|



- |   |  |
|---|--|
| (3) <i>Contract must originate in offer and acceptance—how offer and acceptance must be made.</i> | (8) <i>Contracts by "bought and sold" notes.</i>       |
| (4) <i>Contracts implied from conduct—sub-section (2).</i>  | (9) <i>Earnest.</i>                                    |
| (5) <i>Contracts under seal—contracts by corporations.</i>  | (10) <i>Interpretation of a contract of sale.</i>      |
| (6) <i>Written contracts.</i>   | (11) <i>Contracts of sale of goods by written deed</i> |
| (7) <i>Contracts partly written and partly printed.</i>   | (12) <i>Conditional sales.</i>                         |

**(1) Formation of the contract of sale—old law—changes effected.**

Sub-section (1) of section 5 corresponds to repealed section 78 of the Indian Contract Act, 1872, which ran as follows :

Sale is effected by offer and acceptance of ascertained goods for price, or of a price for ascertained goods, together with payment of the price or delivery of the goods ; or with tender, part payment, earnest or part delivery ; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery or both, shall be postponed, the property passes as soon as the proposal for sale is accepted."

This section referred to the making of a sale as well as to the passing of property. The Special Committee considered it desirable to keep the two matters separate. Further, in their opinion, that section was open to the following objections :

(1) Although by its marginal note it purported to lay down a rule relating to sales generally, it dealt only with the simplest case of a sale of ascertained goods for a fixed price.

(2) After stating that a sale could be effected by offer and acceptance of goods for a price, it went on to enumerate various circumstances which would constitute a sale. This enumeration or description was neither accurate nor complete.

(3) The acceptance referred to in the section was the acceptance of goods as distinguished from the acceptance of offer. The two were fixed in this section.

(4) The section stated that part delivery along with offer and acceptance was sufficient to constitute a sale. But, in order to effect a complete sale, part delivery must be made in course of delivery of the whole. The provisions of this section had therefore to be read subject to the provisions of section 92 of that Act [I.L.R. 15 Cal. 1 at page 6].<sup>1</sup>

The present section removes all these ambiguities.

1. See report of the Special Committee

(Appendix C).



Sub-section (2) of section 5 is new and is based on section 10 of the Indian Contract Act and section 3 of the English Sale of Goods Act, 1893.<sup>1</sup>

The proviso to section 3 of the English Act which related to corporations has been omitted because it is already covered by the opening words of sub-section (2), namely, 'subject to provisions of any law for the time being in force'.

Sub-section (1) of section 5 describes the mode of formation of a contract of sale which includes a sale as well as an agreement to sell while section 78 of the Indian Contract Act was confined to the formation of sale and did not describe the formation of a contract of sale or agreement to sell. While section 78 confined its formation only to ascertained goods, the present section is more comprehensive and applies to all contracts of sale of goods whether ascertained or unascertained. The provision for the inference of sale from conduct of the parties in sub-section (2) is very salutary.

## (2) Formalities required for making a contract of sale.

Section 5 deals with the formalities required for making a contract of sale. The general principle underlying sections 3, 4, 7, 8 and 9 of the Indian Contract Act is that every contract is effected by an offer proceeding from one side and an acceptance by the other, supported by consideration, and sub-section (1) embodies that general principle. It also emphasizes the consensual nature of a contract of sale, and consequently the parties may agree to such terms as they think fit. *Est autem emptio juris gentium, et ideo consensu peragitur.*

Sub-section (1) states that a contract of sale is made by a buyer offering to buy or a seller offering to sell goods *for a price*, and the other party accepting such offer. Every contract thus involves two parties one of whom must offer and the other must accept to buy or sell goods, and the consideration should be price [as defined in section 2(10) of the Act].

As regards delivery of the goods or payment of the price the parties may agree among themselves. This sub-section provides that the contract may provide for the immediate delivery of the goods or immediate payment of the price or both or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed. The legal consequences which follow any agreement made, for sale of goods on credit or for delivery of goods by instalments, are dealt with under the appropriate sections.

1. Section 10 of the Indian Contract Act, 1872, reads as follows :

"All agreements are contracts if they are made by the free contract of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses of any law relating to the registration of documents."

Section 3 of the English Sale of Goods Act, 1893, is to the following effect :

"Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties :

Provided that nothing in this section shall affect the law relating to corporations."



According to sub-section (2), subject to the provisions of any law for the time being in force,<sup>1</sup> a contract of sale may be made by—

- (1) writing, or
- (2) word of mouth, or
- (3) partly by writing and partly by word of mouth, or
- (4) may be implied from the conduct of the parties.

A written offer to sell goods may be orally accepted and *vice versa*. Where a man goes into a restaurant, orders a dinner and eats it, obviously there is a sale though no mention be made of buying, or selling, or price. If, however, contract of sale has been reduced into writing, it is like other contracts in writing, governed by the rules of evidence laid down by sections 65-66, and sections 91-92 of the Indian Evidence Act, 1872. Oral evidence is inadmissible to contradict the terms of the written instruments<sup>2</sup> but such evidence is admissible to prove any fact falling within any of the provisos to section 92 of that Act. Thus oral evidence is admissible to prove any fact which would invalidate any document, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want of failure of consideration, or mistake in fact or law.<sup>3</sup>

Where A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery, and B sues A for the price, A may show that the goods were supplied on the credit for a term still unexpired.<sup>4</sup> Again, where A sells B a horse and verbally warrants him sound, and A gives B a paper in the words, "Bought of A a horse for Rs. 500", B may prove the verbal warranty.<sup>5</sup> A agrees to buy from B a full cargo of kerosine oil which B had contracted to buy from C. Subsequently A and B request C to transfer C's contract with B into A's name. C refuses to consent to the transfer, and it is thereupon arranged between A and B that bought and sold notes should be exchanged. Seeing that the market was rising B inserts in the bought and sold notes the figures 1,00,000 cases as descriptive of the quantity of oil sold whereas the cargo in truth amounted to 1,25,000 cases. The bought and sold notes having been falsified, A is entitled to disregard them and prove his contract by other and antecedent material.<sup>6</sup>

Section 3, clause (58) of the General Clauses Act provides that writing includes printing, lithography photography, and other modes of representing or reproducing words in a visible form.

### **(3) Contract must originate in offer and acceptance--how offer and acceptance must be made.**

This Act does not prescribe how an offer to buy or sell goods can be made and in what manner such an offer can be accepted. The general

1. See the Copyright Act, (3 of 1957), section 19; Apprentices Act, 1850 (19 of 1850), section 8; the Conveyance of Land Act, 1854 (31 of 1854) sections 14 & 18; the Carriers Act, 1865 (3 of 1865), sections 6 & 7; the Merchant Shipping Act, 1894 (57 & 68 Vict. C. 60), section 24; the Companies Act, 1956 (of 1956), sections 12, 30, 46, 47 & 48.

2. Section 92 of the Indian Evidence Act, 1872.

3. Section 92 of the Indian Evidence Act, 1872, proviso (1)

4. Illustration (f) to section 92, Indian Evidence Act.

5. Illustration (g) to section 92, Indian Evidence Act.

6. Durga Prasad Sureka v. Bhajan Lal Lohea, (1904) 31 Cal. 614,



principles embodied in sections 3, 4, 7, 8 and 9 of the Indian Contract Act would therefore appear to govern these questions.

As is obvious, every contract must originate with an offer. The offer may be either by the seller to sell goods, or by the buyer to buy goods, for a price. An offer which is the same thing as a proposal, may be general or specific. An offer may also be in the form of a tender.

According to section 5 of the Act, a contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. It may be oral or in writing or may even be inferred from the conduct of the parties, but it must of necessity originate in offer and acceptance.

Where the seller had offered to transfer his goods on payment of some price at the future date, in order to make it a binding contract that price must be accepted or agreed to by the intending purchaser. The mere fact that the latter had made an offer for purchase of goods does not render the contract complete by the acceptance of that offer even though it may be for a price which was not contained in the original offer. The price quoted will constitute a counter-offer which must be accepted to develop into a contract. The requirements of valid contract are varied. They are not satisfied if the offer to buy or sell unaccompanied by the quotation of price is accepted. There must be acceptance both of the purchase and of the price, at which it is to be purchased.<sup>1</sup>

An offer is said to be specific when it is addressed to a definite individual or body of individuals. It is general when it is addressed to an unascertained body of individuals even though may be an ascertained individual. An example of general offer is an offer or a reward for bringing back a lost article.<sup>2</sup>

Where large quantities of goods are required from time to time during a particular period, it is usual to call for tenders for the supply of such goods and that tender which gives the most favourable terms is accepted. A tender thus is in the nature of a standing or continuing offer. An offer may be revoked at any time before acceptance,<sup>3</sup> but it is made irrevocable by acceptance.<sup>4</sup> A company advertised for the supply of such iron articles as they might require between 1st November, 1871 and 31st October, 1872. Witham sent a tender to supply the articles required on certain terms in such quantities as the company might order from time to time and his tender was accepted by the company. Orders were given and executed for some time on terms of the tender, but after a while Witham refused to execute orders. The company sued him for non-performance of an order already given and he was held liable.<sup>5</sup>

It is to be noted that in the case of such a tender the true position is that a person submitting a tender can withdraw it by giving a notice until it had been accepted by the company in such a manner as to bind it.

1. Alapati Ramamurthi Galli Krishnamurthi & Co. v. J. Ramanujam, A.I.R. 1961 An. Pra. 408.

2. See Lancaster v. Walsh (1883) 153 E.R. 1324 : 51 P.R. 441. See also Carlil v. Carbolic Smoke Ball Co., (1893) 1 Q.B. 256.

3. Offord v. Davies, 12 C.B. (N.S.) 747 : 142 E.R. 1336, 123 R.R. 491.

4. Great Northern Railway Company v. Witham, (1873) 9 C.P. 16.

5. Great Northern Railway Company v. Witham. (1873) 9 C.P. 16.



This depends upon the construction of the contract, that is, whether the tender is entire or severable. If the tender is intended by both parties to be an offer of a contract for a period involving, if accepted, an obligation on both parties during that period, a contract is entire and a tender is, after the acceptance, irrevocable. But if the tender is merely a revocable continuing offer to be accepted from time to time by the giving of orders it is revocable by giving a notice.

The company is under no obligation to give any order, and no action would lie against it for not so doing, its so-called "acceptance" of the tender being merely a recognition of the offer. But as soon as an order is given—although not till then—there is a binding acceptance, which renders the contract complete, so far at least as concerns the instalment ordered and both parties are bound to perform it.<sup>1</sup>

In the case cited above, Keating J. observed :

"If, before the order was given, the defendant had given notice to the company that he would not perform the agreement it might be that he would have been justified in so doing. But here, the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise."

In *Percival Ltd. v. London County Council*,<sup>2</sup> Atkin J. said :

One knows that it is quite common for large bodies that require supplies over a year to ask for tenders and to obtain them, and it sometimes happens that the effect of the form of the tender with the acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, one knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all ; in other words, the contractor offers to supply goods at a price and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order ; but apart from that nobody is bound.

"There is also an intermediate contract that can be made in which although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed for them. Of course, if there is a contract such as that, then there is a binding contract which will be broken if the purchasing body in fact do need some of the articles the subject of the tender, and do not take them from the tenderer."

In *Kier & Co. Ltd. v. Whitehead Iron & Steel Co.*,<sup>3</sup> the contract was for the sale of steel "as per buyer's total requirements" up to 8,000 tons. The prices having increased the buyers ordered 4,000 tons for the purpose of keeping in stock and sellers having refused, the court held that the contract was not a mere option to buyers to take any quantity upto the 8,000 tons with a right to take none in all, but a contract to supply the

1. See Benjamin on Sale, 8th Edn., p. 77.

2. (1918) 87 L.J.K.B. 677.

3. (1938) 1 All E.R. 591.



buyer's actual needs, and consequently there was no breach by the seller in refusing to supply goods not actually required.

In *Smyth & Co. v. Bailey & Co.*,<sup>1</sup> the House of Lords on facts held : The contract was an indivisible one for 15,000 units and the rejection of the first invoice was a breach which was not waived by the bare fact of sending of the second invoice which was merely an attempt on the part of the sellers to meet the buyer's objection. There was no repudiation of contract by the sellers.

In this case there was a contract dated 3rd August, 1938, for purchase of 15,000 quarters 2 per cent. more or less of corn and additional option to the sellers of shipping a further 3 per cent. more or less. It provided for separate documents for each 1,000 quarters and that each 1,000 quarters were to be considered a separate contract. About 15,444 quarters corn were shipped. There were 15 bills of lading for 1,000 quarters each and one for 444 quarters in bulk and/or ship bags. The buyers rejected it as not in accordance with the contract, and repudiated it in its entirety.

The next step is the communication of the offer. In order to constitute a valid contract there must be mutual assent and the parties must therefore be of the same mind. Consequently, unless the acceptor knows of the offer there can be no acceptance and therefore no contract. This is true of specific as well as of general offers.<sup>2</sup>

Where an offer consists of several terms and a document containing all of them is handed to the acceptor, his assent is presumed in all cases where the offerer has done what is reasonably sufficient to bring those terms to the knowledge of the acceptor and where he has signed the document, he is bound in the absence of misrepresentation, whether he has read the conditions or not.<sup>3</sup> In *L' Estrange v. Graucob*,<sup>4</sup> the buyer of an automatic slot machine signed an order form containing in ordinary print the essential terms of the contract, and certain special terms in small print. One of the terms in small print was to the effect that any express or implied condition or warranty not stated therein was excluded. In an action for damages for breach of an implied warranty of fitness, the court held that as the plaintiff had in signing the contract, not been induced by any misrepresentation, she was bound by the terms, though she might not in fact have acquainted herself with the contents.

It is to be observed that the communication of offer, acceptance or revocation of either of them is deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to

1. (1940) 3 All E.R. 60 (H.L.) reversing (1939) 3 All E.R. 175.
2. *Cole v. Cottingham*, (1831) 173 E.R. 406 ; see also *Tinn v. Hoffman & Co.*, (1873) 29 L.T. Exch. 271 ; *Taylor v. Laird*, (1856) 25 L.J. Ex. 329 ; *Gibbons v. Proctor*, (1891) 64 L.J.N.L. 594 ; *Williams v. Carwardine*, (1833) 110 E.R. 500, 38 R.R. 328 ; *Pitch v. Suedaker* (1868) 38 N.Y. 948 ; *Lalman v. Gauri Dutt*, (1913) 11 A.L.J. 89 : 19 I.C. 576, for general principles under the Contract Act.
3. See *Henderson v. Stevenson*, (1875)

- 2 H.L. (Sc. 470) ; *Symonds v. Pain*, (1861) 158 E.R. 293 ; *Parker v. S.E.R. Co.*, (1877) 2 C.P.D. 416 ; *Watkins v. Rymill*, (1883) 10 Q.B.D. 178 ; *Ashby v. Talhurst* (1937) 2 K.B. 242 ; *Richardson v. Rowntree*, (1894) A.C. 217 ; *Mackilligan v. Compagnie de Messageries Maritimes*, (1897) 6 Cal. 227.
4. (1934) 2 K.B. 304 ; see also *Penton v. Southern Rly.*, (1931) 2 K.B. 103.



communicate or which has the effect of communicating it.<sup>1</sup> Performance of the conditions of a proposal or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal.<sup>2</sup> In order to constitute a legal offer or acceptance or revocation of either it is not enough that party making such offer or acceptance or revoking it should only intend or make up in his mind to do so, but it should be accompanied by such overt act or omission as may be sufficient to carry the information or a reasonable inference from it that the party doing the act or making the omission communicates the offer or acceptance or revocation to the other party.<sup>3</sup>

Communication may be made in a variety of ways besides by written or spoken words or signs. For instance, it may be made by delivery of goods by that owner to a man who has offered to buy them for a certain price,<sup>4</sup> or by acceptance of price and crediting it in his accounts<sup>1</sup> or by dropping a coin into an automatic selling machine<sup>5</sup> or by some prearranged signs not being any form of cipher or secret writing and not having in themselves any common understood meaning<sup>6</sup> or by other overt act which has the effect of communication of intention to an ordinary reasonable mind.<sup>7</sup> "A greater number of contracts", observes Stephen J., "are in the present state of society, made by the delivery by one of the contracting parties to the other, of a document in a common form stating the terms by which the person delivering it will enter into the proposed contract. *Such a form constitutes the offer of the party who tenders it.* If the form is accepted without objection by the person to whom it is tendered, he is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not."<sup>8</sup>

Where a merchant advertises his goods to be sold at a certain price and certain conditions, such advertisement amounts to an offer and any person ordering such goods shall be deemed to accept the price and the conditions attached to it unless he takes exception to them in his order.<sup>9</sup> Such offers are usually known as continuous offers. Another instance of this is of Railway companies making offers in their prospectus or tariffs to carry or to take care of goods and passengers on certain terms. A traveller who takes a ticket for a journey or for luggage left at a cloak room accepts an offer in the prospectus for such purposes and is bound by the many terms which it may contain, although he has not acquainted himself with any of them and has not even seen the prospectus.<sup>10</sup> Such continuous offers may be made to individuals as well as to the public at large.<sup>11</sup>

But, as already observed, a mere failure to reply to a proposal or counter-proposal would not *per se* amount to an acceptance of it.<sup>12</sup> A counter-proposal, however, may be deemed to be accepted by mere silence

1. S. 3, Indian Contract Act, 1872.

2. *Ibid*, S. 8.

3. 2 App. Cas. 612 ; Dartford Union v. Trickett, 5 T.L.R. 619 ; Felthouse v. Bindley, 31 L.J.C.P. 204.

4. Pollock's Contract Act, p. 28.

5. Ramsgate Victoria Hotel Co. v. Montefiore, L.R. 1 Exch. 109.

6. *Ibid*.

7. Paynter v. Williams, 1 C. & M. 810.

8. Watkins v. Rymill, (1883) 10 Q.B.D. 178.

9. (1883) 10 Q.B.D. 178.

10. See Anson's Law of Contract.

11. Bengal Coal Company Ltd. v. Home Wadia & Co., 24 Bom. 87 (102).

12. Bishun Padu Holder v. Chandi Prasad and Co., 18 A.L.J.R. 73 ; Krishnayya v. Padmanabhan, (1917) M.W.N. 91.



when it contained an intimation for the other party that his silence will amount to an acceptance.<sup>1</sup>

After communication of the offer comes the question of acceptance of the offer. Contract is formed by the acceptance of an offer. Till then neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it was made.<sup>2</sup>

Acceptance must also be *communicated* to the other party like offer and this means more than a tacit formation of intention. The communication of acceptance need not, however, be by words or writing. Conduct may amount to communication, and even silence where there is a duty to dissent,<sup>3</sup> or some act must be done which the other party has expressly or impliedly offered to treat as a communication. For instance, if the offerer says, "If you mean to accept my offer, inform B or hang out a flag, or fire a gun"—in all these cases if the offerer acts accordingly, the acceptance of the manner authorized turns it into a contract, irrespective of the offerer's actual knowledge of such acceptance. Similarly, a written offer to buy goods accompanied by a sum of money representing the price will be deemed to be accepted, if the other party credits the money received to his account.<sup>4</sup>

Bowen L.J. observed in *Carlill v. Carbolic Smoke Ball Co.*<sup>5</sup> :

"One cannot doubt that, as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that *consensus* which is necessary according to the rules of English law to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person, who makes the offer may dispense with notice to himself if he thinks it desirable to do so ; and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance ; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance, with notification."

An acceptance must be *in the terms* of the offer, otherwise it is a counter-offer, or new proposal. In *Jordon v. Norton*<sup>6</sup> the defendant offered to buy a mare, if warranted "sound and quiet in harness." The plaintiff

1. *Krishnayya v. Padmanabhan*, (1917) M.W.N. 91. See, however, *Bishun Padu Holdar v. Chandi Prasad & Co.*, 18 A.L.J.R. 73 ; *Felthouse v. Bindley*, 22. L.J.C.P. 284.  
2. See *Thawaradas Pherumal v. Union of India*, A.I.R. 1965 S.C. 468—one-sided offer which is never accepted—no contract particularly when contract

intended to be reduced to writing.  
3. See *Dartford Union v. Trickett*, (1839) 59 L.T. 754 (C.A.) ; cf *Felthouse v. Bindley*. 11 C.B. (N.S.) 869 ; 3, L.J.C.P. 204 ; 132 R.R. 784.  
4. *Ramsgate Victoria Hotel v. Montefiore*, L.R. 1, Exch. 109.  
5. (1893) 1 Q.B. 256.  
6. 4 M. & W. 155.



sent the mare with a warranty that she was "sound and quiet in double harness." It was *held*, there was no complete contract. In *Hutchinson v. Bowker*,<sup>1</sup> the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied: "Such offer we accept expecting you will give us, *fine* barley and *full* weight." It was *held*, that the plaintiff had not accepted the defendant's offer and the contract was not complete.

An inquiry of the proposer whether he will modify his terms, is not a counter-proposal entitling him to treat his offer as rejected.<sup>2</sup> Nor can there be an acceptance of an offer made in ignorance of the offer. Therefore, whether cross-offers are made simultaneously—as, for instance, offers by post to sell and to buy goods at same price—neither offer can be construed as an acceptance of other.<sup>3</sup> Similarly, an acceptance cannot precede the offer.<sup>4</sup>

The acceptance must be absolute and unconditional.<sup>5</sup> If the other party imposes any condition, it is not acceptance but only a counter-offer which if accepted by the party making the offer may become a contract.<sup>6</sup> In order to convert a proposal into a promise the acceptance must be absolute and unqualified. For unless and until there is such an acceptance on the one part of terms proposed on the other part, there is no expression of more or less different intentions of each party separately—in other words proposals and counter-proposals.<sup>7</sup> The acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

In *Bishop & Baxter v. Anglo-Eastern Trading and Industrial Co. Ltd.*, (1943) 2 All E.R. 598, an offer from an intending purchaser of goods was accepted by the seller "*subject to war clause*". There were many kinds of war clauses in use and it did not appear that any particular war clause was in the minds of the parties. In the circumstances, it was held that there was not completed contract as there was no *consensus ad idem*.

"A tentative order, bearing the notation that it would be confirmed on receipt of samples, is not an unqualified offer, acceptance of which would constitute a contract, but is merely a preliminary negotiation. So also, it has been held that an order for goods which contains the notation 'confirmation later' is not complete contract but constitutes merely a contingent contract, which may be withdrawn or the sale rescinded even after the goods are delivered; but it may become an effective contract of sale by acts of acceptance and confirmation by the parties, and the shipment of the goods by the seller constitutes acceptance by him, and acceptance of the goods or any part thereof by the buyer constitutes confirmation by him."<sup>8</sup>

"A contract of sale signed by one party only becomes binding against the party who did sign when the party who was not bound acts thereon and performs. The fact that the buyer could defeat enforcement of a contract which was signed only by the seller by interposing the statute of frauds as a defence

1. 5 M. & W. 535.

2. See *Stevenson v. McLean*, 5 Q.B.D. 346; 49 L.J.Q.B. 701.

3. See *Tinn v. Hoffman*, (1873), 29 L.T. 271, especially at pp. 278, 279.

4. See *Re Northern Electric Wire Co.*, exp. Hall, 63 L.T. 369.

5. See S. 7, Indian Contract Act, 1872.

6. *Bhagwandas v. Shiv Dial*, 22 I.C. 811; *Rampur Sugar Factory v. Diwan Chand Ishar Dass*, 51 I.C. 860.

7. Per Bramwell L.J. in *Drew v. Nunn*, 4 Q.B.D. 668; I.L.R. 28 Bom. 420.

8. *Corpus Juris Secundum*, Vol. 77, S. 25, p. 633.



does not render the written contract unilateral and lacking in mutuality so as to render it unenforceable against the seller.”<sup>1</sup>

There is in principle a rational distinction between the acceptance of an offer which asks for a promise and an offer which asks for an act on the condition of the offer becoming a promise. In the former case where the acceptance is to consist of a promise, there must be communication to the proposer. But in the latter class of cases where the acceptance is to consist of an act, as for example, despatching goods ordered by post, the rule is that no further communication of the acceptance is necessary than the performance of the proposed act. The distinction is recognised in Ss. 5 and 8 of the Indian Contract Act, 1872.<sup>2</sup>

The post office is the ordinary channel of communication, and in the vast majority of cases an authority to post an acceptance, where not express, will be implied, for it is conceived that an offer made by post or by telegraph invites an answer by post or by telegraph respectively, unless the contrary is expressed.<sup>3</sup> Where acceptance by post or telegraph is authorised, the posting of letter, or despatch of telegram, addressed to the offerer within due time accepting the offer is an acceptance. At the moment the bargain is struck, and the contract is complete, neither party can afterwards escape from it.<sup>4</sup> As soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.”<sup>5</sup> Accordingly, an offer cannot be withdrawn after the acceptance has been duly posted, although it may not then have reached the offerer,<sup>6</sup> or may never reach him.<sup>7</sup> To be effective the withdrawal must reach the other party before he has duly posted his acceptance. Similarly, an acceptance once posted cannot be revoked, even though the letter is lost in transit and never reaches offerer.<sup>8</sup>

In *Pratap Chandra Koyal v. Kali Charan Acharya*<sup>9</sup>, it was held : Unless the offerer expressly or impliedly directs to the contrary, an acceptance by letter is admissible. The exact date on which the option of acceptance is exercised by a party is to be ascertained from the date when the acceptance is put in transmission and the letter is posted.

*Henthorn v. Fraser*<sup>10</sup> was relied on in the above case. In that case letters accepting an open offer and withdrawing the offer were posted on the same day. The letter of withdrawal was received before the letter of acceptance. It was held : Nevertheless, the withdrawal was too late. An offer which is likely to be accepted by letter is accepted when the letter is posted ; but a withdrawal of such an offer dates only from the time when the fact of the withdrawal is known to the other party. It was observed :

1. Corpus Juris Secundum, Vol. 77, S. 20, p. 619.
2. State of Bihar v. Bengal Chemical and Pharmaceutical Works Ltd, A.I.R. 1954 Pat. 14.
3. See Benjamin on Sale, 8th Edn., p. 79.
4. Dunlop v. Higgins, (1848), 1 H.L.C. 311 ; 73 R.R. 98.
5. Per Thesiger L.J. in Household Fire Insurance Co. v. Grant, (1879) 4 Ex. D. at 221, 48 L.J. Ex. 577.
6. Adams v. Lindsell, (1818) 1 B. & Ald. 681, 19 R.R. 415.
7. Household Fire Insurance Co. v. Grant, (1879) 4 Ex. D. 216.
8. See Benjamin on Sale, 8th Edn. p. 82.
9. A.I.R. 1952 Cal. 32 : 55 C.W.N. 557.
10. (1892) 2 Ch. 27.



“Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usage of mankind the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.”

A posted letter of acceptance must be addressed to the offerer or his agent. One addressed to the acceptor's agent only will not become binding until it is actually communicated to the offerer.<sup>1</sup> If the letter of acceptance is misdirected by fault of the acceptor, it cannot be deemed to be a proper acceptance (*Ram Das Chakrabarti v. Official Liquidator*) (1887) 9 All. 366.

If the offerer expressly stipulates that an answer must be despatched by telegram or by a particular post, the other party must of course comply with that stipulation. If nothing be said about time the offer must be accepted within a reasonable time<sup>2</sup> and an unusual delay may make it inoperative,<sup>3</sup> unless the other party waives his right to treat it as such and accepts such delayed acceptance as valid.

What applies to the post applies equally to an acceptance by telegram as decided in *Stevenson v. McLean*.<sup>4</sup>

The law is thus summed up in *Corpus Juris Secundum* (Vol. 77, S. 28, pp. 644, 645) :

“Where an offer to buy or sell is made by post or telegraph, acceptance of the offer may be made by the same means, that is, by letter or telegram, unless it can fairly be inferred from the offer or other prior communication that some other means of communicating acceptance is expected. Moreover, unless the offer expressly stipulates that acceptance thereof must be received by the offerer before the acceptance is binding, or unless there is a general agreement or understanding between the parties to that effect, or unless there are other special circumstances, the acceptance is communicated and the contract of sale is complete from the time the letter is posted or telegram is filed in the usual way for transmission, even though it is not received by the offerer. However, the mere writing of a letter or telegram containing notice of acceptance is not, of itself, sufficient to complete the contract but the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the telegraph office, for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract of sale.

*Time of sending.*—In accordance with the rule that acceptance must be made within a reasonable time,...in the absence of limitation as to time, a letter or telegram of acceptance in order to be effective, must be posted or filed for transmission within a reasonable time after receipt of the offer. An offer to sell sent by mail in normal course of business, without expressly requiring an answer by return mail, must generally be accepted by the mail leaving during business hours on the day the offer is received although not necessarily by the next post ; but, if the offer requires an answer by

1. *Re National Savings Bank, Hebb's case* (1867) R.L. 4 Eq. 9 ; 36 L.J. Ch. 748.

2. See Benjamin on Sale, 8th Edn, p. 83 and the authorities cited thereunder.

3. *Bishun Padu Holdar v. Chandji Prasad and Co.*, 18 A.L.J.R. 73.

4. (1880) 5 Q.B.D. 346; *Bruner v. Moore*, (1904) 1 Ch. 305.



return mail the acceptance must be sent by the next post, unless such condition is waived.

*“Effect of withdrawal.*—An acceptance by post or telegraph is effectual only where the offer is still standing; but, since a withdrawal of an offer to buy or sell does not become effective until notice thereof is communicated to the offeree.....although an offer is in the meantime withdrawn, the contract of sale is consummated if the person to whom the offer is made mails his letter or files his telegram of acceptance before notice of the withdrawal is received by him, or before the withdrawal is sent particularly where the acceptance is received before the revocation is received.”

Where the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is binding contract and the reference to the mere formal document may be ignored. The conduct of the parties in acting upon the contract before the formal agreement was drawn up is the clearest evidence of this fact.<sup>1</sup>

An offer lapses (1) by not being accepted in the mode prescribed,<sup>2</sup>  
 When offer lapses. (2) by not being accepted within the time prescribed,<sup>3</sup>  
 (3) by rejection or counter offer,<sup>4</sup> (4) by the death of the offerer or the offeree before mutual assent is given, and (5) by revocation. If no time is prescribed for the acceptance, it must be accepted within a reasonable time. If the acceptor does not make a counter offer but only desires to know if the offerer's terms are final or merely makes an enquiry, offer does not lapse and may be accepted at any time before it is withdrawn.<sup>5</sup>

Although the proposer may prescribe a mode of acceptance of the proposal, he cannot prescribe a mode for refusal. He cannot for instance lay down a condition that if he receives no answer within a given time he shall consider the offer accepted.<sup>6</sup>

1. *Gujjarmal v. Governor-General of India*, A.I.R. 1942 Pesh. 33.

2. Section 7 (2) of the Indian Contract Act which runs as follows:

“In order to convert a proposal into a promise, the acceptance must be expressed in some usual and reasonable manner, unless the proposer prescribes the manner in which it is to be accepted. If the proposer prescribes the manner in which it is to be accepted and the acceptance is not made in such a manner, the proposer may within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise, but if he fails to do so, he accepts the acceptance.”

This is a departure from English

law where acceptance not corresponding in time or place with the terms prescribed by the proposal is inoperative—See *Felthouse v. Bindley*, 31 L.J.C.P. 204.

3. See *Ramsgate Hotel Co. v. Montefiore*. (1866) 1 Ex. 10; *Indian Co-operative Navigation Co. v. Padamsey*, (1934) 36 Bom. L.R. 32.

4. See *Hyde v. Wrench*, (1840) 49 E.R. 132; 52 R.R. 144; but it is not rejection if it is a mere inquiry; see *Stevenson v. McLean* (1880) 5 Q.B.D. 346 (350).

5. See *Stevenson v. McLean*, cited above.

6. *Felthouse v. Bindley*, 31 L.J.C.P. 204; *Bishun Padu Holdar v. Chandi Prasad & Co.*, 18 A.L.J.R. 79; *Mylappa v. Aga Mirza*, 54 I.C. 550.



Under the English law, if a person accepts the offer in ignorance of the offerer's death, there can be no contract,<sup>1</sup> but the Indian law on the point is different. Section 6, clause (4) of the Indian Contract Act lays down that "a proposal is revoked by the death or insanity of the proposer if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance." Thus under the Indian law an acceptance in ignorance of the death or insanity of the offerer gives rise to a contract.

It has been held under the English law that the bankruptcy of the offerer does not put an end to the offer except where the offer relates to the property of the offerer which on his bankruptcy will vest in the assignee who may if he chooses make a fresh offer.<sup>2</sup>

Revocation may be made at any time before the offer is turned into a contract by acceptance. A revocation has necessarily to be communicated. On this point sections 4 and 5 of the Indian Contract Act provide as follows :

"4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

5. Proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against acceptor, but not afterwards."

The communications of a proposal is thus complete when it comes to the knowledge of the person to whom it is made. The proposer has full power to withdraw it before that time but after the proposal is communicated to the other party, it can be withdrawn only if the other party has not already accepted it and has not put such acceptance in the course of transaction to the proposer, inasmuch as communication of an acceptance is complete against the proposer when it is put in the course of transmission to him, so as to be out of the power of the acceptor.<sup>3</sup> The communication of an acceptance is complete against the acceptor when it comes to the knowledge of the proposer and then the agreement becomes irrevocable. Before that, however, the acceptor can withdraw his acceptance by communicating such withdrawal earlier than the communication of acceptance reaches the proposer's knowledge inasmuch as the communication of a revocation is complete against the person to whom it is made when it comes to his knowledge. So, if the communication of the revocation or acceptance

1. Reynolds v. Atherton, (1922) 127 L.T. 189.

2. Meynell v. Surtees, (1855) 25 L.J. Ch.

257.

3. See Henthorn v. Fraser, (1892) 2 Ch. 27(31)



reaches the proposer after the acceptance is communicated to him the contract becoming binding the revocation becomes ineffective.<sup>1</sup> Where acceptance and revocation are communicated simultaneously, for instance, where letter of acceptance and letter of revocation reach the proposer at the same time, there is no contract.<sup>2</sup>

So acceptance, after knowing that the proposal has been revoked, is void and of no effect.<sup>3</sup> A bid at auction is a mere offer which may be retracted before the hammer is down.<sup>4</sup> So where the auctioneer accepted the bids of an agent without, however, knocking down the goods to him, but the principal repudiated the bids before the auctioneer notified their acceptance, it was held that there was no contract.<sup>5</sup>

A proposal may be revoked otherwise than by communication of notice of revocation, namely ;

(1) by the lapse of the time prescribed in such proposal for its acceptance, or if no time is prescribed, by the lapse of reasonable time without communication of the acceptance ; (2) by the failure of the acceptor to fulfil a condition precedent to acceptance, and (3) by the death or insanity of the proposer if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.<sup>6</sup> So, an offer made to one who is not in immediate communication with the offerer remains open and available for acceptance until the lapse of such a time as is prescribed by the offerer or is reasonable as regards the nature of the transaction,<sup>7</sup> after which it is deemed to be withdrawn.

In *Union of India v. Kulu Valley Transport Ltd.*<sup>8</sup>, it was held :  
 Ordinarily, a sale of shares becomes complete and binding on the parties when scrips with respect to those shares are handed over to the purchaser along with blank transfer deeds by the seller. Price may be paid at the time or agreed to be subsequently paid. The parties may also agree that the price shall be fixed by the purchaser and paid after such fixation. But where the shareholder along with the documents passed on to the buyer a letter in which he stated 'and request the Railway Administration to pay me any amount that it considers just and reasonable. This is in no way binding on the Railway Administration to make the purchase that was not meant to be an out-right sale but only an offer to sell on the specified terms'. It remained open to the Railway Administration to accept the offer or not and also to fix the price to be paid for the share. Before the Railway Administration fixed the price and paid it while communicating their acceptance of the offer, it was open to the seller to revoke the offer or the offer itself may stand revoked after the expiry of a reasonable time as it is an implied term in an offer that it shall be promptly and within a reasonable time be accepted.

1. *Household Fire Insurance Co. v. Grant*, 4 Ex. D., p. 222.  
 2. *Dunmore v. Alexander*, 9 Ch. (1st Ser.) 190.  
 3. *Dickinson v. Dodds*, 2 Ch. D. 413.  
 4. *Govind v. Mana Vikraman*, 14 Mad. 285.

5. *Mackenzie Lyall & Co. v. Chamroo Singh & Co.*, 16 Cal. 702 ; see also *Payne v. Cave*, 3 T.R. 148 ; *Marlow v. Harrison*, 28 L.J.Q.B. 18.  
 6. S. 6, Indian Contract Act, 1872.  
 7. *Adams v. Lindsell*, 1 B. & Ald. 681.  
 8. (1958) 28 Com. Cas. 29 (Punjab).



**Section 5—Offer—Parties must make their own contract—Offer or contract—Enforceability in law—Contract Act, 1872, Ss. 2 (a), 10.**

In *Coffee Board, Bangalore v. Janab Wada*<sup>1</sup>, it was held : As in the case of a contract the terms of an offer must be certain, and, the offer should be such as in law is capable of being accepted and gives rise to a legal relationship. If the terms of an offer are unsettled or indefinite, its acceptance cannot create any contractual relationship and vagueness of the offer would not carry any contractual force. The parties must make their own contract which means that they must agree as to its terms and if they do not make any such contract in that way the Court cannot make a contract for them.

It is the duty of the Court as far as possible to uphold a bargain between the parties and to give efficacy to a commercial transaction and it should for that purpose interpret the contract or the offer as the case may be, fairly broadly without astuteness for discovery of defects. Whether an offer or contract, as the case may be, is enforceable or capable of being accepted in law is a question the answer to which should necessarily depend upon the facts and circumstances of each case, no formula of universal application being possible for the solution of all such cases.

If a person is told that goods of more than one description are available for sale and he is asked to state what price he would be willing to offer for those goods and which of those goods he would be willing to buy at those prices and that person states only his prices but never indicates the goods required by him, it is impossible for any one to suggest that there was any acceptable offer made by him.

Where the specification of quantity required by the tenderer for the purchase of various types and grades of coffee from the Coffee Board was an essential term of the offer, and if that term was not to be found in the offer, his offer was vague for uncertainty and indefiniteness, on the acceptance of which no contract was ever born or came into being.

*For detailed discussions on the subject, see Commentaries on the Indian Contract Act, 1872.*

**(4) Contracts implied from conduct—sub-section (2).**

According to sub-section (2) of this section, subject to the provisions of any law for the time being in force, a contract of sale may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. According to it, if a particular law in force for the sale of a particular article provides a particular form the contract for the sale of such article must be made in that form ; otherwise, notwithstanding anything contained in this sub-section, it may be invalid. Thus share certificates of a company may be sold as goods, but the rights of the parties are subject to the provisions of the Indian Companies Act. It is not necessary that the whole of the contract may be oral or in writing. It may be partly oral or partly in writing ; for instance, a written offer to sell goods may be accepted verbally or verbal offer may be accepted in writing.<sup>2</sup> So also goods may be ordered by a letter and may be supplied without further communication<sup>3</sup>

1. A.I.R. 1966 Mys. 118.

2. *Watkins v. Rymill*, 10 Q.B.D. 178

(188).

3. *Taylor v. Jones*, 1 C.P.D. 87,



or goods may be ordered by letter with subsequent verbal alteration and may be supplied accordingly.<sup>1</sup> "Writing" *prima facie* includes "printing lithographs, photography and other modes of representing words in a visible form."<sup>2</sup> Any phraseology which expresses the agreement of the parties clearly and without any patent ambiguity is sufficient and it is not necessary that that should be expressed in any particular words.

"Implied" seems to be used in this section in the sense in which it is used in section 9 of the Indian Contract Act. Such implication may arise either (a) as an inference of fact or (b) as an inference of law. Terms which are implied by law in a contract of sale are dealt with in later sections. Thus when a man takes up an article in a shop and pays for it, or otherwise appropriates it with the owner's consent, or when an unsigned contract is acted on by the parties according to its terms, the conduct of the parties gives rise to an inference of fact that the parties intend a sale or purchase, though they do not express their intention in words.<sup>3</sup>

A contract of sale may also be implied from conduct of the parties as an inference of law. "In such a case the law does not require an actual agreement, but implies a contract from the circumstances; in fact, the law itself makes the contract."<sup>4</sup> A new contract of sale may be implied by law from acts done in a part-performance of a contract of sale, as for example, where the buyer retains part of the goods delivered,<sup>5</sup> or has consumed the goods before a valuation of the price.<sup>6</sup>

#### (5) Contract under seal—contract by corporations.

Contracts or obligations under seal, or specialities, such as deeds and bonds, are instruments which are not merely in writing, but which are *sealed* by the party bound thereby, and *delivered* by him to, or for the benefit of, the person to whom the liability is thereby incurred. In England a contract under seal is binding though it may not be supported by any consideration. Such a contract derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but from the *form* in which it is expressed. The binding effect of such a contract is the result of the doctrine of estoppel which prevents a party from denying a solemn engagement entered into by him under his hand and seal.<sup>7</sup>

The doctrine of English law has never been accepted in India.<sup>8</sup> But in case of corporations it is invariably provided in their constitutions created by the statute that they can only contract by instrument under seal. Under the English common law rule a corporation can only bind itself by deed executed under its corporate seal so that its contracts must be

1. *Hoadly v. M'Laine*, 110 Bing. 482.  
 2. See General Clauses Act, (Act X of 1897), S. 3 (58).  
 3. *Brogden v. Metropolitan Railway Co.*, (1877) 2 App. Cas. 666 H.L.; see also *Falcke v. Scottish Imperial Insurance Co.*, (1887) 34 Ch. D. 234.  
 4. *Per Pollock C.B. in Gore v. Gibson*, 13 M. & W. 623 (626); *Ramsay v. North Eastern Rly. Co.*, 14 C.B.N.S. 641 (where contract was inferred

against express intention).  
 5. *Hart v. Mills*, 15 M. & W. 85; *Martholomew v. Marwick*, 15 C.B. N.S. 711.  
 6. See Secs. 24, 27, 28 and 29 of the Act.  
 7. See Anson's Law of Contract, 23rd Edition, Part I, Chapter, III, section 1.  
 8. *Kaliprasad v. Raja Sahib*, (1869) 2 B.L.R. (P.C.) 111, at p. 122,



made by such a deed or by its agent authorised by such a deed. To this rule, however, there are important exceptions.<sup>1</sup> Thus, where a corporation has taken the benefit of certain work under a contract not under seal, for the doing of which it was created, it cannot refuse to pay for such work.<sup>2</sup> Similarly, it has been held that as a general rule, when goods have been supplied to, and used by, a corporation which can only contract under seal, the goods must be paid for.<sup>1</sup> In the case, however, of contracts which are required by *statute* to be under seal, the common law exceptions referred to above do not apply.<sup>3</sup>

In *Radha Krishna Das v. The Municipal Board of Benares*,<sup>4</sup> the plaintiff had supplied the defendant municipality with stone ballast for metalling its roads, but the contract did not comply with the formalities required by the Municipal Act. It was *held* by the Allahabad High Court that the plaintiff could not sue on the contract, either for recovery of the value of the materials supplied or for damages, for non-acceptance of the delivery of the rest of the ballast. In an earlier case reported as *Abaji v. Trimbak Municipality*,<sup>5</sup> it had been decided by Bombay High Court that a Municipality could successfully sue for the balance of the amount agreed to be paid by the defendant in consideration of being granted the right to collect certain tolls, although the contract was not sealed as required by the Bombay District Municipal Act. It would appear that in deciding this case the court did not draw the distinction observed in the English decisions between the class of cases in which a seal is required by the common law and that in which it is prescribed by statute.

Where the contract is executory, it cannot be enforced if it does not comply with the formalities required by law.<sup>6</sup>

As regards the formalities required in the case of contracts with companies registered under the Indian Companies Act, see section 46 of the Companies Act, 1956, Act No. 1 of 1956.

#### (6) Written contracts.

When all the terms of a contract are in writing, no evidence of any oral agreement or statement is admissible for the purpose of contradicting, varying, adding to or subtracting from, its terms.<sup>5</sup> This is subject to certain exceptions.<sup>7</sup>

It has been *held* in *Birbal v. Thamansingh*<sup>8</sup> that although the signature of the executant is in the beginning or middle of the instrument, it is as binding as if at the foot of it. The question always is, whether the party, not having signed it regularly at the foot, yet meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it ; but when it is ascertained that he meant to be bound by it as a complete contract, the signature is, for purposes of execution, effective.

1. See *Nicholson v. Bradfield Union* (1866) L.R. 1 Q.B. 620 ; *Wells v. Mayor of Kingston-upon, Hull*, L.R. 10 C.P. 402.  
2. *Lawford v. Billericay Rural District Council*, (1903) 1 K.B. 772 C.A.  
3. See *Young v. Leamington Corporation* (1883) 8 App. Cas. 517 ; *British Insulated Wire Co. v. The Prescat Urban District Council*, L.R. (1895) 2 Q.B.D.

453 ; *Nixon v. Erith Urban Council*, (1924) 1 K.B. 87.  
4. (1905) 27 All. 592, 600.  
5. (1904) 28 Bom. 66.  
6. *Ahmedabad Municipality v. Sulemanji* (1913) 27 Bom. 618.  
7. Sec. 92, Indian Evidence Act. See the exceptions to that section.  
8. A.I.R. 1955 Raj. 91 (simple money bond—Signature only on first sheet).



### (7) Contract partly written and partly printed.

In a contract partly written and partly printed, special importance should be given to that part of the contract which is written. It does not follow that the printed matters are to be neglected. The whole contract both written and printed must be construed and, if possible, one intelligent whole made of it.<sup>1</sup> The written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adopted equally to their case and that of all other contracting parties upon similar occasions and subjects.<sup>2</sup>

In *Meghraj v. Baldeodas*<sup>3</sup>, the contract consisted of a printed form written in English which provided that anything except the buyer's signature written in a vernacular language shall be null and void. The buyer inserted the specifications of the goods in Hindi which were at variance with those written in English. *Held*, the terms in English could not be modified by the Hindi terms. See *Dudgeon v. Pembroke*<sup>4</sup> as to the effect of inserting words in a contract without striking out printed words which may be applicable to a larger or different contract. "But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against without striking out the printed words which may be applicable to a larger or different contract, is too well-known, and has been too constantly recognised in Court of Law."<sup>5</sup> It is well-settled that words deleted in a printed form of mercantile contract are to be treated as if they had not formed part of the printed contract; they cannot be used to construe added words.

### (8) Contracts by 'bought and sold' notes.

A contract of sale is often brought about by a broker who issues bought and sold notes to the buyer and seller respectively. They generally begin with the words "bought for you or on your account" or "sold to you or on your account". They are identical in every respect except the names of the buyers or sellers when disclosed.

It has been *held* that where there was a material variation between the two notes, they could not constitute a binding contract.<sup>6</sup> Where the notes are falsified, the original contract between the parties may be proved in some other way.<sup>7</sup> See *Roe v. Naylor*<sup>8</sup> regarding conditions in the sale note not brought to the notice of the buyer. In *Ah Shain v. Moothia*,<sup>9</sup> writing containing conditions on the sold note in Chinese not understood by or known to the other, was held not contract.

1. *Mohan Lal v. Krishna Premji*, (1927) 30 Bom. L.R. 415; *Robertson v. French*, (1803) 4 East, 130, 136.

2. See also *Paul Beier v. Chotalal*, (1904) 30 Bom. 1, 17.

3. (1926) 54 Cal. 97.

4. (1877) 2 A.C. 284, 293.

5. *Per Lord Penzance M.A. Sassoon v. International Banking Corporation*, (1927) 55 Cal. See also *Hollis Bros.*

*& Co. Ltd. v. White Sea Timber Trust*, (1936) 3 All E.R. 895.

6. *Couie v. Remfry*, (1846) 3 Moo. I.A. 448; *Sievwright v. Archibald*, (1951) 20 L.J.Q.B. 529.

7. *Durga Prasad v. Bhajan Lal*, (1904) 31 Cal. 614 (P.C.)

8. (1918) 3 L.J.K.B. 958.

9. (1899) 27 Cal. 403.



**(9) Earnest.**

Section 78 of the Indian Contract Act expressly referred to the passing of the property in the goods sold in pursuance of a contract for the sale of the ascertained goods on payment of earnest. Section 4 (1) of the English Sale of Goods Act, 1893, which has superseded the 17th section of the Statute of Frauds also referred to giving something in earnest to bind the contract and preserve the distinction between part-payment and earnest.<sup>1</sup> Earnest is “something” to bind the bargain, or, ‘the contract’ whereas it is manifest that there can be no part-payment till after the bargain has been bound, or closed.

Sir Edward Fry observed in *Howe v. Smith*<sup>2</sup> :

“The practice of giving something to signify the conclusion of the contract, sometimes a ring or other object, to be repaid or redelivered on the completion of the contract, appears to be one of great antiquity and very general prevalence. It was familiar to the law of Rome (where the rule was that a defaulting buyer forfeited the earnest money, and a defaulting seller was bound to restore it two-fold....). That earnest and part-payment are two distinct things is apparent from the 17th section of the Statute of Frauds, which deals with them as separate acts, each of which is sufficient to give validity to a parol contract.”

The parties may intend, that the deposit may be both earnest and part-payment as is often the case in England and even in India on a sale of land. The deposit serves two purposes—if the purchase is carried out, it goes against the purchase money—but its primary purpose is this, it is a guarantee that the purchaser means business.<sup>3</sup>

Generally speaking, in a contract for sale of *immoveable* property, the deposit of earnest money is a guarantee for performance of the contract by the vendee, and when the transaction is completed, it becomes part of the purchase money. But if by default of the vendee, the transaction falls through, the money is forfeited.<sup>4</sup> If the sale goes off through the default of the vendor, he must return the sum so paid.<sup>5</sup>

In *Moula Bux v. Union of India*, A.I.R. 1970 S.C. 1955, 1958, the Supreme Court held : “According to Earl Jowitt in, ‘the Dictionary of English Law’ at p. 689 : ‘Giving an earnest or earnest-money is a mode signifying assent to a contract of sale or the like by giving to the vendor a nominal sum (e. g. a shilling) as a token that the parties are in earnest or

1. Section 4 of the (English) Sale of Goods Act, 1893. has since been repealed by S.I. of the Law Reform (Enforcement of Contracts) Act, 1954.
2. (1888) 27 Ch. Div. 89, 101 ; *Farr Smith & Co. v. Messrs. Ltd.*, (1904) 1 K.B. 397, 408-409.
3. Lord Macnaghten in *Soper v. Arnold*, (1889) 14 App. Cas. 429, 435.
4. See *Dina Nath v. Malvi & Co.*, A.I.R. 1930 Bom. 213 ; *Fazle Ahmed v. Rajendranath*, A.I.R. 1926 Cal. 339;

- Verman & Co. v. Gopaldas*, A.I.R. 1923 Lah. 363 ; *Subbarayar v. Muni-sami*, A.I.R. 1926 Mad. 1133 ; *Nadiar Chand v. Satish Chandra*, A.I.R. 1927 Cal. 964 ; *Ram Chand v. Central Flour Mills*, A.I.R. 1925 Lah. 192 ; *Roshan Lal v. Delhi Cloth & General Mills* 33 All. 166.
5. *Ibrahimhai v. Fletcher*, (1896) 21 Bom. 827, 853 ; *Alokeshi Dassi v. Hara Chand Das*, (1897) 24 Cal. 897.



have made up their minds.' As observed by the Judicial Committee in *Chiranjit Singh v. Har Swarup*, A.I.R. 1926 P.C. 1 :

'Earnest-money is part of the purchase price when the transaction goes forward ; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.'

In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest-money."

In *Dina Nath v. Malvi & Co.*,<sup>1</sup> the Bombay High Court held : There is a distinction between the penalty for breach of contract and the forfeiture of a deposit of earnest money. While the latter is a payment actually made, the former is compensation sought for breach of contract. Section 74, Contract Act, contemplates the case of recovery of compensation for breach of contract and not a case in which money has been paid by way of earnest. The same was the view of the majority in *Natesa Aiyar v. Appavu Padayachi*<sup>2</sup> in which it was 'held : Where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to be ready with the purchase money at the essential time, cannot recover the deposit. Section 65 or 74 of the Contract Act does not apply to such deposits.

It has been held in *N. V. Jagannadhayya v. Ramanatha*<sup>3</sup> by the Orissa High Court : There is a difference between the giving of an **earnest money** with a view to fulfil the contract, and a **part-payment** made towards the discharge of the contract, though there is nothing to prevent the same payment being both earnest and part-payment. It depends on the intention of the parties as to whether the sum paid was intended to be the one or the other, or a combination of both. The deposit serves two purposes. Primarily the purpose is to guarantee that the purchaser means business. If the purchase is carried out, it goes against the purchase money. If the contract falls through on account of the laches of the vendor, he is bound to return the sum so paid. If, however, the default is that of the purchaser, the earnest is forfeited. If the vendor re-sells the property and claims to recover the loss arising on such re-sale, the deposit is to be taken into account in diminishing the deficiency. Where, however, a part-payment is made under the contract and the buyer commits default in performance, he can recover the purchase price that he had paid subject to the right of the seller to set off a certain sum for damage against the purchaser. These principles apply both to purchase of immoveable property and to sale of goods.

In this case the observations of *Coutts-Trotter C.J.* in *Satyanarayana-murthi v. Erikalappa*<sup>4</sup> to the effect that it was not the practice in mercantile contracts to forfeit the deposits, irrespective of the damage suffered or not

1. A.I.R. 1930 Bom. 213 : 127 I.C. 324.

2. (1913) 38 Bom. 178 : 19 I.C. 462,

3. A.I.R. 1955 Orissa 11.

4. A.I.R. 1926 Mad. 410 : 50 Mad. L.J. 150,



suffered were not followed, and agreement was expressed with the following remarks of *Venkatramana Rao J.* in *Narayanamurthi v. Nageswar Rao* :<sup>1</sup>

“What may be the practice with regard to mercantile contracts in England, so far as I am aware, even in respect of sale of goods it has been customary in this country to receive sums of money by way of deposit or earnest money and such sums were forfeited when default is committed by the vendee, and courts have given effect to such forfeiture.”

It was further held in *N. V. Jagannadhayya v. Ramanatha* :<sup>2</sup>

It is doubtless true that courts have intervened to relieve a party against a forfeiture clause by way of penalty, but every clause providing for forfeiture is not necessarily penal in character. Unless the seller seeks to exact payment of an extravagant sum for default in payment by the buyer of a nominal sum a clause providing forfeiture does not become a penalty. The stipulation must appear unconscionable on a consideration of all the circumstances. The principle is that while the equity is available to a defaulting purchaser, the vendor cannot forestall this equity by demanding an extravagant sum as deposit, any more than he can recover a penalty by claiming liquidated damages.

Where the purchaser was guilty of breach of contract and the seller rescinded it by a registered notice in which he distinctly stated that besides forfeiting the deposit he would claim damages for any possible loss resulting from a resale of the paddy, it was an integral term of the contract that the amount of deposit should be forfeited besides entitling the defendant to claim damages.

Section 74 of the Contract Act, in terms, applies only to contracts where a penalty is stipulated for by way of liquidated damages and does not apply to deposits paid as a guarantee for the fulfilment of the contract. A stipulation to pay a deposit is an ancillary to the contract itself and may be enforced even if the contract is broken.

In *Ranganayakamma v. S.R. Subudhi*,<sup>3</sup> the same High Court held : Earnest money is not the same as deposit of a portion of the price but is of a two-fold character. It is part-payment of a price if the transaction is completed. But it is also an earnest or guarantee that the contract shall be performed. Consequently, it is not correct to say that the right of the vendee to the refund of a sum deposited as part of the purchase price must necessarily extend to a right to the refund of the earnest money also. Further, it cannot be said that the earnest money is a benefit under the main contract for sale within the meaning of S. 64, Contract Act.

In *Balchandra v. Mahadeo*,<sup>4</sup> the Nagpur High Court also held : Earnest money is a part of the purchase price when the transaction goes forward and it is forfeited, when the transaction falls through by reason of

1. A.I.R. 1941 Mad. 108 : 193 I.C. 751.  
See also *Seethana v. Yassikalappa*,  
A.I.R. 1926 Mad. 117 : 91 I.C. 765 to  
same effect.

2. A.I.R. 1955 Orissa 11.

3. A.I.R. 1955 Orissa 20.

4. A.I.R. 1947 Nag. 193—Money deposited by the vendee, under a note called ‘*qrar chitti*’ held earnest money. See also *Amar Nath v. Mohan Singh*, A.I.R. 1954 M.B. 134—earnest money and penalty—distinction.



the default or failure of the vendee. There is a distinction between a penalty for breach of contract and the forfeiture of deposit by way of earnest money. The latter is a payment actually made by the vendee where the penalty is the compensation sought for the breach and yet to be recovered. Deposit is a plain advance to which both Ss. 73 and 74, Contract Act, do not apply. The fact that there is no forfeiture clause in respect of the deposit in the agreement is immaterial as the principle of forfeiture applies, whether there is such a clause or not. Similarly, whether the deposit is described as earnest money or part-payment is immaterial. The proportion it bears to the sum contracted for is equally irrelevant. The advance cannot be regarded as penalty merely because its proportion is large.

In *Amar Nath v. Mohan Singh*<sup>1</sup>, it was held: "This ruling of the Privy Council<sup>2</sup> applies to a case where earnest money has been paid to the seller and an advance can be said to be earnest money only if it is given as security for the performance of the contract but not otherwise. Whether the deposit is described as earnest money or part-payment is immaterial. It must be a guarantee for the purpose of the contract, which alone can be forfeited if transaction falls through.

In *Krishna Chandra v. Mahmud Behari*<sup>3</sup>, plaintiff had brought a suit for the recovery of his deposit which was paid only as part payment of the price and it was held that the plaintiff was entitled to recover it from the defendant, and that in spite of the breach being on his part. This was followed in *Madan Mohan v. Jwala Prasad*<sup>4</sup> in which it was held: "Part payment of purchase price cannot be forfeited because it is not a guarantee for the purpose of the contract which alone can be forfeited if transaction falls through."

Section 74 of the Indian Contract Act does not apply to a deposit in the nature of earnest and a stipulation for its forfeiture in case of breach is not one by way of penalty.<sup>5</sup>

If on the breach of the agreement by the purchaser vendor resells the property, and sues to recover the loss arising on such resale, the deposit although forfeited, is to be taken into account as diminishing the deficiency.<sup>6</sup>

The rule is no doubt the same for goods.<sup>7</sup> It is, however, a question of fact, in each case, whether a particular sum paid in advance, should be

1. A.I.R. 1954 M.B. 134.

2. Chiranjit Singh v. Har Sarup, A.I.R. 1926 P.C. 1.

3. A.I.R. 1936 Cal. 51.

4. A.I.R. 1950 E.P. 278.

5. Natesa Aiyer v. Appavu, (1913) 38 Mad. 178; Veerayya v. Sivayya, 26 I.C. 121; Dina Nath Damodhar v. Malvi & Co., A.I.R. 1930 Bom. 213; see, however, Bhimji Dalal v. Bombay Trust Corporation, A.I.R. 1930 Bom. 306; 54 Bom. 381; 124 I.C. 800 relating to the hire-purchase contract.

6. Ockenden v. Henly, (1858) E.B. & E. 485, 113 R.R. 740; Shuttleworth v. Clews, (1910) 1 Ch. 176; Vellore

Taluk Board v. Gopalasami, (1913) 38 Mad. 801; 26 I.C. 626.

7. Muhammad Habib Ullah v. Muhammad Shafi, (1919) 41 All. 324; 50 I.C. 948. See Pyare Lal v. Meena Mal, A.I.R. 1927 All. 621; 102 I.C. 766; Subbarayar, v. Munisami Ayyar, A.I.R. 1926 Mad. 1133; 50 Mad 161; 98 I.C. 516 (forfeiture of deposit); Gopal Das Sidany v. Lachmi Chand Jhawar, A.I.R. 1930 Cal. 324; 57 Cal. 106; 125 I.C. 594 (forfeiture of deposit); Karsondas v. Chhotalal, A.I.R. 1924 Bom. 119; 48 Bom. 259; 77 I.C. 275 (on breach by vendor, buyer can recover the deposit).



treated as earnest money *i.e.* security for due fulfilment of the contract.<sup>1</sup> If the seller seeks to retain money prepaid by the buyer, on the contract falling through by reason of the buyer's default, the onus is on the seller to show that it was paid as earnest money, that is, as a deposit by way of security.<sup>2</sup>

Where there is a stipulation that earnest money shall be forfeited and there is breach of contract by the party who claims the return of the earnest money his claim is not entertainable because the opposite party has the right under the contract between the parties to retain it in case of breach by the person claiming it.<sup>3</sup>

Earnest, whether given in money or not, must be something of value really given by the buyer and kept by the seller ; a mere symbolic ceremony such as one party drawing a coin across the other's hand will not do.<sup>4</sup>

Earnest is the deposit of money or some tangible thing given by buyer to seller at the moment at which the contract is made, as a 'token of good faith' and as a guarantee that he will fulfil his contract, and subject to the terms that if, owing to his default, the contract goes off, it will be forfeited. If, on the other hand, the contract is fulfilled, an earnest may still serve a further purpose and operate by way of part-payment.<sup>5</sup>

When money is paid in advance it may be a deposit strictly so-called that is something which binds the contract and guarantees its performance or it may be a part-payment—merely prepaid on account of the purchase price or—again, it may be both. If it is a deposit, or both a deposit and pre-payment, and the contract is rescinded, it is not returnable to the person who prepaid it if the rescission was due to his default. If, on the other hand, it is part payment only, and not a deposit in the strict sense at all, then it is recoverable even if the person who paid it is himself in default.<sup>6</sup>

Whether the advance payment is a deposit, part-payment of the price, or both, depends on the terms of the contract or the custom of the trade ; a 'returnable deposit' normally qualifies as part-payment.<sup>7</sup> In *Dies v. British and International Mining and Finance Corporation, Ltd.*<sup>8</sup>, by a contract contained in two letters in the French language, but subject to English law (as varied by subsequent letters), the defendants contracted to sell to one Q, certain rifles and ammunition for a total of 270,000l. The contract, as translated, contained the following clause : "If from any cause whatsoever independent of our (the vendors') volition (or will) and particu-

1. *Desu Rattama v. Kakarapathi Krishnamurti*, A.I.R. 1928 Mad. 326 : 106 I.C. 482 ; *Kanhaiya Lal v. Lakshmi Chand*, A.I.R. 1923 Nag. 213 : 143 I.C. 192 ; *Premji v. Garlic & Co.*, A.I.R. 1925 Sind 254 : 90 I.C. 573.
2. *Satyanarayanamurthi v. Erikalappa*, A.I.R. 1926 Mad. 410 : 99 I.C. 962 : 50 Mad. L.J. 150 ; A.I.R. 1928 Mad. 326 referred to above.
3. *Khudai Tale v. Hamida Khatoon*, 1944 All. L.J. 423.

4. See *Blenkinsop v. Clayton*, (1817) 7 Taunt. 597, 18 R.R. 602.
5. Per Wright J. in *Farr, Smith & Co. v. Messrs. Ltd.*, (1928) 1 K.B. 397, 408.
6. Per Finmore J. in *Gallagher v. Shilcock*, (1949) 2 K.B. 765, 768. See also *Howe v. Smith*, (1884) 67 Ch. 89, 104, and *Mayson v. Clouet*, (1924) A.C. 980.
7. See Schmittoff "The Sale of Goods", p. 47.
8. (1939) 1 K.B. 724.



larly a case of *force majeure* the performance of the present sales contract shall be rendered impossible, we should have to refund to you the whole of the payments which you should have made to us with the exception of the sum of (13,5000/.) which is to remain our property in any event by way of liquidated damages (or fixed compensation) to compensate us for our expenses and disbursements as well as for our trouble and care."

The purchaser paid 100,000/., but thereafter, in breach of the contract, as he himself admitted, neither completed the payment of the purchase price nor took delivery of any rifles and ammunition. The vendors elected to treat the contract as at an end. In an action by the purchaser and his alleged assignee to recover the 100,000/., less 13,500/., which he admitted that the vendors were entitled to retain under the clause above set out ;

it was *held* : (1) The clause was intended to refer only to the case of a frustration of the contract, and, since the contract was not rendered impossible of performance but merely broken by the purchaser, the clause had no application ;

(2) The payment of 100,000/. was not in the nature of deposit or earnest, but was a part-payment of the price ;

(3) The distinction between a deposit which is forfeitable on the purchaser's default and a part-payment which is returnable is not confined to contracts for sale of land but is of general application ;

(4) The purchaser was accordingly entitled to recover the sum of 100,000/. subject to debts.' claim to damages for the purchaser's breach of contract.

Buyer might be entitled to recover even a deposit in the strict legal sense where seller resells the goods by virtue of S. 48 (3) [corresponding to S. 54(2) of the Indian Sale of Goods Act, 1930] and on resale receives more than the original purchase price.<sup>1</sup>

#### (10) Interpretation of contract of sale.

The Sale of Goods Act does not make any provision for the interpretation of a contract of a sale and leaves to be governed in that respect by the rules for the interpretation of contracts in general. A contract of sale reduced into writing must therefore be construed and given effect to like any other contract.<sup>2</sup>

An invoice is not *per se* written contract. It is only evidence of a contract, and may be contradicted according to the fact.<sup>3</sup> The ordinary rules as to the admissibility of oral evidence also apply in the same way as in the case of contracts in general.

In both written and verbal contracts any right, duty, or liability which would arise under a contract of sale by implication of law may be negated or varied by express agreement or by the course of dealing between the parties or by usage, if the usage be such as to bind both parties to the contract.

1. See *Gallagher v. Shilcock*, (1949) 2 K.B. 765.

2. *Coddington v. Paleologo*, L.R. 2 Ex.

193 (200) ; *Honck v. Muller*, 7 Q.B.D. 92 (103) C.A.

3. *Holsing v. Elliorix* 8 H. & N. 117.



One of the conditions of a contract of sale and purchase between the plaintiff and the defendants was as follows : "It is understood that this indent is null and void in case the goods are shipped or you cannot supply for *any causes whatsoever* without assigning any reason". Earlier in the conditions reference was made to the defendants or their agents being exempted from responsibility for non-delivery of the goods by the makers or loss or inconvenience for reasons mentioned, and the delivery of the goods was subject to storm, fire and similar provision. It was held that the words "any cause whatsoever" in the first sentence should not be read by the *ejusdem generis* rule and that they excused the defendants from liability.<sup>1</sup>

In *Modi Vanaspati Manufacturing Co. v. Kaithar Jute Mills Ltd.*, A.I.R. 1969 Cal. 496, a company contracted with a purchaser to sell goods which it did not have. It entered into a contract with a firm dealing in such goods. The contracts were independent, distinct and different in terms, time and price. There was not direct contract or correspondence between the firm and the purchaser. The transaction between the company and the firm was only in aid and for benefit of the purchaser. All payments for goods were made only by the purchaser through the company. It was held that the contracts were not one composite contract and the company was not an agent but only a middleman.

In *Radhakissen Mall v. Maganlal Bros.*<sup>2</sup>, one of the clauses of the contract was as follows ; "You or your agents are not to be held responsible for non-delivery of the goods by the makers of any loss or inconvenience that may originate by fulfilment of these goods. Delivery of the above goods is subject to storms, fire, war, tempest, flood, drought, strikes, lock-outs, bankruptcy, accidents, and such other causes beyond human control. It is also understood that this indent is null and void in case goods are not shipped or you do not supply for *any cause whatsoever* without assigning any reason." It was held, (i) that the inclusion of the word '*whatsoever*' in the last paragraph excluded the application of the rule of '*ejusdem generis*' when interpreting the meaning of the sentence in which the word appeared, that the provision in the last paragraph was intended and it did intend to cover every possible reason for non-supply and non-shipment, and in the event of the defendants failing to supply the goods, the indent was to be null and void and that consequently the defendants could not be held responsible for loss which might be occasioned to the plaintiff through failing to obtain delivery of the goods specified in the indent : (ii) that there was nothing which prevented the parties to a contract including a term in it to the effect that the party who was obliged to deliver the goods should not be liable for non-delivery.

Where a term in a contract of sale provides for "Delivery-November, December, January, February, 1933", it means that delivery has to be made in equal instalments in each of the four months, or at any rate some quantity has to be delivered in each of the four months. It cannot be construed as meaning that it is at the option of the seller or supplier to deliver at any time before the end of February, 1933, or that it is not obligatory on the seller to make deliveries in each of the four months.<sup>3</sup>

1. *Radhakissen Mull v. Sohan Lal Mohan Lal*, 47 C.W.N. 86.  
2. A.I.R. 1943 Cal. 206 ; 47 C.W.N. 19.

3. *Vankiah and Bros. v. Gupta*, 20 Mys. L.J. 194.



In *D.K. Parekh v. The Burma Sugar Co. Ltd.*,<sup>1</sup> there was a contract to sell certain quantity of molasses during season. Deposit of half the value was made and receipt obtained. In previous contract between the parties, in respect of previous season, receipt was followed by contract fixing terms and conditions of delivery. In a suit by buyer for recovery of deposit on ground that the contract had not been completed for want of agreement as to delivery etc., it was *held*: Whether execution of contract was condition or term of bargain or mere expression of desire, was a question of construction of contract that terms as to time and delivery were not of importance, since contract had to be fulfilled in the whole season.

The right of the parties cannot be decided on mere suspicions or conjectures and the law presumes in favour of honest dealings.<sup>2</sup>

**Agency how constituted—Maxim, qui facit per alium, facit per se—Sale of goods on payment of price—No liability to account—Effect.**

The rule as to agency is expressed in the maxim *facit per alium, facit per se*. It is founded on a contract either express or implied by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other agrees to do the business and render an account of it. The essence of the matter is that the principal authorises the agent to represent or act for him in bringing or aid in bringing the principal into contractual relation with the third person.

The plaintiff used to place orders for the goods (cigarettes) which used to be delivered to him by the defendant on payment of the price. He was not liable to render account of the sale proceeds. The goods were sold only at scheduled rates. The account of the stock of certain qualities of cigarettes remaining with the plaintiff was being asked for from him by the defendant to inform itself of the state of trade in the area for which he was acting as the distributor. The defendant used to pay the *octroi* duty a matter connected only with the settlement of the price. It was *held* that in the absence of any liability to account for the sale proceeds, the transactions would be deemed to be made on the basis of contracts of sale within the meaning of S. 5, Sale of Goods Act, 1930, and that as the goods passed to the plaintiff, the price of goods remaining with him was not liable to be refunded.<sup>3</sup>

### **Sales agency or distributor contracts.**

“Contracts between a producer, manufacturer, or other seller and a jobber, distributor, retailer, or other buyer which contemplate the distribution or re-sale of the products of the former by the latter sometimes known as contracts of sales agency, or of distributorship or dealership, must, as a general rule, be mutually obligatory on both parties in order to be enforceable. Contracts of this nature generally lack mutuality and are unenforceable where performance thereunder is not obligatory on one or both of the parties, as where the contract is terminable at will. Thus, generally,

1. (1948) Bur. L.R. 257.

2. *Madholal v. Official Assignee of Bombay*, A.I.R. 1950 F.C. 21 : 51 Bom. L.R. 906.

3. *I. Motilal v. Golden Tobacco Co.*, A.I.R. 1957 M.P. 223 : 1957 M.P.C. 268 : 1957 M.P.L.J. 313.



mutuality is lacking where the contract does not bind the seller to sell or deliver, as well as where no definite obligation to buy or otherwise perform is placed on the buyer. So, such an agreement looking to the sale and purchase of merchandise without specification of the amount to be bought or sold and duration of the contract or with an arbitrary right of termination lacks mutuality and is unenforceable.

“Contracts of this nature, however, have been said to be presumably entered into with the intention of performance in good faith by both parties with the courts being disinclined to hold them void for lack of mutuality of obligation because the obligation of one is imperfectly expressed, or even in the absence of an express statement of an obligation where the contract is for a definite term. Accordingly, the essential mutuality obligation may be implied in such contracts, as where from the whole contract it is manifested that the parties intended that for an express obligation on one of them there should be a corresponding obligation on the other, and such contracts have frequently been upheld against a charge of want of mutuality, even where the amount or quantity of the product to be bought or sold is not specified in the contract or is otherwise uncertain.

“Mutuality of obligation is not essential to render such contracts enforceable where there is a separate valid consideration as an inducement to the agreement, and execution of the contract or performance thereunder cures the lack of mutuality.”<sup>1</sup>

#### **(11) Contracts of sale of goods by written deed.**

When a contract of a sale of goods has been embodied in a written deed the previous offers and acceptances lose all importance and the only contract between the parties is the written contract. The previous offers and acceptances are merely stages in the negotiations between the parties.<sup>2</sup>

#### **(12) Conditional sales.**

##### **(i) Sale on trial or approval in general.**

“Goods may be delivered subject to the condition that they shall be satisfactory to the buyer and that there shall be no sale if they are not satisfactory after a trial or test. Whether the transaction constitutes a contract for the sale of goods on trial or approval depends on the intention of the parties. A buyer cannot, by a mental reservation of his intention or a mere statement that he takes the goods on trial, convert what is in fact an absolute sale into a sale on trial. A sale on trial or approval is conditional, and the approval of the buyer is a condition precedent. Under a contract of this character the obligation of both parties is suspended until the purchaser's satisfaction is gained or waived. Until the title passes to the buyer he is a mere bailee. Where the sale is on trial, the buyer is not bound to accept, or entitled to reject, until such trial is made.

“A provision that the article shall be satisfactory, without stating to whom, has been construed as meaning satisfactory to the buyer, and the

1. Corpus Juris Secundum, Vol. 77, S. 20, pp. 619, 620.

2. Ralli Bros. Ltd. v. Firm Bhagwan Das, A.I.R. 1954 Lah. 35.



doctrine of caveat emptor does not apply. Where the contract itself provides definite tests or specifications, and the required performance to the satisfaction of the buyer is not the sole determining factor, reasonable satisfaction of substantial performance in such a manner as to conform to the standards provided is all that is required. If the buyer purchases a machine "cash on trial" the sale is conditional on the ability of the machine to do work, for which it is purchased, and not on the buyer's satisfaction with it. In some jurisdiction it has been held that when the contract provides that an article shall be kept if it works well, the buyer is bound to give it a fair trial, but if it is provided merely that the article shall be kept if it suits the buyer he is not bound to give it a trial before rejecting it; and the rule last stated applies even though the contract provides that the buyer shall give the goods a practical test.

"Under a sale on trial the buyer is not liable pending the trial, for loss of, or injury to the goods unless he is guilty of negligence or unless the contract makes him liable. Injury to the property, without fault of the buyer, will not deprive him of the right of rejection.

*"Condition applicable to parts of appliance.—*Where an appliance is sold complete with necessary attachments under an agreement for satisfactory service, failure of the attachment to operate properly absolves the buyer from liability for the price even though the appliance itself aside from the attachments, functions properly."<sup>1</sup>

**(ii) Absolute sale with reservation of title as security; chattel mortgage.**

"Notwithstanding a provision reserving title to an article until payment of the purchase price, a contract may constitute an absolute sale. In passing upon the question whether a contract with a reservation of title constitutes a conditional sale or a sale with a reservation merely in the nature of a lien, the courts if they take the latter view of the contract, do not always style it an absolute sale, but may characterise the transaction, as a whole, as a chattel mortgage. Such cases, however, are treated as being in effect similar to those styling such a transaction an absolute sale with a reservation of title as a lien or chattel mortgage. There are cases, however, involving the distinctions between chattel mortgages and conditional sales which do not involve a sale with a mortgage back.

"There is considerable confusion in regard to the relationship between conditional sales and chattel mortgages. This confusion is somewhat dispelled if it is kept in mind that the two transactions are meant to bring about the same result but on different theories; that the modern theory of the chattel mortgage is that it transfers merely a lien for security, leaving the title in the mortgagor, as opposed to the common-law theory that the mortgage transferred title; that in some jurisdictions there is no such thing as a conditional sale but that such a transaction constitutes a chattel mortgage; that in some jurisdictions the conditional sale does not have its usual distinctive effect of reserving full title to the seller, but merely reserves a security title or lien; that many cases holding a transaction to be a chattel mortgage had as a basis of the holdings the desire to protect rights of third persons at a time when recording of conditional sales was not required and attempts were made to avoid the effect of statutes

1. Corpus Juris Secundum, Vol. 77.

S. 195, pp. 938, 939.



requiring the recording of chattel mortgages to prevent secret liens. It seems that the holding in certain cases that a transaction amounts to a mortgage is little more than a statement that the transaction is a conditional sale in which title is reserved by way of security, that such is in fact has been clearly recognised in some cases. The courts frequently do not distinguish in their own opinions and in the authorities which they cite between the problem of deciding whether a certain transaction is a conditional sale or a chattel mortgage and that of determining the operation and effect of a transaction which is established to be a conditional sale..."<sup>1</sup>

### Subject-matter of Contract

6. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

### Synopsis

- |   |   |
|---|---|
| (1) <i>Analogous law.</i>   |   |
| (2) <i>Sub-section (1)—goods which form the subject of a contract of sale may be either existing goods or future goods—"ready goods."</i> | <i>which by the seller depends upon a contingency which may or may not happen—failure of the contingency.</i> |
| (3) <i>Sale of future goods—wagering contracts.</i>   | (5) <i>Sub-section (3)—present sale of future goods—agreement to sell and not sale.</i>                       |
| (4) <i>Sub-section (2)—Contract for the sale of goods the requisition of</i>  | (6) <i>Estoppel.</i>  |

#### (1) Analogous law.

Section 6 of the Indian Act follows section 5 of the English Act, except that the definition of "future goods" which is contained in the latter section is omitted, being already contained in section 2.

As to sub-section (2), reference may be made to sections 31 to 35 of the Indian Contract Act which deal with contingent contracts in general. According to section 31 a 'contingent contract' is a contract to do or not to do something, if some event collateral to such contract does or does not happen. Sections 32 to 36 lay down the rules as to when a contingent contract becomes enforceable at law and when it becomes void. Sub-section (3) makes it clear that a contract for the sale of future goods operates as an agreement to sell. The rules embodied in this sub-section

1. American Jurisprudence, Vol. 47, S. 833, pp. 14, 15.



have been well-recognised in English law (*vide* Benjamin on Sale, 8th Edn., p. 141), and were also adopted in sections 87 and 88 of the Indian Contract Act<sup>1</sup> which have now been repealed by this Act. Sections 87 and 88 of that Act did not, however, contain a complete statement of law on the subject. The present section has been enacted as a distinct rule specially to declare that a contract which purports to effect a present sale of future goods operates only as an agreement to sell—a declaration which was wanting in the Indian Contract Act, 1872. The question regarding the transfer of property has been dealt with separately in section 21.

It was doubted by the Roman Lawyers whether an agreement to sell “future goods” constituted a valid contract of sale; but in England this question seems to have been solved long since in the affirmative (*Chalmers*, p. 70). The purchase of a chance was, however, well-known in the Civil Law and it went by the name *emptio spei*. If the intention of the parties is that the purchase money shall be paid in any case, whether the hoped for equivalent comes to anything or not, it is commonly called for the sake of distinction, *emptio spei simplicis*. If it is that it shall not be paid unless something at any rate is forthcoming, or shall only be paid in proportion to what the purchaser actually gets, it is termed *emptio rei speratae*.<sup>2</sup>

**(2) Sub-section (1)—goods which form the subject of a contract of sale may be either existing goods or future goods—“ready goods”.**

Sub-section (1) above lays down that the goods which form the subject of a contract of sale may be either existing goods or future goods. The expression “future goods” is defined in section 2(6) of the Act (*see* pages 16 and 56). Although the term “existing goods” is not defined, the expression is clearly used in antithesis to the term “future goods.”

Again, ‘existing goods’ may be either owned or possessed by the seller. Instances of sales of goods possessed but not owned by the sellers are sales by agents and pledgees.<sup>3</sup>

A seller might be having a stock in his actual possession at the date of the contract and parties may contract if they please for goods to be selected out of such stock, but any such intention must be clearly expressed. It has been held in *Mulchand Chandolia v. Kundanmull*<sup>4</sup> that (in the Calcutta market) the expression “ready goods” does not necessarily convey that the goods are in the seller’s actual possession at the date of the contract. A seller who has contracted to sell “ready goods” sufficiently complies with the terms of the contract, if at the time of entering into the contract, and during the period intervening between that date and the due date, the seller is in a position at any moment, when called upon by the buyer, to deliver goods of the contract quality and description.

**(3) Sale of future goods—wagering contracts.**

There is no doubt of the possibility of contracting to sell goods which the seller does not own at the time. Contracts by a manufacturer to sell

1. See Appendix.

2. *Chalmers*, 16th Edn., pp. 70, 71 citing. *Moyle’s Sale in the Civil Law*, p. 30. See also notes on pp. 220, 221

*post.*

3. See notes on pages 134, 135, 146 & 157 to 159.

4. (1919) 47 Cal. 458 : 57 L.C. 14).



his future product or to sell what the buyer's business shall require, form a typical and common instance. Contracts to sell goods, especially stocks and staple commodities like grain and cotton, which the seller does not own at the time, have, however, been made the means of speculations depending so greatly on chance that they have sometimes been classed as gambling transactions and treated as contrary to public policy.<sup>1</sup>

"Future goods" as defined in section 2(6) of the Act mean 'goods to be manufactured or produced or acquired by the seller, after the making of the contract of sale'. They are not the same as "unascertained goods".<sup>2</sup> A contract to sell oil, not yet pressed from seeds in possession, was also held to be a contract of future goods.<sup>3</sup>

In relation to contracts for the sale of goods not yet belonging to the seller, Lord Tenterden held in *Bryan v. Lewis*<sup>4</sup> that if goods be sold to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, it is not a valid contract, but a mere wager on the price of commodity. This doctrine is quite exploded now<sup>5</sup> and a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them provided it is not a wager.<sup>6</sup>

When the ascertainment of the price really involves a wager a contract of sale would be invalid. In *Bragden v. Marriott*<sup>7</sup> the defendant agreed to sell his horse to the plaintiff for £200, provided that he trotted eighteen miles in an hour; if he failed to do so the horse was to be the plaintiff's for one shilling. The animal failed in the test, and the plaintiff demanded him of the seller for a shilling. The defendant refused to deliver. It was held that the mode of ascertainment of the price was a wager within 9 Anne, C. 14, the stake being on one side £200, and on the other one shilling.

In *Rourke v. Short*,<sup>8</sup> the plaintiff and the defendant, while discussing the terms of a bargain for the sale of a parcel of rags, differed as to their recollection of the price in a previous bargain and then agreed to sale on these terms, viz., that the rags should be paid for at six shillings a cwt. if the plaintiff's but only three shillings a cwt. if the defendant's statement as to the former sale should turn out to be correct, six shilling being more and 3 shillings being less than the value of the goods per cwt. It was held that although the goods were really to be delivered and the price to be

1. See *Williston on Sales* (Revised Edn.), Vol. I, Para. 128, pp. 367, 368.

2. See *Watts v. Friend*, 10 B. & C. 446, 8 L.J. (O.S.) K.B. 181, 34 R.R. 477, cited at p. 57 *ante*, for a contract of sale of future goods.

3. *Wilks v. Atkinson*, (1815) E.R. 935.

4. (1826) Ry. and Moo. 386.

5. See *Hibblewhite v. McMorine*, (1839) 5 M. & W. 462; 8 L.J. Ex. 271, 55 R.R. 576; *Mortimer v. McCallan*, (1840) 6 M. & W. 58; 9 L.J. Ex. 73; 55 R.R. 503; *Ajello v. Worsley*, (1898)

1 Ch. 274.

6. See notes on pages 102 to 110 as to when such a contract is a wagering contract and therefore invalid.

7. (1836) 3 Bing. N.C. 88, 43 R.R. 599, Gaselee J. dissenting.

8. (1856) E. & B 904; 103 R.R. 798; cf. *Wilson v. Code* (1877) 36 L.T. 703, where the wager was treated as separable from the contract as being contracted only with the determination of an addition to the price, for which the plaintiff did not sue,



paid, yet the terms of the bargain included a wager that rendered it void, and the plaintiff could not recover the price.

On the other hand, in *Crofton v. Colgan*,<sup>1</sup> where the plaintiff agreed to exchange a race-horse for a horse of the defendant's of less value on the terms that he should receive half the winnings of his former horse in the first two races, it was held that the contract was not a wagering one, as it was simply an arrangement to give an increased price if an event occurred which would enhance the value of the animal. *Rourke v. Short* was distinguished as a case where the price was to vary upon an event unconnected with the value of the goods.

The three preceding cases show that a test to determine whether a transaction is a contract of sale at an uncertain price or a wager is to consider whether there is any proper relation between the event and the true value of the goods.

*See also notes on pages 102 to 110 ante.*

**(4) Sub-section (2)—contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen—failure of the contingency.**

Sub-section (2) is merely a particular instance of the sale of future goods and categorically states that there may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen. This removes all doubts arising out of Lord Tenterden's decision in *Bryan v. Lewis*<sup>2</sup> referred to above.

As a contract of sale may be either absolute or conditional,<sup>3</sup> a seller may contract unconditionally to sell goods to be afterwards acquired; or he may contract to sell goods "to arrive"; or the fact of the case may show that he contracts to sell no more than a mere chance of obtaining goods, for this by English law, as by the Civil law, may be the subject of a sale.<sup>4</sup>

The distinction between a conditional contract of sale of goods and a sale of a chance is well illustrated by the difference between the *emptio reisperatae* and the *emptio spei* of the Civil law. The former is a contract for the sale of what might be expected in the ordinary course of nature to come into existence, as a future crop or the young of animals. An illustration of the latter oft-quoted is that of the fisherman who agrees to sell a cast of his net for a given price.<sup>5</sup>

How the rights and obligations for the parties will be affected by the contingency happening or not happening, are questions of interpretation of the contract. The parties may make what bargain they please. They may expressly or by implication stipulate (1) that the contract shall be conditional on the part of the seller only the price being payable in an event,<sup>6</sup> or (2) that the contract shall be absolute on the part of the seller, despite the uncertainty of his being able to acquire the goods and in such

1. (1859) 10 Ir. C.L.R. 133.

2. (1826) Ry. & Moo. 386.

3. Section 4 (2); see notes on pages 150 to 157.

4. Per Martin B. in *Buddle v. Green*,

(1857) 27 L.J. Ex. 34, 114 R.R. 991.

5. See Benjamin on Sale, 8th Edn., p. 129.

6. *Covas v. Bingham*, (1853) 2 E. & B. 826; 39 Digest 401.



a case he will be liable to pay damages if he fails to perform his contract,<sup>1</sup> or (3) that the contract shall be conditional on both sides, and, if the event does not happen, both parties shall be freed from their obligations,<sup>2</sup> or (4) the buyer may have to pay in any event, for "a man may buy the chance of obtaining goods."<sup>3</sup>

As has already been noted,<sup>4</sup> where there is a contract for the sale of goods "to arrive" or "on arrival" the seller does not, in the absence of terms creating such a warranty, warrant the arrival of the goods, but the contract is on both sides contingent on their arrival, and when a particular ship is named, contingent both on the arrival of the ship in the ordinary course, and within the time stated, if any, and on the goods being on board where there is a warranty, that the goods are in a particular ship, the contract is subject to the single contingency of the arrival of the ship. The contingency of the arrival of the goods is not fulfilled by the arrival of similar goods consigned to third person with which the contract did not purport to deal.<sup>5</sup>

Williston observes:<sup>6</sup> "The words 'to arrive' in such bargains have been construed to mean, in effect, 'if they shall arrive', not, 'which I agree shall arrive.' The promise of each party is, therefore, subject to the same condition, the arrival of the goods; and other cases may readily be supposed of contracts to sell, contingent upon the acquisition by the seller of goods suitable for the bargain."

**Sections 6 (2), 23, Sale of Goods Act, 1930—Contract Act, 1872 S. 56—Contract becoming impossible of performance—Andhra Pradesh District Municipalities Act, 1965, S. 38.**

In *Markapur Municipality v. Dodda Ramireddi*, A.I.R. 1972 A.P. 299, the defendant was the contractor for collecting pig dung in the municipal area of Markapur (Andhra Pradesh) for the year 1965-66. The defendant became the highest bidder for Rs. 7050/- under which he was entitled to collect and appropriate the pig dung within the municipal area. The defendant paid an advance representing one-fourth of the bid amount and executed a written agreement in favour of the municipality but failed to pay the balance on which a suit was filed against him by the municipality for recovery of the said balance amount. The suit was contested on the ground that the owners of the pigs prevented the defendant from collecting the pig dung, that the contract became impossible of performance and that the defendant was therefore discharged of his obligation under the contract to pay the balance. Relying on *Satyabrata Ghosh v. Mugneeram Bangur and Co.*, A.I.R. 1954 S.C. 44, it was held: The pig dung becomes the property of the Municipality under S. 38 of the A.P.

1. *Splidt v. Heath*, (1809) 2 Camp. 57; *Simond v. Braddon*, (1857) 2 C.B. (N.S.) 324; 109 R.R. 697; *Hale v. Rawson*, (1858) 4 C.B. (N.S.) 85, 114 R.R. 632; *Ganesh Das-Isher Das v. Ram Nath*, A.I.R. 1929 Lah. 20; 9 Lah. 148; 111 I.C. 498.
2. *Hayward v. Scougall*, (1809) 2 Camp. 56. cf. *Re Thornett & Fehr & Yullis, Ltd.*, (1921) 1 K.B. 219.
3. *Buddle v. Green*, (1857) 27 L.J. Ex. 33 at p. 34, 114 R.R. 991, per Martin B.; *Hitchcock v. Giddings*, (1817) 4 Price 235, 18 R.R. 725, per Richard

- C.B. Cf. *Hanks v. Palling*, (1856) 5 E. & B. 659 at p. 669, 106 R.R. 752; *Covas v. Bingham*, (1853) 2 E. & B. 836, 95 R.R. 842.
4. See pages 151 to 153; and Halsbury, *Laws of England*, 3rd Edn., Vol. 34, pp. 31, 57, 100; Benjamin on Sale, 8th Edn., pages 585 to 590.
5. *Gorrissen v. Perrin*, (1857) 2 C.B. (N.S.) 631; *Thornton v. Simpson*, (1816) Taunt. 556.
6. Williston on Sale (Revised Edition) para. 129, pp. 368, 369.



Municipalities Act, 1965, when it is not removed by the pig owners and is collected by the municipality. Where the municipality instead of collecting the dung itself sells the right to collect and remove it, it is a sale of future contingent goods within S. 6(2) of the Sale of Goods Act, 1930. Where the pig owners remove the dung as of right and nothing is left for the contractor to collect, the contract becomes impossible of performance as the goods do not come into existence and do not become ascertained goods in a deliverable state within Section 23 of the Sale of Goods Act, 1930. The contract having become impossible of performance for no fault of either party the contractor cannot be compelled to pay the price of the dung.

**(5) Sub-section (3)—present sale of future goods—agreement to sell and not sale.**

A man cannot sell what he has not got, but he can agree to sell property which he expects to acquire, and then, when the property is acquired the agreement to sell attaches.<sup>1</sup> Instead of merely agreeing to sell goods which he does not own or possess, a seller may purport to make a present sale of them. It is of course not possible for him to effect an actual sale of such goods. "It is of common learning in the law that a man cannot grant or charge that which he hath not."<sup>2</sup> "The law has long been settled that a person cannot by deed, however solemn, assign that which is not in him—in other words, that there cannot be prophetic conveyance."<sup>3</sup> Sub-section (3) lays down that a contract of present sale of future goods purports to operate as an agreement to sell the goods and not a sale.

There are, however, some situations where an attempt by a seller to sell goods, which he does not at the time own, but of which he is in possession or of which, he afterwards becomes the owner, may have or be thought to have a wider effect than a mere contract to sell. These cases may be classified under the heads of estoppel, sale of an exception, sale of property in the potential possession of the sellers and equitable property rights acquired by contracts to buy future goods.<sup>4</sup>

This rule as of passing to property in goods not yet in existence, was contained in S. 87 of the Contract Act, which was as follows :

"Where there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done after the goods are produced in pursuance of the contract, by the seller, or by the buyer with the seller's assent."

*Illustrations*

(a) A contracts to sell to B, for a stated price, all the indigo which shall be produced at A's factory during the ensuing years. A, when the indigo has been manufactured, gives B an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B from the date of the acknowledgment.

(b) A, for a stated price, contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops then standing. Under this con-

1. See Halsbury, Vol. 34, 3rd Edition, p. 30., f.n. (u). See *Bhimayya v. Government of Andhra*, A.I.R. 1956 Andhra Pra. 386 cited at p. 167 *ante*—Distinction between "sale" and "agreement to sell."

2. Perkins' Profitable Book, tit, grant, 65; *Lunn v. Thornton*, (1845) 1 C.B. 379.

3. Per Pollock G.B. *Belding v. Read*, (1865) 3 H. and C. 955, at 961.

4. See Williston, S. 130, p. 369.



tract B with the assent of A, takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in B

(c) A, for a stated price, contracts that B may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this contract, B applies to A for possession of some crops which were standing at the time of the contract. A refuses to give possession. The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession.

There does not seem to be any material alteration in the law, though in S. 87 the word 'act' is used instead of appropriation and assent. The illustrations referred to will therefore hold good under the present law.

The property in the goods does not pass merely because the goods have been manufactured or otherwise acquired by the seller; there must be subsequent appropriation by one party and assent to it by the other to pass the property. The appropriation and assent may of course be presumed from the acts and conduct of the parties. Thus in *Langton v. Higgins*<sup>1</sup>, there was a sale of all the crops of peppermint oil which might be produced in 1858 on a particular farm at a price per pound, the buyer to advance money on account. On the same day the seller also gave to the buyer a bill of sale assigning (*inter alia*) all future crops of oil of peppermint until repayment of the advance. It was usual for the buyer to send bottles to be filled by the seller, who weighed the oil in each bottle at the time of filling. The question was what act of appropriation was necessary before the property could pass. The case was decided on the ground that the parties intended that the property in the oils should pass on the filling of the bottles.

In *Mucklow v. Mangles*,<sup>2</sup> a large builder contracted with P to build a barge for him and for which P advanced the whole value of the barge before it was completed. When it was nearly finished P's name was painted on the stern, but before it was completed builder committed an act of bankruptcy. *Held*, property did not pass to P. In *Atkinson v. Bell*<sup>3</sup> there was refusal to accept the goods after they were manufactured. *Held*, the property did not pass and there could be no action for price of goods bargained and sold but an action would lie for non-acceptance. In *Hope v. Hayley*,<sup>4</sup> property in the goods in stock and all substituted goods passed on taking possession of them under a licence from the seller contained in the deed of transfer. In *Chidell v. Galsworthy*,<sup>5</sup> under the deed of assignment the assignee was held justified in seizing after acquired property of the assignor upon the premises built subsequently to the date of the instrument and the property passed.

Where there was assignment of the crops and all rights etc. of the assignor's present or any after-taken farm, it was *held*, on a construction of the deed, that the assignee was entitled to take possession of stock and growing crops on a farm not occupied by the assignor at the time of the

1. (1859) 4 H. and N. 402; *Yunn v. Thornton*, (1845) 1 C.B. 379; *Congreve v. Evetts*, (1854) 13 Ex. 293; buyer taking possession under a licence to seize.

2. (1808) 1 Taunt. 318. See *Woods v. Russell*, (1822) 5 B. and Ald. 942;

*Clarke v. Spence*, (1836) 4 Ad. and El. 448; *Bellamy v. Dovey* (1891) 3 Ch. 540, where property in incomplete tanks did not pass.

3. (1828) 8 B. and C. 277.

4. (1856) 5 El. and Bl. 830.

5. (1859) 6 C. B.N.S. 471.



execution of the deed but subsequently acquired and on seizure the property passed.<sup>1</sup>

In *Grantham v. Hawley*<sup>2</sup>, the plaintiff's predecessor in title, the lessor had in demising land covenanted with the lessee his executors and assigns that "it should be lawful for him to take and carry away to his own use such corn as should be growing upon the ground at the end of the term." The lessee's executors sowed corn and at the end of the term sold it to the defendant. The court decided it against the plaintiff. "He that hath it may grant all fruits that may arise upon it after, and *the property shall pass as soon as the fruits are extant.*"

There has been considerable discussion in the Civil Law in regard to the sale of an expectation. The rule of the Civil Law has been thus summarised: "When what is bought is a thing which does not as yet exist, and which may never exist at all, or the quantity or value of which is so indeterminate that it may, as we say, come to nothing, the transaction is called *emptio spei*. If the intention of the parties is that the purchase money shall be paid in any case, whether the hoped-for equivalent comes to anything or not, it is commonly termed, for the sake of distinction, *emptio spei simplicis*; if it is that it shall not be paid unless something at any rate is forthcoming, or shall only be paid in proportion to what the purchase actually gets, it is termed *emptio rei speratae*.<sup>3</sup> The first is presumed to be intended in such cases as where one agrees to buy the fish that shall be caught in such or such a net or nets,<sup>4</sup> the game that shall be killed in such or such a battue, the minerals that shall be extracted from such or such a mine to be opened. The second, which is in fact the purchase of a future thing conditionally on its coming into existence, is presumed to be intended when one buys a thing which may reasonably be expected to come into existence in the ordinary course of nature: e.g. the offspring of slave woman now actually with child, the lambs to be born in the following spring on a particular sheep run, or next season's yield from a certain farm, garden, or vineyard. In such a case the quality of the produce has no effect upon the amount of the purchase money, which, as it cannot be increased because the quality is better, similarly cannot be diminished because it is worse in fact than was expected.

"The presumption, however, in favour of either construction can be rebutted by evidence of a contrary intention. For instance, if one were to agree to buy for a fixed sum the whole of next year's vintage on a particular vineyard, this would be an *emptio spei*; but if the agreement were for ten casks of the wine which so and so should make next year from his vineyard, it would be an *emptio rei speratae*, and if only five casks were made, or none at all, the purchaser would have to pay only for five or none;

1. See also *Hallas v. Robinson*, (1835) 15 Q.B.D. 288 (no seizure). *Watts v. Friend*, (1830) 19 B. and C. 446—Sale of crops to be grown from seeds purchased, held to be sale of goods and chattels; *Ajello v. Worsley*, (1893) 1 Ch. 274, 280. *Hibblewhite v. M' Morine*, (1839) 7 M. and W. 200.  
2. (1615) Hob. 132.  
3. Instances of such sales in English law

would seem to be sales of things having a potential existence.  
4. See Benjamin on Sale, 8th Edn., p. 130 for criticism of this illustration—Sale of chance involves an agreement to sell the goods if they come into existence, but the buyer must pay the price, whether they come into existence or not (Benjamin, *ibid*, p. 129).



while conversely the vendor would not be liable to deliver more than was made in fact, though he might have agreed to sell more."<sup>1</sup>

Where the parties clearly intend it, there may be an *emptio spei*, that is to say, the sale and purchase of the chance of obtaining goods rather than of the goods themselves. Such a contract is contingent on the part of the seller but absolute on the part of the buyer.<sup>2</sup> Such a contract would not be a bargain and sale of goods at common law, but would be a valid executory contract binding the purchaser to pay the price even if no pearls were found, for, "if a man will make a purchase of a chance, he must abide by the consequences."<sup>3</sup>

"There seem to be but two rights in our law which the buyer can acquire by a bargain for goods which the seller may thereafter acquire, and neither of these rights is a property right in the strict sense of the term. The seller may grant the buyer a power to take the goods when they come into existence so that they never came into the possession of the seller. Instead of giving such a power the seller might contract to transfer the goods to the buyer as soon as he, the seller, received them. That is, he might make a contract to sell. But with the possible exception under the heading of potential possession, the future acquisition by the seller of goods intended to be sold does not, it seems, in the common law operate as a transfer of the property in the goods to the buyer, even though the parties intend that it shall do so."<sup>4</sup>

Where a contract purported to be an immediate sale of future goods, a distinction was recognised at common law between future goods in which the seller had, and those in which he had not, what was called a potential property. Things not yet existing which may be sold (that is to say, a right to which may be immediately granted) are those which are said to have a *potential* existence, that is, things which are the natural produce, or expected increase of something already owned or possessed by the seller. Thus a person who has an interest in land may grant all the fruit which may grow upon it hereafter.<sup>5</sup> So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool.<sup>6</sup> But a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially.<sup>7</sup> Of such things there could be, according to the authorities, an immediate grant or assignment, whereas there could only be an agreement to sell where the subject of the contract is something to be afterwards acquired as the wool of any sheep, or the milk of any cows, which the seller might buy within the year, or any goods to which he might obtain title within the next six months.<sup>8</sup>

1. Moyle, Contract of Sale in the Civil Law 30 cited by Williston, S. 132. pp. 373, 374.

2. Halsbury, Vol. 34, 3rd Ed., para. 47, p. 31.

3. Per Richards C. B. in Hitchcock v. Giddings, (1817) 4 Price 135, 18 R. C. 725. See also per Lord Campbell C.J. Hanks v. Palling, (1856) 6 E. & B. 669; Benjamin, p. 131.

4. Williston, S. 131, p. 375.

5. Grantham v. Hawley, (1615) Hob. 132;

Petch v. Tutin, 15 M. & W. 110; Waddington v. Bristow (1801) 2 R. & P. 452.

6. Per Pollock, C.B., 15 M. and W. 116.

7. See Williston, S. 133, p. 376.

8. See Benjamin on Sale, 8th Edn., p. 136. The distinction has been recognised in America, Hull v. Hull, 40 Am. Rep. 165 (future offspring of seller's animals); Conderman v. Smith, (1863) 41 Barb. 404 (cheese to be made from the milk of seller's cows).



The authorities treat a present grant or assignment of goods in which the grantor has a potential property as possible, and a grant of other future goods impossible. As a matter of fact in neither case, however, can there be an actual grant or assignment, but only an agreement to assign; the real distinction being that goods in which the seller has a potential property became the buyer's as soon as they are "extant"; whereas other future goods require some further act of appropriation—some *novus actus interveniens*. In neither case is there an immediate assignment or sale of the goods; although in the former case there may be said to be a sale of a present right to the goods as soon as they come into existence. The only difference between the two classes of future goods seems to be in respect of the time of the passing of the property.<sup>1</sup>

The distinction seems to be based on the ground that the goods having a potential existence are more or less specific goods; there is no difficulty as to their identification, as the things out of which they grow are clearly identified.<sup>2</sup>

It is thus clear that the practical effect of the illustrations cited above is that the property in the future natural product of existing goods will pass to the buyer, and when it is identified by coming into existence, without any further act of appropriation and without the necessity of invoking equity to give to the buyer rights to the goods, which it sometimes finds itself unable to do,<sup>3</sup> and refuses to do as against a legal title acquired for value in good faith.<sup>4</sup> Although, therefore, the grant of the future product of existing property may, by virtue of the wording of the sub-section, be no more than an agreement to sell, it will, in the absence of any provision to the contrary in the contract, pass into a sale when the subject-matter of the contract comes into existence.<sup>5</sup>

The leading American case on the subject is *Grantham v. Hawley*,<sup>6</sup> In that case the owner of the land leased it out for 21 years and covenanted that the lessee should have the crop growing at the expiration of the term. Corn was then growing which had been planted by the lessee's executor. After planting it he sold to the defendant. The plaintiff had previously bought the reversion of the leased premises and, the term of lease having expired, claimed the growing corn as owner of the land. The court decided for the defendant saying: "And though the lessor had it (the corn) not actually in him, nor certain, yet he had it potentially; for the

1. Ibid. p. 138. Sir M. Chalmers expresses the opinion that, "there is no rational distinction between one class of future goods and another." (Sale of Goods Act, 1893, 16th Edn., p. 71. See Benjamin on Sale, 8th Ed., p. 139, f n. (d). Williston observes: Since the passage of that Act in England, it may be assumed that if a remnant of the doctrine of potential possession still exists, there it goes no further than to warrant an inference that the property passes when it comes into existence without any act of appropriation" (*Williston on Sales*, S. 134. p. 378).

2. *Reeves v. Barlow*, (1884) 12 Q.B.D. 436, 442: passing of property in building materials when brought by

the builder upon the land. See *Banbury and Chaltenham Ry. v. Daniel* (1884) 54 L.J. Ch. 265; passing of property in building materials when certified by an engineer.

3. *In re Wait*, 1927) 1 Ch. 606 C.A.

4. *Hoare v. Dresser*, (1859) 7 H.L.C. 290; 115 R.R. 154

5. See Mulla's Indian Sale of Goods Act, p. 49.

6. *Hob. 132* (1616). See also *Andrews v. Newcomb*, (1865) 32 N.Y. 417: Title to a potentially existing thing "vests potentially from the time of the executory bargain, and actually as soon as the subject arises"; *Van Hoozer v. Cory*, (1860) 34 Barb. 9 at 12, 13 (N.Y.). See Benjamin on Sale, 8th Edn., p. 140.



land is the matter and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 Hen. V. A person may grant all the tithe-wool that he shall have in such a year, yet perhaps he shall have none ; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter : for there he hath it neither actually nor potentially."

The assignment of a man's stock-in-trade passes the *property*, or legal ownership, in such articles only as are his at the time he executes such assignment and does not pass the property in any other articles which he may afterwards purchase ;<sup>1</sup> not even if the instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling house.<sup>2</sup> In such cases some specific act appropriating them to grant is necessary before the property passes. And the same rule applies to assignment of all chattels personal, whether in possession or action, to which a man is not entitled at the time of the assignment, but to which he shall afterwards *become* entitled.<sup>3</sup>

It does not seem altogether clear whether, in the class of potentially existing goods, are comprised such goods as are produced by labour from potentially existing goods, such as butter or cheese to be made from the future milk of cows, or oil to be extracted from an unsown crop. There is authority in America for affirmation of this proposition. But it is not unreasonable to suppose that in the case of artificial products some future act of appropriation is contemplated by the parties before the property is to pass.<sup>4</sup>

It is to be observed that the above rule regarding goods having a potential existence though described as perfectly logical in Halsbury's Laws of England, is not approved by Chalmers who says in his Sale of Goods Act that there is no rational distinction between one class of future goods and another. Section 5 of the (English) Sale of Goods Act does not make any such distinction. The Indian Act defines future goods as goods to be manufactured produced or acquired (the English Act uses the words manufactured or acquired). The use of the word "produced" in the Indian Act has evidently been made with the intention of including agricultural products, though it would seem that accretions of all kinds in the circumstances stated above would come under the definition.

Referring to corresponding sub-section (3) of section 5 of the English Sale of Goods Act, 1893, Benjamin observes<sup>5</sup> : "Sub section (3) renders it now no longer doubtful that all present sales of future goods are agreements to sell. The Act, however, says nothing as to the time *when* the property is to pass ; this, as in all cases, depends upon the intention ; and there seems to be nothing in section 5(3) to alter any pre-existing rule with regard to the passing of the property in any class of future goods.

"Although equitable principles are now recognised in Court of law, yet the Judicature Acts have not abolished the distinction between a legal

1. Tapfield v. Hillman, 6 Man. and Gir. 245, S.C. 6 Scott. N.R.

2. Lunn v. Thornton, (1845) 1 C.B. 379, 68 R.R. 727 ; Joseph v. Lyons, 15 Q.B.D. 280 ; cf. Robinson v. Macdonel (1816) 5 M. and S. 228.

3. Re Clarke, 36 Ch. D. 348, 351, (future legacy) ; Harwood v. Millar's Timber

etc Co., (1917) 1 K.B. 305, 315 (future earnings), Performig Right Society v. Theatre of Varieties, (1922) 2 K.B. 433, 454 (future copyrights).

4. See Benjamin on Sale, 8th Edn., p. 139.

5. Benjamin on Sale, 8th Edn., pp. 141, 142.



and an equitable title. 'It was the rule at common law that the property in future-acquired goods should not pass, except, perhaps, where there was a contract that the property in them should pass; that rule still remains in force,' and it seems clear that section 5(3) of the Act has not turned an equitable into a legal title, since the Act deals only with legal title to goods."

If the goods are specific (*e. g.*, capable of being ascertained or identified), equitable interest in them would be transferable without any act on the part of the seller when the goods are acquired or come into existence.<sup>1</sup>

Any instrument purporting to assign chattels to be afterwards acquired can only take effect in law as a contract to transfer the legal ownership in such chattels when they shall have been acquired.<sup>2</sup> But in consequence of the doctrine of equity treating as actually accomplished what is agreed to be done, when any goods become subject to a contract to assign them, which is capable of being specially enforced, the equitable interest therein passes to the intended assignee as soon as the intending assignor has acquired the legal ownership of them.<sup>3</sup> Lord Macnaghten observed in *Tailby v. Official Receiver*<sup>4</sup>: It has long been settled that future properties, possibilities and expectations are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence if it is of such a nature and so described as to be capable of being ascertained and identified.....The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done, if that principle is applicable under the circumstances of the case."

"A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."<sup>5</sup>

In *Industrial Finance Syn. etc. v. Lind*,<sup>6</sup> there was assignment of an expectant share of personal estate which became vested before bankruptcy of the assignor. It was *held* that this did not impose merely a personal liability which could be effected by a bankruptcy.

A person purporting to sell as owner is estopped from denying that he was the owner when he subsequently acquired the goods.<sup>7</sup>

1. *Holroyd v. Marshall*, 10 H.L.C. 191; *Joseph v. Lyons*, 15 Q.B.D. 280; *Tailby v. Official Receiver*, 13 App. Cas. 523.

2. *Holroyd v. Marshall*, 10 H.L.C. 191; *Collyer v. Isaacs*, 19 Ch. D. 342; *Joseph v. Lyons*, 15 Q.B.D. 280.

3. *Langton v. Horton*, 1 Hare 549; *Holroyd v. Marshall*, 10 H.L.C. 191; *Brown v. Bateman*, L.R. 2 C.P. 272.

4. (1888) 13 App. Cas. 523, at pp. 543,

547; see also *Brandt's Sons and Co., v. Dunlop Rubber Co.*, (1905) A.C. 454. See also *In re Wait*, (1927) 1 Ch. 606 C.A., where previous decisions on equitable assignments were considered.

5. *Collyer v. Isaacs*, (1881) 16 Ch. D. 342; see at pp. 351, 354, C.A.

6. (1915) 1 Ch. 744.

7. *Edmands v. Best*, (1862) 7 L.T. 279.



The general equitable principle has been applied in India also. Where A at Virangam consigned goods to B at Bombay for sale on commission, and drew hundies against the goods which B accepted and paid and it was arranged that B should pay himself the advances out of the sale proceeds of the goods when he received and sold them, it was *held* that the agreement constituted a good equitable charge upon the goods, and that they could not therefore be attached by persons holding decrees against A, even though the goods had not yet come into the possession of B.<sup>1</sup> *Maradugula v. Katala*<sup>2</sup> similarly relates to a case where money was advanced by A to B to cut and prepare timber in a forest, and A was to pay himself the advances out of the sale proceeds of the goods when he received and sold them.

It must be clearly noted that the cases relating to general principles of equitable assignment under the English law must be applied with caution to facts of a case in India, for it is possible the decision in the English case under reference might have been influenced by the existence of imperative statutory rules as to particular kinds of transactions or dealings with particular kinds of property, as the Bills of Sale Acts. Facts of each case must be examined carefully in the light of the general principles explained above and statutory rules, if any, relating to the particular property before decision is arrived at.

#### (6) Estoppel.

Though the goods may not be ascertained the seller may be estopped from alleging that goods are unascertained. In *Knights v. Wiffen*,<sup>3</sup> the defendant sold eighty quarters of barley to M out of a large quantity lying in sacks in his granary adjoining a railway station. No particular sacks were appropriated to M. M sold sixty quarters of it to the plaintiff, who paid him for them and received from him a delivery order addressed to the station master asking him to confirm the transfer. On the station master showing the delivery order to the defendant he said: "All right, I will put the barley on the line." M became bankrupt, and the defendant as unpaid vendor refused to deliver the barley. *Held*, that the defendant was estopped from denying that the property in the sixty quarters of barley had passed to the plaintiff as by making the statement he induced the plaintiff to rest satisfied under the belief that property had passed and so to alter his position by abstaining from demanding back the money which he had paid to M.

In *Harman v. Anderson*,<sup>4</sup> the owner of the certain casks of butter lying in the defendant's warehouse sold them to one D and gave him a delivery order, which was lodged with the defendants, who transferred the goods into his name in their books and debited him with rent. D became bankrupt and his assignee brought an action in trover. *Held*, the defendants were estopped from disputing an attornment to the purchaser and the right to stop the goods in transit was gone.

1. *Velji Hirji & Co. v. Bharmal*, (1896) 21 Bom. 287; *Palaniappa v. Lakashmanan*, (1893) 16 Mad. 429; *Baldev Parshad v. Miller*, (1904) 31 Cal. 667 (mortgage of indigo cakes to be manufactured hereafter). *Navajee v. The A.G.*, (1913) 38 Mad. 500. The words were "one should have a charge over cheques or moneys received for worse done with your capital" held, it created a charge; *Bansidhar v. Sant*

*Lal*, (1887) 10 All. 133; hypothecation of certain future indigo produce became complete when the crop came into existence and was enforceable against a transferee with notice.

2. 9 I.C. 255; (1911) 21 Mad. L.J. 413.

3. (1870) L.R. 5 Q.B. 660. See also *Dixon v. Kennaway*, (1900) 1 Ch. 833.

4. (1809) 2 Campb. 243.



In *Ganges Manufacturing Co. v. Sourujmull*<sup>1</sup>, there was a contract to buy for cash on delivery but the seller handed delivery orders to buyer without payment. The buyer then endorsed the same to a third party who advanced money on the delivery orders and obtained part delivery of the goods. The seller assented to the delivery being made to the third party by writing on the delivery orders. *Held*, though there was no appropriation by the seller and no payment by the buyer, the seller was estopped from denying that he held the goods covered by the delivery orders at the disposal of such third party and was bound to deliver the same.

But the mere giving of the delivery order by the sellers, and receipt of the same by the warehouse-men without objection does not estop them from denying the buyer's title.<sup>2</sup>

In *Woodley v. Coventry*,<sup>3</sup> the plaintiff expressly inquired if the delivery order was contract and was expressly told "yes" by the defendant, who accepted it, and thereupon the plaintiff paid part of the price. *Held*, the defendant was estopped from denying that he was holding the goods on plaintiff's behalf.<sup>4</sup>

Williston observes :<sup>5</sup> "If a seller purports to make a present sale of goods which he does not own, and the buyer is ignorant of the seller's lack of title, the seller will be estopped in any contest with the buyer to deny that he himself had title when he purported to make a sale. By assuming to sell the goods, the seller represents that he is the owner of them. The buyer by buying them indicates his reliance on the seller's representations, and suffers damage by such reliance. If the seller never acquires the goods, this estoppel clearly can have no effect upon the title. But if the seller actually acquires the goods after he had purported to sell them, it is said the property in the goods passed by estoppel, thereby giving the buyer not merely a contract but a property right...

"Though it is generally said that the title passes by estoppel, it seems on principle that the exact statement is rather that the seller is estopped to deny that title has passed. Therefore, in any contest as to the ownership of the goods with him, or with those who stand in his place, the buyer will prevail. If, however, after the seller has acquired title and while he has possession of the goods and has made no new act of appropriation or delivery to the buyer, he sells and delivers them to a purchaser for value who has no notice of the previous sale, the later purchaser should be protected, for the seller actually had the title to the goods, and though he, on account of an equitable rule binding him personally, cannot assert this title, the purchaser for value, not being subject to the equity, may do so. The decisions in regard to real estate upon this point are in great conflict. The weight of authority seems to be, however hard it may be to explain the result in theory, that a title good against all the world actually passes to the buyer upon the acquisition of title by the seller. While the difference between transferring a real title to the buyer and merely estopping the seller to deny that the buyer has title has not been much discussed in the cases on personal property,

1. (1880) 5 Cal. 669.

2. *Laurie v. Dudin & Sons*, (1929) 1 K.B. 223.

3. (1863) 2 H. & C. 164. See also *Anglo-India Jute Mills Co. v. Omademull*, (1910) 48 Cal. 127 ; *Goodwin v.*

*Roberts*, (1876) L.R. 1 A.C. 476.

4. *Stonard v. Dunkin*, (1910) 2 Camp. 344.

5. *Williston on Sales*, Revised Edition, S. 131, pp. 369 to 372.



some of the decisions seem to involve the question and to decide in accordance with the weight of authority in the cases relating to land that the property in the goods actually passes. Even so the title would be defeasible by a sale with delivery to a *bona fide* purchaser...

"Chattels...may be transferred without formality, and though the mere acquisition of title by the seller does not operate in itself to convey the property to one who has a contract right to it, any agreement to hold the goods for the buyer or any act of appropriation, to which the buyer's assent might be presumed, would be sufficient to make the buyer legal owner."

7. Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

### Synopsis

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|--|--|
| (1) <i>Specific goods—goods perishing before making of contract.</i> | (5) <i>Express agreement or usage of a particular trade.</i>               |
| (2) <i>Knowledge of destruction.</i>                                 | (6) <i>C.I.F. contracts.</i>   |
| (3) <i>Non-existence of part of the goods sold.</i>                  | (7) <i>Buyer's remedy for the earnest money or the price already paid.</i> |
| (4) <i>Sale of part of an identified stock.</i>                      |  |

### (1) Specific goods—Goods perishing before making of contract.

Pothier<sup>1</sup> says, "There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of thing sold. For the same reason, if when we are together in Paris, and I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null, because the house, which was the subject of it, did not exist: the site and what is left of the house are not the subject of our bargain, but only the remainder of it."

Section 7, therefore, declares that 'where there is a contract for the sale of *specific* goods, the contract is void if the goods, without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.'<sup>2</sup> This section thus deals with the case of common mistake. The contract being void from the beginning, the buyer can recover the purchase price or any part payment, whilst the seller is not entitled to retain or recover his just expenses.

### Analogous English law.

The corresponding section 6 of the English Sale of Goods Act, 1893, runs as follows :

"Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

1. Contract de Vente, S. 4.

2. See G.G. in Council v. Kabir Ram, A.I.R. 1948 Pat. 345 before sale and

without knowledge of vendor goods stolen—Contract is void.



The expression "perished goods" is not defined in the English Act although it has been taken to mean not only goods physically destroyed, but also if they had ceased to exist in a commercial sense, that is, if their merchantable character, as such, had been lost, as dates contaminated with sewage, and therefore unsaleable as dates or table potatoes which had sprouted; or cement which had lost, through moisture, its properties as such.<sup>1</sup> The present section specifically relates to goods both which have perished or have become so damaged as no longer to answer their description in the contract at the time when the contract was made. The Special Committee observed on this point:

"Some writers observe, that goods must be deemed to have perished not only if they are physically destroyed, but also if they have ceased to exist in a commercial sense, that is, if their merchantable character, as such has been lost.....There seems to be a strong opinion in favour of the view that the import of the word is not to be restricted to mere physical destruction. We have accordingly made it clear that the goods must have been either physically destroyed or so damaged as not to answer the description given in the contract."

This section is confined to the case of "specific goods" as defined in section 2(14) of the Act. Generic goods, that is to say, goods defined by description only, come within the maxim *genus numquam perit*.<sup>2</sup> The rule which it embodies may be regarded as a particular instance of the effect of mutual mistake making an agreement void<sup>3</sup>, or of impossibility of performance.<sup>4</sup> This section applies whether the contract purports to be an agreement to sell or a sale, whereas section 8 applies only to agreement to sell.<sup>5</sup>

From the decisions under the English law it may be said that this section will apply not only to cases where the goods have been destroyed or have been so damaged as no longer to answer to their description, but also to cases where the seller is irretrievably deprived of them as when they have been stolen or lawfully requisitioned by the Government or have, in some other way, been lost and cannot be traced.<sup>6</sup>

### Illustrations

The following illustrations will explain the meaning of this section:

(1) A cargo of corn, loaded on a vessel not yet arrived, was sold on May 15. It was afterwards discovered that the corn having become heated had been discharged by the master at an intermediate port, and sold on the 24th of the preceding month of April. *Held*, that the sale of May 15 was properly repudiated by the purchaser.<sup>7</sup>

(2) In *Smith v. Myers*<sup>8</sup> the contract was for the sale of "about 600

1. See *Asfar v. Blundell*, (1896) 1 Q.B. 123; *Rendell v. Turnbull and Co.*, (1908) 27 N.Z.L.R. 1067; *Duthie v. Hilton*, (1868) L.R. 4 C.P. 138; *Montreal Light, etc. Co. v. Sedgwick*, (1910) A.C. 598 (P.C.); *Benjamin on Sale*, 8th Edn., p. 143.

2. *Re Thornt and Fehr and Yuills* (1921) 1 K.B. 219; *Hayward Brothers v. Daniel* (1904) 91 L.T. 319.

3. See section 20, illustrations (a) and (b), Indian Contract Act.

4. Section 56 of the Indian Contract Act.

5. See *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 36.

6. *Barrow Lane and Ballard v. Phillips and Co. Ltd.*, (1929) 1 K.B. 574; *Shipton Anderson and Co. v. Harrison* (1915) 3 K.B. 676, 682; *G.G. in Council v. Kabir Ram*, A.I.R. 1948 Pat. 345.

7. *Hastie v. Couturier*, 9 Ex. 102; 96 R.R. 598; *Couturier v. Hastie*, (1856) 5 H.L.C. 673; 101 R.R. 329.

8. L.R. 5 Q.B. 429; L.R. 7 Q.B. 139.



tions, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12s. 9d. per cwt. Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." Before the date of the contract, but without the seller's knowledge, an earthquake had destroyed the greater part of the nitrate. The sale was held void.

(3) Sale of 700 bags of nuts, identified by marks, lying in a named warehouse. Unknown to the seller, before the sale, 109 of the bags had been stolen. The sale is void and the buyer cannot be compelled to take the remainder.<sup>1</sup>

Benjamin observes :<sup>2</sup> "These cases are sometimes treated in the decisions as dependent on an implied warranty by the seller of the existence of the thing sold : sometimes on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground, is rather that there has been no contract at all, for the assent of the parties being founded on a mutual mistake of fact was really no assent, there was no subject-matter for a contract, and the contract was therefore never completed."

Williston observes :<sup>3</sup> "Even apart from the doctrine of impossibility the mutual mistake under which the parties labour would excuse the seller from any obligation. On the part of the buyer there is no question of impossibility, it is entirely possible for him to pay the price. If the promise however was expressly or impliedly conditional upon the transfer of title, which would generally be the case, the non-performance of this condition, for whatever reason, would necessarily excuse him. Even though his promise to pay the price was not conditional, the destruction of the goods for which the price was to be paid would be such failure of consideration as to excuse him from paying the price if he had not already paid it and would justify him in recovering it if he had already paid it. The doctrine of mutual mistake would also excuse the buyer as well as the seller. It is not accurate, however, to say that there is no mutual assent : the parties do, in fact, assent to the same thing. The mistake which they make is the ground for excusing them from the bargain they made. It is not a ground for saying they never made a bargain."

## (2) Knowledge of destruction.

The section assumes that the seller does not know that the goods have perished. If the seller knows that the goods have perished, then by implication from the terms of this section, and according to general principles,<sup>4</sup> the seller, but not the buyer, will be estopped from asserting that no contract exists. Conversely, if the buyer only knows of the loss of the goods, he, but not the seller, will be estopped from setting up a contract.<sup>5</sup>

If the seller, knowing the goods to have perished, agreed to sell them, he would be liable in damages if the buyer did not know of this fact, as in other cases where a person promises for valuable consideration to do something which he knows he cannot perform.<sup>6</sup> It has been held

1. *Barrow Lane and Ballard Ltd. v. Phillips & Co. Ltd.*, (1929) 1 K.B. 574.  
 2. Benjamin on Sale, 8th Edn., pp. 142, 143.  
 3. Williston on Sales, Revised Edition, §. 161, p. 425.

4. See *Smith v. Hughes*, (1871) L.R. 6 Q.B. 597.  
 5. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 37, f.n. (t).  
 6. *Bell v. Lever Bros. Ltd.*, (1932) A.C. 161, 217, per Lord Atkin.



under the English law that as the contract is void *ab initio*, the price, if paid, can be recovered back. It is money paid under a mistake of fact, for the contract is founded on mutual mistake.<sup>1</sup> But the High Court of Australia has held, in a case where the goods had never existed at all, that the buyer is entitled to damages.<sup>2</sup>

### (3) Non-existence of part of the goods sold.

Where two or more things are sold for an entire price, or otherwise under an entire contract, and one or more of them have perished at the date of the contract, is the contract void as to the remainder? In *Barrow v. Phillips*<sup>3</sup>, the sale was of 700 bags of nuts and only 591 bags were in existence at the date of the contract, the remaining having been stolen. It was held that the contract was void and the buyer could not be compelled to take remainder. The seller could not be compelled to deliver what was left, and equally the buyer if he had actually paid the whole or part of the purchase price could recover it, as on a total failure of consideration unless indeed he had actually received and used part of the goods, in which case he would obviously have to pay at the contract rate, as in the case cited. Wright J. observed:

“This case raises a further problem which so far as I know, and so far as the learned counsel has been able to ascertain, has never hitherto come before the court. The problem is this: Where there is a contract for the sale of specific goods such as the parcel of goods in this case, and some, but not all, of the goods have been stolen and taken away and cannot be followed or discovered anywhere, what then is the position? Does the case come within section 6 of the Sale of Goods Act (corresponding to section 7 of the Indian Act), so that it would be the same as if the whole parcel had ceased to exist. In my judgment it does.”

Can it be held that if the buyers were willing to take the portion of the goods, which could be delivered, the seller would be bound to deliver? In *Howell v. Coupland*<sup>4</sup>, the contract was to sell “200 tons of potatoes grown on land belonging to the defendant in Whaplode.” There was a failure of the crop from disease, and the seller could deliver only 80 tons. It was not decided whether the seller might have refused delivery of the 80 tons which he in fact delivered. Blackburn J. and Quain J. seemed to have thought that he was liable to deliver what he could.<sup>5</sup> On the other hand, in *Lovatt v. Hamilton*,<sup>6</sup> where goods were sold “to arrive by a particular ship, and only a small part arrived in that ship, the Court of Exchequer held that the buyers were not entitled to it, as the contract was entire for the whole quantity.” Benjamin observes on this point:<sup>7</sup> “The question is one of the presumed intention of the parties. Where the subject-matter of the sale is such an indivisible whole as a number of volumes forming one work, the intention would doubtless be that the seller should be wholly discharged. The case of a mere quantity of specific goods is not so clear.”

1. *Strickland v. Turner*, (1852) 7 Exch. 208; see Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 37, f.n. (t); Chalmers, *Sale of Goods Act*, 16th Edn., p. 72.  
2. *Mc Rae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377; Chalmers, pp. 72, 73,

3. (1929) 1 K.B. 754; 98 L.J.K.B. 193.  
4. (1876) 1 Q.B.D. 258; 46 L.J.Q.B. 147 (C.A.).  
5. (1874) L.R. 9 Q.B. 463; 45 L.J.Q.B. 201.  
6. (1839) 5 M. & W. 639; 52 R.R. 865.  
7. Benjamin on Sale, 8th Edn., p. 146,



**(4) Sale of part of an identified stock.**

This section only deals with specific goods as opposed to generic goods. It will not therefore apply to unascertained goods and the perishing of such goods will not avoid the contract. It has been suggested that it applies to the case where there is a sale of part of an identified stock out of a larger specified bulk.

Chalmers in his *Sale of Goods Act*<sup>1</sup> says :

“But if a man contracts to sell five dozen of a particular brand of champagne, it would be immaterial if unknown to him his whole stock of wine had been destroyed by fire. He must procure five dozen of that champagne elsewhere or pay damages. A mixed case might arise which is not covered by the action. Suppose a man contracts to sell to B ‘five dozen of the 74 champagne now in my cellar’ not knowing that all but three dozen had been destroyed by fire. The question has not been decided, but probably the contract would be void.”<sup>2</sup>

This involves giving the words “specific goods” a meaning different from that given in the definition ; and an agreement to sell goods forming part of an existing stock is not generally regarded as the sale of specific goods.<sup>3</sup> It would be better to say that such a case will fall within the general principles of section 20 or section 56 of the Indian Contract Act than to hold it to fall under this section.<sup>4</sup>

**(5) Express agreement or usage of a particular trade.**

The provisions of this section, like any other implication of law, may be negatived or varied by express agreement, or by the usage of a particular trade.<sup>5</sup> The seller, for instance, may be entitled by custom to appropriate goods to the contract and the buyer may be bound to accept such appropriation although the goods were lost when it was made.<sup>6</sup>

**(6) C.I.F. contract.**

By virtue of section 62, C.I.F. contracts are saved from the operation of this section,<sup>7</sup> inasmuch as such a contract being a contract for the sale of goods, cost, insurance and freight, the performance of which is satisfied by delivery of the goods<sup>8</sup> is not affected by the loss or damage to the goods sold.<sup>9</sup> But if before the delivery of documents war breaks out and such delivery becomes impossible of performance the contract becomes void not under this section but under section 56 of the Indian Contract Act, which contains a general provision applying to all the circumstances constituting impossibilities and supervening illegalities avoiding contracts.<sup>10</sup>

1. 16th Edn., pp. 72, 73.

2. This view has been approved *obiter* by Wright J. in *Barrow Lane & Ballard v. Phillips* (1929) 1 K.B. 574 (sale of 700 bags of nuts, 109 of which had perished before contract) ; but see *In re Wait* (1927) 1 Ch. 606, at p. 631 C.A.

3. See section 18.

4. See *Taylor v. Caldwell* (1863) 3 B. & S. 826, 129 R.R. 573; *Howell v. Coupland* (1876) 1 Q.B.D. 258, C.A. ; *Kimji Lal Manohar Dass v. Durga Prasad Debi Prasad*, 24 C.W.N. 703 ;

58 I.C. 761.

5. See section 62 of the Act.

6. *Produce Brokers Co. v. Olympia Oil & Cake Co.*, (1917) 1 K.B. 320 C.A.

7. See notes under section 39 and Appendix.

8. Per McCardie J. in *Manbre Saccharine Co. v. Corn products Co.* (1919) 1 K.B. 198 (202).

9. *Ibid.* See also *Produce Brokers Co. v. Olympia Oil and Cake Co.*, *supra*.

10. *Soorthingjee Sakalchand v. Mohamed Nassiruddin*, 40 I.C. 526.



**(7) Buyer's remedy for the earnest money or the price already paid.**

Under S. 65 of the Contract Act when an agreement is discovered to be void or when a contract becomes void, any person who has derived any advantage under it is bound to restore it, or to make compensation for it, to the person from whom he received. The above rule will regulate the right of the parties when the contract is discovered to be void in consequence of the goods having been perished before the contract is made, and the earnest money or price if paid can be recovered back as money paid under a mistake of fact, for the contract in such case is founded on mutual mistake.<sup>1</sup>

**8.** Where there is an agreement to sell specific goods, and subsequently the goods without any fault <sup>Goods perishing before sale but after agreement to sell.</sup> on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

**Synopsis**

- (1) *Specific goods perishing before sale but after agreement to sell—* *Act.*  
*analogous law under the English* (2) *Specific goods.*

**(1) Specific goods perishing before sale but after agreement to sell—analogous law under the English Act.**

This section applies to specific goods perishing before sale but after agreement to sell. Unlike the previous section, it deals with a case where the goods are in existence at the time of making the contract, but perish without the fault of either party before the risk has passed to the buyer.<sup>2</sup> Obviously, therefore, it must apply to agreements for sale and cannot apply to executed contracts of sale, as in those cases ownership would pass to the buyer and any subsequent loss will fall on him. "Specific goods" and "fault" are defined in section 2 of the Act.

Like the previous section, this section expressly includes the case of goods which are so far damaged as no longer to answer to their description in the contract. In fact, this section reproduces section 7 of the English Act with the addition of the words "or become so damaged as no longer to answer their description in the agreement."<sup>3</sup>

While under the preceding section the contract is void *ab initio*, under the present section it is not so, but performance on either side is excused as from the time of the perishing of the goods.<sup>4</sup> The words "agreement is avoided" mean that the agreement becomes void only when the goods perish and from that date both parties are absolved from future performance. Any rights vested before that event will not be affected. For instance, if there be a day fixed by the contract for the payment of

1. See also *Strickland v. Turner*, 7 Exch. 208; *Textile Mfg. Co. v. Salomon Bros.*, 1 L.R. 40 Bom. 570.  
 2. See section 26 of the Act.  
 3. See notes on pages *infra*.  
 4. Cf. *Elphick v. Barnes* (1880) 5 C.P.D.

321. See also *Rangoon Telephone Co. Ltd. v. The Union of Burma*, (1948) Bur. L.R. 527—Goods the subject-matter of contract damaged through fault of no party—Contract cannot be enforced,



the price, irrespective of delivery, and the goods do not perish until after that day, the seller may recover it or retain it if already paid. And conversely, where the price is not then payable, the seller takes the risk, and cannot sue for the price.<sup>1</sup>

The effect of this section read with other sections of the Act, in cases where specific goods agreed to be sold subsequently perish may be stated as follows :

1. If fault of either party causes the destruction of the goods, then the party in default is liable for non-delivery or to pay for the goods, as the case may be.<sup>2</sup>

2. If there be no such fault, then

(a) if the risk has not passed to the buyer, the agreement is avoided and the seller is not liable for non-delivery, but on the other hand must bear the loss ;

(b) if the risk has passed to the buyer, he must pay for the goods, though undelivered.<sup>3</sup>

The rule laid down by this section is only a particular application of the general principle which underlies section 56 of the Indian Contract Act. It deals only with one case of impossibility of performance subsequent to the formation of the contract. There are other cases, common to the whole field of contract, where performance is excused on the ground of impossibility and these are governed by general principles of law of contract. As a general rule, if a man makes a contract, he must fulfil its conditions or pay damages. It is no excuse that he cannot get the goods he has contracted to deliver, or that he can obtain them at prohibitive price, or that they can only be shipped by a much longer sea route than the parties contemplated at the time of contracting, or that they cannot be shipped because the agreed shipping line failed to provide a vessel to load in the agreed month of shipment. If he wishes to be safe, he must protect himself by express stipulation.<sup>4</sup>

The rule is for the benefit of seller who would not be liable if the goods perish through no fault on his part. The contract becomes impossible of performance, but under section 65 of the Contract Act he would be bound to return any advantage received by him. But if the risk has passed to the buyer, the loss will fall on him.

If the destruction or damage to the goods sold is due to the fault of either the seller or the buyer the party to whose fault it is due must bear the loss caused by such destruction or damage and the agreement of the sale is capable of being enforced to that extent in an action for damages.<sup>5</sup> If the destruction or damage occurs before the contract of sale is made, section 7 will govern the case. If it occurs after the contract is made but before the risk passes to the buyer, section 8 will apply. Where, however, it occurs after the risk has passed to the buyer the loss must be borne by the buyer.

1. Cf. section 58(2) ; see also Benjamin on Sale, 8th Edn., pp. 144, 145, 147 and the cases cited thereunder.

2. See Act, section 26, post ; and section 31 post ; see also Clarke v. Bates (1913) 2 L.J. Ct. C. 114.

3. See Benjamin on Sale, 8th Edn., p. 144.

4. See Chalmers, Sale of Goods Act, 16th Edn., p. 20 and the authorities cited therein.

5. Inder Prasad Singh v. Campbell, 1 L.R. 7 Cal. 474.



If the goods are destroyed by *vis major* or, as for example, if the goods which a man has contracted to sell are requisitioned by the Government before delivery, or by any other cause, without the fault of either party, before the property in them is transferred the agreement thereupon ceases to be binding and the seller and buyer are respectively discharged from the obligation to deliver the goods and to pay the price.<sup>1</sup>

### Illustrations

The following illustrations will be helpful in understanding the application of this section :

(1) In *Elphick v. Barnes*,<sup>2</sup> the buyer of a horse on sale or return had eight days in which to return the animal, and it died within the time without his fault. It was *held* that the seller could not recover the price of the horse in an action for goods sold and delivered, the death of the horse not having deprived the defendant of the option, and thus the sale not being complete.

(2) In *re Shipton Anderson & Co. v. Harrison Bros.*,<sup>3</sup> there was a contract for the sale of a specific parcel of wheat lying in a warehouse, payment to be made within seven days against transfer order, the wheat to remain the property of the seller in the meantime. Before the expiration of the seven days the wheat was lawfully requisitioned by the Government. It was *held* that the contract was avoided.

(3) In *Tempest v. Fitzgerald*,<sup>4</sup> the purchaser of the horse agreed in August to give forty-five guineas for it and take it away in September. The parties understood it to be a *ready-money* bargain. The purchaser returned on September 20, ordered the horse out of stable, mounted and tried it and asked plaintiff's son to keep it for another week which was assented to as a favour. The purchaser said he would call and pay for the horse about the 26th. He returned on the 27th with the intention of taking it, but the horse had died in the interval, and he refused to pay. *Held*, the contract is avoided and A must bear the loss, for there has been no delivery to the purchaser and no transfer of ownership.

### (2) Specific goods.

It has been suggested that in this section also "specific goods" has a wider meaning than that given in the definition and may be extended so as to include unascertained goods which form a part of an identified stock, whether existing at the time that the contract is made or to come into existence thereafter;<sup>5</sup> and this suggestion finds support from the language used by the learned Judges in the case of *Howell v. Coupland*.<sup>6</sup> Blackburn J. described the contract as a contract for the delivery at a future time of specific thing so far as this, that is, for the delivery of a portion of a specific thing, and observed : "It is just like the case of a contract for the purchase of 10 or 100 tons of a cargo of goods out of a ship to arrive, which must be so many tons out of the bulk on board the

1. See Chalmers, *Sale of Goods Act*, 16th Edn., pp. 20, 21.

2. (1880) 5 C.P.D. 321 ; 49 L.J.C.P. 698.

3. (1915) 3 K.B. 676.

4. (1920) 3 B. & Ald. 680 ; 22 R.R. 526.

5. See Chalmers, *Sale of Goods Act*, 10th Edn., p. 31 ; and 11th Edn., p.

45 See now 16th Edn., p. 74 for Comments on this view.

6. See page 151 for facts of this case,



ship named.....The principle of *Taylor v. Caldwell*<sup>1</sup> which was followed in *Appleby v. Myres*<sup>2</sup> in the Exchequer Chamber, at all events, decides that if there is contract with respect to a particular thing, and that thing cannot be delivered owing to its perishing without any default in the seller, the delivery is excused. Of course, if the perishing were owing to any default of the seller, that would be quite another thing.....Had the contract been simply for so many tons of potatoes of particular quality, then although each party might have had in his mind when he made this particular crop of potatoes, if they had all perished, the defendant would still have been bound to deliver the quantity contracted for ; it would not have been within the rule of contract as to a specific thing.<sup>3</sup> But the contract was for 200 tons of a particular crop in particular fields, and therefore there was an implied term in the contract that each party should be free if the crop perished."<sup>4</sup>

And Mellish L.J. in the Court of Appeal observed : "This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold ; here there was an agreement to sell and buy 100 tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things. Therefore, neither party is liable if the performance becomes impossible."<sup>5</sup>

In *Taylor v. Caldwell*,<sup>6</sup> was an action for breach of a promise to give to the plaintiff the use of a certain music hall for four specific days, and the defence was that the hall had been burnt down before the appointed day, so that it was impossible to perform the contract. This excuse was held valid.

The principle was thus stated : "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when time for the fulfilments of the contract arrived some particular specified thing continued to exist, so that when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there in the absence of any express or implied condition that the parties shall be excused in case before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

In *Hayward Bros. v. Daniel & Sons*<sup>7</sup>, there was sale of definite quantities of the produce of the soil but no particular land was mentioned. There was a general failure of crop. *Held*, the goods were not specific and the seller was liable for non-delivery.

In *Appleby v. Myers*<sup>8</sup> similarly, the plaintiffs contracted to erect machinery on defendant's premises for a price to be paid on completion. During the progress of the work the premises and machinery were consumed, without the fault of either party, by accidental fire. Both parties were held to be excused from further performance ; and the plaintiffs, having contracted for an entire work for a specific sum, could not recover the value of the work actually done, for defendant neither

1. (1863) 3 B. & S. 826, 129 R.R. 573.

2. (1867) L.R. 2 C.P. 651.

3. Cf. *Re Thornett & Fehr Yuills* (1921) 1 K.B. 219 ; *Hayward Brothers v. Daniel*, (1904) 91 L.T. 319.

4. L.R. 9 Q.B. at pp. 465, 466.

5. (1876) 1 Q.B.D., p. 252.

6. (1863) 3 B. & S. 826, 129 R.R. 573.

7. (1904) 91 L.T. 319.

8. (1867) L.R. 2 C.P. 651.



prevented completion nor entered into a new contract to pay for the work partly done.

The opinion of Mellish L.J. in *Howell v. Coupland* cited above involved giving to the word "specific" in the section a meaning which differs from that given in the definition clause, but the opinion expressed by Atkin L.J. in *Re Wait*<sup>1</sup> throws doubt upon the validity of this view. It was suggested by the learned Lord Justice that the decision in *Howell v. Coupland* would be covered by section 4 (2)<sup>2</sup> as being a case of an agreement for the sale of future goods subject to the condition that the subject-matter should come into and continue in existence, or would be covered by general principles of law, retained by section 66.<sup>3</sup> It would, therefore, appear that the section applies only to an agreement for the sale of specific goods, within the meaning of definition, the other cases falling under the general principles of law of contract.<sup>4</sup>

As regards perishing of part, the same principles as under section 7 of the Act will apply.

Benjamin<sup>5</sup> has stated the principle thus : "Where the specific goods perish *after* the making of the contract, their destruction affects not, as in cases under section 6,<sup>6</sup> the *formation*, but the *performance* of the contract. As will be seen later, the impossibility of performance is, as a general rule, no excuse to the party bound to perform ; but this rule applies only where the contract is positive and absolute, and not subject to any condition expressed or implied. And a condition subsequent excusing performance of the goods perished will be implied where, according to the intention of the parties, performance depends upon the continued existence of a given person or thing, or state of circumstances. This was first decided in *Taylor v. Caldwell* which was followed and extended in *Howell v. Coupland* on which latter case section 7<sup>7</sup> of the Act is based."

### The Price

**\*9.** (1) The price in a contract of sale may be fixed by <sup>Ascertainment of</sup> the contract or may be left to be fixed in <sup>price.</sup> manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is reasonable price is a question of fact dependent on the circumstances of each particular case.

1. (1927) 1 Ch. 606, at p. 630.

2. Section 5(2) of the English Act.

3. Section 61(2) of the English Act. In India these provisions are contained in section 56 of the Indian Contract Act.

4. See Chalmers, *Sale of Goods Act*, 16th Edn., p. 74.

5. Benjamin on *Sale*, 8th Edn., p. 144.

6. Corresponding to section 7 of the Indian Sale of Goods Act, 1930.

7. Corresponding to section 8 of the Indian Sale of Goods Act, 1930. \*See Section 8 of the English Act, in Appendix A and also repealed section 89 of the Indian Contract Act, 1872 in Appendix B, corresponding to this section,



### Synopsis

- |   |   |
|---|---|
| (1) <i>Ascertainment of the price.</i>          | (4) <i>Effect of altered custom and excise duties on price.</i> |
| (2) <i>Different modes of fixing the price.</i> | (5) <i>Mode of payment.</i>                                     |
| (3) <i>Underselling.</i>                        |   |

#### (1) Ascertainment of the price.

"Price" according to section 2(10) of the Act means the money consideration for a sale of goods. It may be *money* actually paid or promised. It has already been seen that in order that a contract may be a contract of sale, it is essential that it should provide for the payment of a money consideration for the goods. [*Vide* section 4 (1) of the Act.]

#### (2) Different modes of fixing the price.

This section suggests four methods of fixing the price :

- (1) The price may be expressly stated in the contract. The parties may fix any price they please, and the court will not embark on an investigation as to the adequacy of the price.<sup>1</sup>
- Fixed price.**

In *Madholal v. Official Assignee of Bombay*<sup>2</sup>, A had an overdraft account with a bank and had pledged certain shares as security for the same. On A's inability to meet the demand for the amount due, bank proposed to sell the shares. B offered rupees 73,000 as price for them. The bank accepted the offer for the price of Rs. 73,000 or thereabouts by a resolution passed in a meeting presided over by B. It was contended that the price was not ascertained or fixed and hence the contract did not satisfy the requirements of S. 9. It was *held* : The whole transaction has to be judged in the light of the attendant circumstances. There was strong circumstantial evidence that unerringly fixed the meaning of the expression "73,000 or thereabouts". The exact sum was not mentioned as possibly the exact figure disclosed by the accounts was not then before the meeting, but there was no manner of doubt that both the purchaser and the seller had understood the meaning of that expression, and once it was held that expression "73,000 or thereabouts" was used to specify the overdraft account of A and that both the parties understood this expression in that sense, then the contention that the sale was not for a fixed price could not hold water.

As has already been noticed,<sup>3</sup> an alternative price, if in the nature of a wager, avoids the contract.<sup>4</sup> An alternative price, however, does not necessarily involve a bet.<sup>5</sup>

1. *Jones v. Gordon*, (1877) 2 A.C. 616.

2. A.I.R. 1950 F.C. 21 : 51 Bom. L.R. 906, reversing A.I.R. 1947 Bom. 217. Kania C.J. dissented.

3. See notes on pages 102 to 110.

4. See *Rourke v. Short*, (1856) 5 El. & Bl. 904 ; cf. *Brogden v. Marriott*, (1846) 3 Bing. N.C. 88 ; sale of a horse for £ 200 if it trotted 18 miles in an hour ; if it failed to do so, it would

be sold for one shilling ; *Ironmonger & Co. v. Dyne*, (1928) 44 T.L.R. 497, at p. 499. As to speculative contracts in "futures" see *Forget v. Ostigny*, (1895) A.C. 318, P.C. at p. 323 and *Re. Giere*, (1899) 1 Q.B. 794, C.A. (wagering contract plus contract for sale of stock).

5. See *Cave v. Coleman*, 3 M. & R. 2.



In *Mckenzie Ltd. v. State of Bombay*,<sup>1</sup> A contracted to deliver bodies on chassis to Government of India. The work and labour in this contract was to end in the finished article viz. the completed body which was to be delivered as an article under the contract for the price to be paid for it. Thus on terms of contract what was intended to by the parties was a contract for the sale of goods. Hence A, the Engineering contractor, who undertook to construct bodies, would be dealer within the meaning of S. 2(6) of the Bombay Sales Tax Act, 1953.

(2) The contract may provide for the manner in which the price is to be fixed. The agreement may be to pay as much for the goods as others pay. In such a case, notice must be given to the buyer as to how much others pay.<sup>2</sup>

In *May and Butcher v. The King*, (1934) 2 K.B. 17n, H.L., the alleged contract provided for "prices to be agreed upon from time to time." The House of Lords held that there was no contract at all but a mere agreement to agree, and S. 8(2) (of the English Act) could only be brought into play where the contract was totally silent about the price.<sup>3</sup>

If the parties agree that the price shall be as subsequently arranged between them, no contract of sale exists unless and until the price is fixed, for the parties have reserved to themselves an option as to the price, which is an essential element of a contract of sale,<sup>4</sup> and the rule of reasonable price does not apply as the parties have impliedly excluded it. But a contract will exist if an intention can be inferred that at any rate a reasonable price shall be paid if the price is not fixed.<sup>5</sup> If the goods were actually delivered and accepted under such an arrangement, presumably the buyer would have to pay a reasonable price.<sup>6</sup>

The clause which ultimately resulted in section 8 of the English Act, originally provided that the price might "be left to be fixed by subsequent arrangement," so that if there was a sale at a price to be subsequently agreed on by the parties there would be a valid contract; as there is a valid contract of insurance "at a premium to be arranged," for if no arrangement is made, a reasonable premium is payable.<sup>7</sup> These words were, however, struck out in the committee.<sup>8</sup>

(3) The price may be determined by the course of dealing between the parties.<sup>9</sup> Thus in *Browne v. Ayrne*<sup>10</sup> a usage to deduct discount in determining the price was implied from the course of dealings.

1. (1962) 13 S.T.C. 602 (Bom.).

2. *Murphy v. Hurley*, (1922) 1 A.C. 369.

3. See Chalmers, 16th Edn., p. 76 and other authorities cited thereunder.

4. Benjamin on Sale, 8th Edn., p. 149; see Loftus v. Roberts, (1902) 18 T.L.R. 532, C.A. & cases there cited; cf. Hillas & Co. v. Arcos Ltd., (1931) 36 Com. Cas. 353.

5. *Jewry v. Bush*, (1814) 5 Taunt. 402; *Bryant v. Flight*, (1839) 5 M. & W. 114.

6. Cf. *Rose & Frank v. Crompton Bros.*, (1925) A.C. 444.

7. Marine Insurance Act (1906), section 31.

8. See Chalmers, Sale of Goods Act, 16th Edn., p. 76. See also *Foley v. Classi-*

*que Coaches Ltd.*, (1934) 2 Q.B. 1 C.A.—"price to be agreed by the parties in writing from time to time of petrol to be sold."

9. *Joyce v. Swann*, (1864) 144 E.R. 34; 142 R.R. 258; *Anderson v. Morice*, (1876) 1 A.C. 713.

10. (1854) 118 E.R. 1304; 97 R.R. 715; *Re Anglesey*, (1901) 2 Ch. 548; agreement to pay interest inferred; *Cannon v. Fowler*, 14 C.B. 181; meaning of "fair value" from previous valuation. *Charrington & Co. Ltd. v. Wooder*, (1914) A.C. 91; meaning of "fair market price," in respect of a tiled house; *Harrower v. M. William*, (1928) Sc. Cas. 326; meaning of "payment according to B.L. Weight."



(4) Where the price of the goods sold is neither fixed by the contract of sale nor there is any stipulation whereby it can be fixed subsequently, the buyer is bound to pay to the seller such price as may be considered reasonable under the circumstances of the case. This rule is based upon the principle that the intention of the parties must be deduced from their conduct and if the parties have not arranged the price, the inference is that they are content to abide by the ordinary rates and to submit to the adjustment of them by the ordinary tribunals.<sup>1</sup>

By English law "a contract for the sale of a commodity in which the price is left uncertain is, in law, a contract for what the goods shall be found to be reasonably worth"<sup>2</sup> and this applies to *executed* contracts as well as to *executory* agreements<sup>3</sup> i.e. to an action, for the price of goods sold and delivered as well as to an action for damages for non-acceptance of goods agreed to be purchased. Thus in an executory contract, where no price had been fixed, it was *held* that the seller could recover, in an action against the buyer for not accepting the goods, the reasonable value of them.<sup>4</sup> Even when the contract is silent as to the method by which the price is to be determined, an agreement to pay a reasonable price will be implied; and what is implied by law is as strong to bind the parties as if it were under their hand.<sup>5</sup>

In the words of Wilde C.J., "goods may be sold and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify agreement, or to be determined by what is reasonable under the circumstances."<sup>6</sup>

What is a reasonable price will be a question of fact dependent on the circumstances of each particular case. Where the goods are such that there is a market price for them, the market price will be evidence of what is a reasonable price between the parties, though not conclusive. The current price of the day may be highly unreasonable from accidental circumstances as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."<sup>7</sup>

Failing evidence of price or value, the court will presume that goods of the lowest value of the kind delivered have been sent.<sup>8</sup>

1. See *Joyce v. Swann*, 17 C.B.N.S. 84. Also illustration to section 89, Indian Contract Act, 1872 (since repealed) Appendix B.

2. *Hoadly v. McLaine*, (1834) 131 E.R. 982; 38 R.R. 510; see also *Valpy v. Gibson*, (1847) 4 C.B. 837; 72 R.R. 740.

3. *Hoadly v. McLaine*, 10 Bing. 482; *Valpy v. Gibson*, 4 C.B. 837 (864).

4. *Hoadly v. McLaine*, (1834) 131 E.R. 982; 38 R.R. 510.

5. *Hoadly v. McLaine*, *supra*; the civil law did not recognize this doctrine and if the contract failed to fix the price, or specify the manner in which it was to be ascertained, it was not a contract of sale. See Benjamin on

*Sale*. 7th Edn., pp. 152-53 & Chalmers, *Sale of Goods Act*, 16th Edn., pp. 75, 76, 77.

6. Per Wilde C.J. in *Valpy v. Gibson*, 4 C.B. at p. 864; *Joyce v. Swann*, 17 C.B.N.S. at p. 93.

7. *Acebal v. Levy*, (1834) 10 Bing. 376; 3 L.J.C.P. 98; 38 R.R. 469; *Chidambaram Chettiar v. Steel Bros.*, A.I.R. 1936 Ran. 419; 165 I.C. 308 (mixed contract for storage of paddy and subsequent sale at seller's option at the current buying rate of the buyer. In absence of such purchase, price will be reasonable rate.)

8. *Chunnes v. Pezzey*, (1807) 170 E.R. 857.



When the price is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser by ascertaining the amount as nearly as can be. The rules herein contained apply even to a case where the goods are destroyed before the price is fixed, and even in such cases if the risk has passed to the buyer, he must pay a reasonable price. Thus where the rate has been fixed but an exact calculation of the price has become impossible by the destruction of the goods, as for example, where the goods were to be weighed or measured to determine the price, the court would make such an estimate as it reasonably can.<sup>1</sup>

Generally the price is fixed by the contract of sale itself or some method of its fixation is agreed upon in it which must be resorted to by the parties to ascertain the price. It may also be left to be fixed by a third party which has been specially dealt with in section 10, *infra*. Other methods include by weighment, measurement, counting or testing in which case the standard is generally laid down in the contract itself, and must be followed in fixing the price after such weighment, measurement, counting or testing. But this standard is sometimes not noted in the contract itself and is left to be ascertained from the usage of the trade or course of dealing between the parties, in which case the standard which must be resorted to to fix the price. For instance, where the agreement was for so much a stone and a much more as the buyer gave to others it was *held* that in fixing the price what the buyer gave to others must be taken into consideration.<sup>2</sup> So also, where the agreement was that the buyer shall pay a "fair value" it was *held* that the valuation must be based on previous dealings.<sup>3</sup> Similarly, the parties may agree to pay and receive average of weekly official prices,<sup>4</sup> or fair market price,<sup>5</sup> or that buyer shall pay customs duty and discount will be deductible only on net price,<sup>6</sup> or that the price shall be the market value and not cost to seller,<sup>7</sup> or that the price stated in the contract will be net cash and no deduction by rebate or otherwise and no credit will be allowed to the buyer.<sup>8</sup> There may be a complete contract of sale so as to pass the property from the seller to the buyer, although the price has not been definitely agreed on between them.<sup>9</sup> In such case, price shall be fixed by the course of dealing between the parties and if there is no previous dealing a reasonable price must be paid.<sup>10</sup> So an agreement to pay interest on the price so long as it remains unpaid at a particular rate or for a particular period may be inferred from the course of dealing between the parties.<sup>11</sup>

An agreement to sell is not void, merely because the price is inadequate.<sup>12</sup> The court will not inquire into the adequacy or otherwise of a

1. *Martineau v. Kitching* (1872) L.R. 7 Q.B. 436 at pp. 455, 456; *Castle v. Playford*, (1872) L.R. 7 Ex. 98, at pp. 99, 100.
2. *Churchill v. Wilkins*, 1 T.R. 447.
3. *Cannan v. Fowle*, (1853) 14 C.B. 181.
4. *Shaw's Bro. Iron Co. v. Birchgrove Steel Co.*, 7 T.L.R. 246.
5. *Charrington Co. v. Wooder*, 29 T.L.R. 145.
6. *Smith v. Blandy*, (1825) Ry. & M.

- 257, 260.
7. *Orchard v. Simpson*, 2 C.B.N.S. 299.
8. *Biddell Brothers v. E. Clements Horst & Co.* (1911) 1 K.B. 934 C.A.
9. *Joyce v. Swann*, *supra*.
10. *Ibid*.
11. *Re Anglesey (Marquis) Willmot v. Gardener*, (1901) 2 Ch. 548 C.A.
12. See explan. (2) and illustration (f) to section 25 of the Indian Contract Act.



*bona fide* consideration.<sup>1</sup> Mere difficulty in fixing a reasonable price is no reason for refusing a decree.<sup>2</sup>

In *Carl Still G.m.b.H. v. State of Bihar*<sup>3</sup>, there was a contract for installation of coke-oven battery and by-products plant for all inclusive price. It was *held*: It is clear from the clauses in the agreement that the subject-matter of the agreement was the installation of the coke-oven battery and its accessories, that the sum of Rs. 2,31,50,000 was the price agreed to be paid for the execution of those works and that there was no agreement for the sale of materials as such, by the appellants to Company B. In other words, the agreement in question is a contract entire and indivisible, for the construction of specified works for a lump-sum and not a contract for sale of materials as such. As the contract in question did not embody an agreement for the sale of materials as such, there was no contract of sale with respect to them and S.9 of the Sale of Goods Act, which pre-supposes the existence of a contract of sale of goods, could have no application for the purpose of fixing the price of the materials by recourse to the account books of the appellant or the course of dealing between the parties.

In *Kurapati Venkata Mallayya v. Thandepu Ramaswami & Co.*,<sup>4</sup> it was *held*: In a contract for sale, fixing up of price is not an invariable rule.

In *Piaremohan v. Thanchand*, 1968 Raj L.W. 68, D agreed to pay P whatever price would be claimed by P for the sale of goods. It was held, though the agreement might be void for uncertainty, D was liable to pay P reasonable price for goods under S. 9 (2) of the Act.

### (3) Underselling.

A man may, of course, sell at any price he likes, and to undersell trade rivals he may offer certain goods at a loss.<sup>5</sup> Moreover, so long as it is not in unreasonable restraint of trade,<sup>6</sup> he can attach a condition to such a sale that the goods shall not be resold by the buyer below some specified price.<sup>7</sup>

In England, where such a condition is attached to a sale by a supplier to a dealer, it is now by the Resales Prices Act, 1964, S. 1, unlawful and void except in certain cases. "Where resale price maintenance is still lawful any conditions as to the price at which goods sold by a supplier may be resold can now be enforced against any person not party to the original sale who subsequently acquires the goods with notice of the condition as if he had been a party to the sale [Restrictive Trade Practices Act, 1956, S. 25(1)]. 'Notice' here seems to mean no more than sufficient,

1. *Jones v. Gordon* (1817) 2 App. Cas. 616, 632, H.L.

2. *New Beerbloom Coal Co. v. Bularam*, (1880) 5 Cal. 932.

3. A.I.R. 1961 S.C. 1615 : (1961) 12 S.T.C. 449.

4. A.I.R. 1964 S.C. 818.

5. *Ajello v. Worsley*, (1893) 1 Ch. 274, 280.

6. *Petrofina (Great Britain), Ltd. v. Martin*, (1966) 1 All E.R. 126 ; *Esso*

*Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, (1967) 1 All E.R. 699 ; (1968) A.C. 269, H.L.

7. *Elliman v. Carrington*, (1901) 2 Ch. 275. As to enforcement of these conditions at common law, see *Sorrell v. Smith*: (1925) A.C. 700 ; *Hardie & Lane Ltd. v. Chilton*, (1928) 2 K.B. 306 ; sale only at certain listed prices.



rather than actual, notice, so that it is enough for the supplier to prove that he took all reasonable steps to bring the condition to the notice of the class of persons of which the defendant is one."<sup>1</sup>

#### (4) Effect of altered custom and excise duties on price.

Customs and excise duties are generally included in the calculation of the price. So, in the absence of a contract to the contrary if after the price of an article is fixed, a new or increased custom or duty is imposed before delivery and the seller has to pay it, he may add the sum to the price already fixed and conversely if the custom or duty is removed or reduced and the seller has to pay less than what was included in the price, the sum removed or reduced may be deducted by the buyer from such price.<sup>2</sup> It has been held under the English law that where there is a dispute as to the amount of custom or duty to be added or deducted the finding of the Revenue Authorities in his respect shall be deemed as conclusive.<sup>3</sup> Thus, in a contract for sale of goods, if before goods are tendered custom duty is increased, the seller is entitled to claim the excess duty imposed from the buyer, provided he proves that such excess duty on the goods tendered has been already paid. It is immaterial whether such duty has been paid by the seller himself or that some one else paid it.<sup>4</sup> In the absence of an agreement to the contrary, where in the interval between the making of the contract and the delivery under it, there is an alteration in the rate of custom duty, the price may be correspondingly added to, or decreased.<sup>5</sup>

In *Raghubar Dayal v. State*<sup>6</sup> it has been held that clause 3 of the U.P. Rabi Food Grains Price Control Order (1950) is not inconsistent with S. 9 of the Sale of Goods Act, 1930.

Sales-tax is charged under the relevant Sales-tax Act in force, and is in addition to the price fixed. If under the law applicable, sale to another registered person is not liable to tax if the goods are intended to be used as stock for wholesale trading or material for manufacture or any other ground, no sales-tax is to be added to the price. Tax relief, if any, is also granted for export sales if permissible under the law applicable and the tax regulations in force thereunder. It has been held under the English law in *Love v. Norman Wright (Builders) Ltd.*<sup>7</sup> that where goods are sold by a registered person at a fixed price, the price includes purchase tax unless the parties have agreed otherwise, and the seller is not entitled to add the tax to the price. The law relating to sales-tax in force in the State should be applied for ascertaining charge of sales-tax.

1. Chalmers, 16th Edn., p. 19. The general principles stated (except what is provided for by statutes) may apply to India also under the Sale of Goods Act, 1930.
2. *Conway Brothers & Savage v. Mulhern & Co.*, 17 T.L.R. 730; *Newbridge Rhondda Brewery Co. v. Evans*, 86 L.T. 453; *Halsbury*, Vol. 34 (3rd Edn.) pp. 39, 40.
3. *Halsbury*, Vol. 34, (3rd Edn.) p. 40.

4. *Jhamandas Jodhram v. Tirathdas Deomal*, A.I.R. 1933 Sind 404 :149 I.C. 614.
5. See *Trikam Lal v. Kalidass*, (1897) 21 Bom. 628; *Probhudas v. Gandidada*, A.I.R. 1925 P.C. 157 : 52 Cal. 644. Cf. *Chin Gwan & Co. v. Adamjee*, A.I.R. 1933 Rang. 79 : 146 I.C. 440.
6. A.I.R. 1953 All. 691.
7. (1944) 1 All E.R. 618.



There are certain items of goods of which prices are controlled under Statutes or under Statutory Rules and orders having the force of law. It is unlawful to sell, agree or offer to sell, or even exhibit for sale price-controlled goods at an excess price. **Price control.** Persons contravening these provisions are liable to punishment. Under section 10 of the (English) Prices of Goods Act, 1939, where the seller has been convicted the buyer may avoid the contract and recover the purchase price, provided the following three cumulative conditions are satisfied : (1) The goods can be returned in substantially the condition in which they passed into buyer's property, (2) rights of third parties are not prejudiced, and (3) the claim for recovery of the price is made within a reasonable time from the date of the sale or agreement to sell. In India, apart from the provisions of statutory law and rules and regulations regarding confiscation of such goods and other cognate matters, the rights of the parties will be determined as on the basis of a void contract.

### (5) Mode of payment.

Price is defined in S. 2(11) of the Act as the money consideration for a sale of goods. The seller is not bound to accept any kind of payment except in the currency of the country unless there is an agreement express or implied to the contrary or unless the seller is estopped from disputing the mode of payment. He is not bound to accept payment by cheque unless he has accepted cheque on previous occasions and has given the buyer to understand that in future similar payments will be accepted.<sup>1</sup>

The price should be in money which is legal tender. In India, the coins issued under the authority of section 6 of the **Legal tender.** Indian Coinage Act, 1906, and all silver coins issued under the said Act after the 10th of March, 1940 are a legal tender in payment or on account.—(a) in the case of a rupee coin, for any sum ; (b) in the case of a half-rupee coin, for any sum not exceeding ten rupees ; (c) in the case of any other coin (issued under S. 6) and quarter-rupee silver coin (issued after the 10th March, 1940) for any sum not exceeding one rupee. All nickel, copper and bronzed coins which may have been issued under the said Act before 24th January 1942 shall continue as before to be a legal tender in payment or on account of any sum not exceeding one rupee.<sup>2</sup> By section 26 of the Reserve Bank of India Act, 1934, every bank note shall be a legal tender at any place in India in payment or on account for the amount expressed therein and shall be guaranteed by the Central Government. Bank notes are of the denominational value of two rupees, five rupees, ten rupees, twenty rupees, fifty rupees, one hundred rupees, one thousand rupees, five thousand rupees, and ten thousand rupees. The Central Government have also issued Government of India notes of the denominational value of one rupee, and under Ordinance No. 95 of 1940 any such note is current in India in the

1. Jagat Tarini v. Naba Gopal, (1907) 34 Cal. 305 ; where tender by cheque was held to be valid ; cases considered. International Sponge etc. Co. v. Andrew Watts & Sons, (1911) A.C. 279, where payment though directed to be made by crossed cheques there was nothing to indicate to the buyers that the seller's agent was not autho-

rised to receive cash. Mitchell v. Norwich Union, (1917) 34 T.L.R. 77. See also Sinason Teicher Corp'n. v. Oilcakes etc. Co., (1954) 3 All E.R. 463—Payment by bank guarantee or letter of credit.

2. Section 13, Indian Coinage Act, 1906. For the latest position, see Appendix G.



same manner and to the same extent and as fully as the silver coin called the Government rupee issued under the provisions of Indian Coinage Act, 1906, is legal tender in India for the payment of any amount and is deemed to be included in the expression "rupee coin" for all the purposes of the Reserve Bank of India Act, 1934, but this is not to be deemed a currency note for the purpose of that Act.

By section 26A of the Reserve Bank of India Act, 1934, with effect from 1-11-1956, notwithstanding anything contained in section 26, bank notes of the denominational value of five hundred rupees, one thousand rupees or ten thousand rupees issued before the 13th day of January, 1946, ceased to be legal tender in payment or on account for the amount expressed therein.

If the contract provides for the payment of price in foreign currency, the Court is to convert the amount payable into rupees, the rate of exchange generally being the rate on the due date of payment, or in case of breach, the rate of the date of breach.<sup>1</sup> In *Barry v. Van den Hurk*,<sup>2</sup> on refusal to take delivery of goods sold, rate of exchange at the date of breach was held to apply. In an action for recovery of balance of price of goods sold and delivered the rate of exchange on the due date of payment was taken and not on the date of judgment.

Generally speaking, when a claim is converted into the currency of the country the rate of exchange on the date of breach is taken. Thus where there is non-delivery of goods sold, rate of exchange on the date of breach will be taken.<sup>3</sup> The same will apply when there is breach of contract to carry goods and conversion.<sup>4</sup> In *Re British American, etc. B.K.*<sup>5</sup> rate of exchange at the date of breach or acceptance of repudiation was taken and not at the date of the winding up order. In *Societe des Hotel, etc. v. Cummings*,<sup>6</sup> in a claim under a foreign contract (e.g., in respect of a hotel bill incurred in France) the rate of exchange at the time the action was brought was taken.

When the contract for sale of shares is held to be capable of being specifically performed not only as to the shares but also as to the dividends declared on them, the purchaser should be asked to pay interest on the unpaid purchase price to the seller from the due date for its completion until it was paid.<sup>7</sup>

**10. (1)** Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided :

1. (1924) 2 K.B. 166. But see contra *Cohn v. Boulken*, (1920) 36 T.L.R. 767.  
2. (1950) 2 K.B. 709.  
3. *Le Beaupin v. Crispin*, (1920) 2 K.B. 714.  
4. *Re Hodgson & Co.* (1920) W.N. 198 ;

*Ferdinando v. Simson*, (1920) 3 K.B. 409.  
5. (1922) 2 Ch. 575.  
6. (1922) 1 K.B. 151.  
7. *Bank of India Ltd. v. Jumsetji, A.H. Chinoy*, A.I.R. 1950 P.C. 90 : 77 I.A. 76.



Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

### Synopsis

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| (1) <i>Price to be fixed by valuation—principle—analogous English law.</i> | (2) <i>Valuation is not arbitration.</i><br>(3) <i>Valuation by two valuers.</i><br>(4) <i>Sub-section (2).</i> |
|--|---|

### (1) Price to be fixed by valuation—principle—analogous English law.

This section reproduces section 9 of the English Sale of Goods Act, 1893. Its principle was thus explained by the Special committee :

“This.....is a corollary to the preceding clause. It is not uncommon for the parties to agree that the price of the goods will be fixed by valuers appointed by them. In such cases they are bound by bargain, and the price so fixed is as much part of the contract as if fixed by themselves. But it is essential for the formation of the contract that the price should be fixed in accordance with this agreement and if the parties appointed as valuers fail or refuse to act, the agreement becomes void.

There was no corresponding section in the Contract Act, although the principle on which sub-section (1) of this section is based was covered by section 32 of the said Act.”

This section specially deals with another method of ascertaining the price *viz.*, to leave it to be determined by the valuation of a third party. If the persons appointed as valuers fail, or refuse to act, there is no contract<sup>1</sup> in the case of an agreement to sell ; even though one of the parties should himself be the cause of preventing the valuation ;<sup>2</sup> nor can the valuers delegate their authority.<sup>3</sup> As contract is avoided by failure to value, so there could not generally be any suit for specific performance of the contract, even though the failure is due to fault of a party, there being no completed contract.<sup>4</sup> But if the agreement has been *executed* by the delivery of the goods, the seller will be entitled to recover the value estimated to be reasonable if the purchasers do any act to obstruct or render impossible the valuation, as in *Clarke v. Westrope*,<sup>5</sup> where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant pending the valuation consumed the goods, so that a valuation became impossible.

1. See per cur. *Loftus v. Roberts* (1902) 18 T.L.R. 532 C.A.

2. *Thurnell v. Balbirnie*. (1887) 2 M. & W. 786 ; *Vickers v. Vickers*. (1867) L.R. 4 Eq. 529 ; see also *Benjamin on Sale*, 8th Edn., p. 150.

3. *Ess v. Truscott*, (1837) 2 M. & W. 385 ; 46 R.R. 630.

4. *Vickers v. Vickers*, (1867) L.R. 4 Eq. 529, 535.

5. (1856), 18 C.B. 765 ; 107 R.R. 507.



And presumably if the proposed buyer has paid any money under it in respect of the goods he may recover it as on a total failure of consideration. The proviso to sub-section (1) is based upon *Clarke v. Westrope*.

Where the defendant contracted to purchase at a price to be ascertained in a specified mode, and no price was fixed in that mode, it was *held* that as price is of the essence of a contract of sale, there could be no concluded contract which court could enforce.<sup>1</sup>

As regards actual *sale* at a valuation, Benjamin observes<sup>2</sup> :

“There does not seem to be any authority to show whether, in the case of an actual *sale* at a valuation, the failure of the valuer to act would entitle the seller or the buyer to avoid the contract, and re-vest the property in the seller. It would probably depend upon the construction of the contract whether the provision for valuation is in this case collateral to the contract, or whether there is an implied condition subsequent justifying avoidance.”

In the circumstances mentioned in sub-section (1), the agreement becomes void *ab initio*, so that a buyer who has not been in fault can perhaps recover any deposit paid by him in such a case,<sup>3</sup> and the property in goods, if vested in the buyer, will revert in the seller.<sup>4</sup>

If a time is fixed by the contract for the appointment of a valuer it is usually of the essence of the contract, so that if the valuer is not appointed by that day, the contract is avoided.<sup>5</sup>

So long as the sale remains executory, there is no contract if the valuers fail or refuse to act<sup>6</sup> even though such refusal is unreasonable.<sup>7</sup> The court can neither compel defendant to name another valuer nor compel the valuer to make the valuation or the buyer to buy at any other price.<sup>8</sup>

Where no valuation takes place in pursuance of an agreement to sell at valuation, there being no contract, equity cannot decree specific performance,<sup>9</sup> though in cases where the court is of opinion that the appointment of the valuer is not of the essence of the contract (as in an agreement between partners that one shall take over the assets of the partnership from the other at a valuation) it may ascertain the value for itself and decree specific performance after so ascertaining the price.<sup>10</sup> In appropriate cases too it may make a mandatory order on the party obstructing the valuator to allow the valuation to proceed. Thus, where the seller refused permission to the valuer appointed to enter his premises for the purpose of valuing the goods, a court of equity in a suit for specific performance made a mandatory injunction to compel the seller to allow

1. *Milnes v. Gery*, (1807) 33 E.R. 574 : 9 R.R. 307.

2. Benjamin on Sale, 8th Edn., p. 150.

3. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 40.

4. Benjamin ; Remfry, p. 576.

5. *Tew v. Harris*, (1847) 11 Q.B. 7 ; 75 R.R. 270 ; see Halsbury, Laws of England, 3rd. Edn., Vol. 34, p. 40.

6. *Cooverji Lodha v. Bhumiji*, 6 Bom.

523 ; *Cooper v. Shuttleworth*, 25 L.J. 114.

7. *Worsley v. Wood*, 6 T.R. 710.

8. *Wilks v. Davis*, 2 Mer. 507 ; *Darbey v. Whitaker*, 4 Drew. 134 ; *Vickers v. Vickers*, 36 L.J. Ch. 946.

9. *Vickers v. Vickers*, (1867) L.R. 4 Eq. 529.

10. *Dinham v. Brandford*, (1870) L.R. 5 Ch. App. 519.



him to enter.<sup>1</sup> In this case there was an agreement for the sale of a house at a fixed price and of the pictures and furniture therein at valuation by a person named by the parties.

The valuation is completed if everything necessary for the valuation has been ascertained and it only remains to calculate the price mathematically.<sup>2</sup> It may, however, be questioned if the valuer has proceeded on a wrong standard, or taken into account things which by the agreement ought to have been omitted. The valuation made by the valuer is final, but the parties would not be bound by the valuation if the valuer acts improperly or, if it is procured by fraud.<sup>3</sup>

### (2) Valuation is not arbitration.

Valuation must be distinguished from arbitration, as a reference to arbitration could only be made when there is a dispute between the parties.<sup>4</sup> But even where a question of fixing of price is involved, there may be an arbitration, as distinguished from a mere valuation, as where different prices are offered by two parties, and a third person is to decide.<sup>5</sup> On the other hand, a valuation may be included in an arbitration.<sup>6</sup> The court has no power to appoint a valuer if the valuer selected by the parties refuses or is unable to act, or where the parties are to nominate valuer, they or any of them refuse to do so.

The guiding principles whereby to distinguish a valuation from an arbitration were laid down by Lord Esher, M.R. in *Re Dawdy*,<sup>7</sup> and in *Re Carus Wilson* cited above.

"If a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that, in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially, he is using the skill of a valuer, not of judge."<sup>8</sup>

### (3) Valuation by two valuers.

Where under the agreement each party is to appoint a valuer, it is essential to the validity of the appointment that notice thereof should be given to the other party.<sup>9</sup> A valuation by one valuer only in such a case is no valuation, unless it is expressly agreed that if one of the parties fails to appoint a valuer, or that valuer refuses to act, or is prevented from acting, the valuer appointed by the other party may make the valuation by himself.<sup>10</sup> In such cases the agreement generally provides that if the two valuers cannot agree on the value, they may refer the matter to an umpire,

1. *Smith v. Peters*, (1875) L.R. 20 Eq. 511.

2. *Gordon v. Whitehouse*, (1856) 18 C.B. 747.

3. See *Shipway v. Broadwood*, (1899) 1 Q.B. 369 C.A.

4. *Bos v. Helsham*, (1866) L.R. 2 Exch. 72 ; 2 Digest 324 ; *Re Carus Wilson & Greene* (1886) 18 Q.B.D. 7 C.A. ; 39 Digest 413.

5. *Thomson v. Anderson*, (1870) L.R. 9 Eq. 523 ; 2 Digest 320.

6. *Stewart v. Williamson*, (1910) A.C. 455.

7. (1885) 15 Q.B.D. 426.

8. *Re Dawdy*, *supra*.

9. *Thomas v. Fredricks*, (1847) 10 Q.B. 775 ; 74 R.R. 502 ; *Tew v. Harris*, (1847) 11 Q.B. 7 ; 55 R.R. 270.

10. *Tew v. Harris*, *supra*.



but even in such a case the reference to the umpire does not of itself amount to a submission to arbitration and his decision is not necessarily an award.<sup>1</sup>

In *Thurnell v. Balbirnie*<sup>2</sup>, goods sold were to be valued by two named valuers. One of them refused to value whereupon the other valued the goods alone and an action was brought for not taking the goods and paying the price so fixed. *Held*, that there could not be an action for price unless they had been valued by both the valuers, at least without an averment that the other party refused to permit the valuer to value.

In *Milnes v. Gery*<sup>3</sup> each party was to appoint a valuer. An action for specific performance praying that the court will appoint a valuer was dismissed.

If the persons named as valuers accept the office or employment for reward or compensation, they are liable in damages to the parties to the contract for neglect or default in performing their duties.<sup>4</sup> But there is no implied undertaking on the part of the person appointing the valuer that the valuer shall make the valuation and the valuer of one party is not liable to the other party if the valuer does not act in the valuation and no right of action lies against a party who appoints a valuer who refuses to act.<sup>5</sup> The appointment of a valuer is irrevocable.<sup>6</sup>

In other that a valuation made by a valuer may be binding on the parties to the contract of sale he must act fairly and properly.<sup>7</sup> If the valuer acts in collusion with one party that party cannot sue on his valuation.<sup>8</sup> The valuer must act honestly and impartially to the best of his ability and must apply his mind to the point for decision.<sup>9</sup> So long as he fulfils these conditions it is no valid objection to his valuation that he is a servant of one of the parties<sup>10</sup> inasmuch as the parties may make one of themselves a judge in his own cause.<sup>11</sup>

#### (4) Sub-section (2).

If one of the parties wrongfully prevents the valuation from taking place, the party not in fault may maintain a suit for damages against the party in fault. This sub-section is an instance of the application of the rule that neither of the parties to a contract can by his own act or default defeat the obligations he has undertaken to fulfil.<sup>12</sup> Where the valuer is

1. *Re Carus Wilson and Greene*, supra.
2. (1837) 2 M. & W. 786.
3. (1807) 14 Ves. 400.
4. *Jenkins v. Betham*, (1855) 15 C.B. 168, 100 R.R. 297; *Cooper v. Shuttleworth*, (1856) 25 L.J. Ex. 114; 105 R.R. 346.
5. *Cooper v. Shuttleworth*, supra.
6. *Mills v. Bayley*, (1863) 2 H. & C. 36; 133 R.R. 579. See Benjamin on Sale, 8th Edn., p. 152.
7. *Emery v. Wase*, 8 Ves. 505; *Chickster v. McIntire*, 4 Bl. N.S. 78; *Bombay-Burmah Trading Co. v. Aga Mohammad*, 15 C.W.N. 981 P.C.; 38 I.A.

- 169.
8. *Shipway v. Broadwood* (1899) 1 Q.B. 369 C.A.; *Batterbury v. Vyse*, 32 L.J. Ex. 117; *Panama Telephone Co. v. India Rubber Co.*, L.R. 10 Ch. 515.
9. *Bombay-Burmah Trading Co. v. Aga Mohammad*, 15 C.W.N. 981 P.C. See also *Re Enock*, (1913) 1 K.B. 387.
10. *Eckersley v. Mersey Docks*, (1894) 2 Q.B. 667.
11. *Secty. of State for India v. Arathoon*, 5 Mad. 173; *Aghor Nath Banerjee v. Calcutta Tramways*, 11 Cal. 232.
12. *Sailing Ship Blairmore Co. v. Macredic*, (1898) A.C. 593, at p. 607.



prevented from making the valuation as agreed, by the fault of the seller or the buyer, the other party not in fault may maintain a suit for damages against the party in fault,<sup>1</sup> or for an injunction against such party restraining him from preventing the valuer to make the valuation.<sup>2</sup>

### Conditions and Warranties

**11.** Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

#### Synopsis

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|--|--|
| (1) <i>Analogous law.</i>                        | (5) <i>Effect of waiver of the stipulations.</i>                     |
| (2) <i>Conditions and warranties in general.</i> | (6) <i>"Meaning of month".</i>                                       |
| (3) <i>Stipulations as to time of payment.</i>   | (7) <i>Stipulation as to time whether a condition or a warranty.</i> |
| (4) <i>Other stipulations regarding time.</i>    |  |

#### (1) Analogous law.

This section corresponds to sub-section (1) of section 10 of the English Act—See Appendix A. Sub-section (2) of the same is omitted as it contained only a definition of "month" which is defined in the General Clauses Act, 1897 [*vide* section 3(33) of the same]. The principle underlying this section is found in section 55 of the Indian Contract Act, 1872 (See Appendix B) of which this section is only a corollary specially applicable to the contracts of sale of goods. It will be observed that section 11 of the present Act in a way only supplements section 55 of the Contract Act, inasmuch as resort must be had to the provisions of the latter in order to determine the question of the effect of stipulations of time on the rights, duties and liabilities of the parties consistently with the other provisions in the Sale of Goods Act there being no other provisions in the Act relating to the effect of the stipulations as to time and the provisions contained in section 55 of the Contract Act not appearing inconsistent with any other provisions of the Sale of Goods Act. Section 11 of this Act in fact supplies the want, there being no provision in the Contract Act to determine when time is of the essence of the contract and when not.<sup>3</sup>

The section draws a distinction between stipulation relating to the time of payment of the price and other time stipulations; as regards the former it establishes a rebuttable presumption that such a stipulation is merely a warranty, but as regards the latter it refrains from providing any presumption.

1. *Thomas v. Fredricks*, 10 Q.B. 775.  
2. *Smith v. Peters*, L.R. 20 Eq. 511.

3. *Ma Pwa Shiv v. Ramen Chetty*, L.B.R. 99 (100).



## (2) Conditions and warranties in general.

The parties are at liberty to enter into a contract on any terms they please. In the case of a sale of goods, the ordinary principle is *caveat emptor*, "purchaser beware". But the purchaser before purchasing may satisfy himself as to the right quality of goods. Where representations are made by the seller with reference to the goods sold, and if such representations find a place in the contract, they may rank either as conditions or as warranties. Section 12 of the Act clearly brings out the distinction between a warranty and a condition, and both of these must be distinguished from mere representations which do not form part of the contract. This subject will be dealt with under the next section.

## (3) Stipulations as to time of payment.

Section 11 lays down that 'unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale'. The parties may, however, intend otherwise,<sup>1</sup> and the terms of the contract may make the time of payment an essential condition. To prove that it was so there must be clear evidence of intention to that effect. The court would examine each case on merits to discover what the parties really intended, and if time appears, on a fair consideration of the language and the circumstances to be of the essence of the contract, stipulations in regard to it will be held conditions precedent. Where there is nothing to warrant such inference, the mere fact that the contract contains a stipulation as to the time of payment will not make it of the essence of the contract.<sup>2</sup> If the parties want that they should be considered as of the essence of the contract, they must include in the contract such terms as may lead to a reasonable inference that this was the intention of the parties.<sup>3</sup>

The rule in this section is based on the principle that failure in punctual payment does not go to the whole consideration for the sale and it is very seldom that mercantile contracts are made conditional on payment, payment generally being considered to be made after the contract is completed. The failure by the buyer to pay on the appointed day does not, as a rule, entitle the seller to treat contract as repudiated, though he may be entitled to withhold delivery until the price is paid and re-sell the goods if the buyer does not pay or tender the price within a reasonable time.<sup>4</sup> Consequently, if before such re-sale the buyer tenders the price, even though it be on a date after the date named in the contract, the seller cannot, in the absence of a stipulation to the contrary, treat the contract as at an end and refuse to allow the buyer to have the goods; and a subsequent re-sale by him will be tortious.<sup>5</sup>

1. *Bishop v. Shillito*, (1819) 2 B. & Ald. 329; *Ebbw Vale Co. v. Blaina Iron & Tin-plate Co.*, (1901) 6 Com. Cas. 33 C.A.; *Ryan v. Ridley*, (1902) 8 Com. Cas. 105; *Thames Sack Co. v. Knowles*, (1918) 88 L.J.K.B. 585.
2. See *Martindale v. Smith*, (1841) 1 Q.B. 389; *Mersey Steel & Iron Co. v. Naylor Benzon & Co.*, 9 App. Cas. 434.
3. *Martindale v. Smith* (1841) 1 Q.B. 389, at p. 395, 55 R.R. 285, 289; *Mersey Steel & Iron Co. v. Naylor*

(1884) 9 App. Cas. 434, at p. 444. *Payzu Ltd. v. Saunders*, (1919) 2 K.B. 581 C.A.; *Maples Flock Co. v. Universal Furniture Products*, (1934) 1 K.B. 148.

4. See sections 47 & 48.
5. *Martindale v. Smith*, *supra*; *Mersey Steel and Iron Co. v. Naylor*, *supra*; *Payzu Ltd. v. Saunders*, *supra*. See *Sale of Goods Act* by Mulla and Pollock, p. 66.



Section 11 has no application when the defendants unequivocally state that unless and until the advance is paid the contract would not come into existence. Where the parties treat the payment of advance as a vital element in the bargain and the advance is paid only after the offer is revoked, there is no contract to be enforced.<sup>1</sup>

The following illustrations will make the point clear :

(i) Six specific stacks of oats had been sold by Smith to Martindale, to be paid for on July 16. Smith afterwards told Martindale that if he failed to pay on the very day he should not have the oats. Martindale did not pay on July 16, but tendered the price shortly afterwards. Smith, however, subsequently sold the oats to another. *Held*, that Martindale's mere failure to pay on the 16th day did not justify Smith in repudiating the contract ;<sup>2</sup> he was not bound to deliver without a tender of the price, but this condition having been fulfilled, the subsequent re-sale was tortious, and he was liable in trover.

(ii) In *Ryan v. Ridley & Co.*<sup>3</sup>, there was a sale of a perishable cargo c.i.f. Lisbon. Payment was to be made by cash in London in exchange for bill of lading and insurance policy. Shortly after the arrival of the ship at Lisbon the seller tendered the documents to the buyer in London, but the buyer failed to pay. *Held*, that the seller was entitled to treat the contract as repudiated, time being the essence of contract.

(iii) In *Mersey Steel and Iron Co. v. Naylor*,<sup>4</sup> the defendants had agreed to purchase from the plaintiff 5,000 tons of steel blooms, "delivering 1,000 tons monthly, commencing January next, payment net cash within three days after receipt of shipping documents." The plaintiff company delivered about half of the first instalment, but before payment became due a winding-up petition was presented. Thereupon, the defendants, acting under a mistake of law, refused, pending the bankruptcy petition, to pay for the steel, already delivered. The plaintiff thereupon informed the defendants of their intention to treat the refusal to pay as a breach of contract releasing them from any obligation to make further deliveries. The defendants afterwards offered to accept and pay for all other deliveries subject to a right of set off which they claimed. The plaintiff, however, declined to make further deliveries, and brought their action for the price of the steel delivered. *Held*, (1) that on the construction of the contract payment for a previous delivery was not a condition precedent to the right to claim subsequent deliveries ; (2) that the defendants had not by postponing payment under mistaken advice acted so as to show an intention to repudiate the contract and thereby to release the plaintiff company from further performance.

(iv) *Bishop v. Shillito*<sup>5</sup> was trover for iron that was to be delivered under a contract which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery, and brought *trover* for what had been delivered. On facts it was found that the delivery of the iron and the

1. *Sundara Bayamma v. Venkateswara & Co.* (1955) 6 S.T.C. 379.

2. *Martindale v. Smith*, 1 Q.B. 389 ; 55 R.R. 285.

3. (1902) 8 Com. Cas. 135.

4. (1884) 9 App. Cas. 43 ; see section 38 (2) of the Act.

5. 2 B. & Ald. 329.



delivery of the bills were to be contemporary. *Held*, that on facts the delivery was conditional only, and the condition being broken, trover would lie. Bayley J. observed: "If a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser.

(v) In *Woolfe v. Horne*,<sup>1</sup> purchaser at an auction sale failed to take away the goods on Saturday which was the last day fixed but claimed them two days later when he found that the goods had been delivered to another person. *Held*, that the condition as to clearing the lot within three days was not a condition precedent to the buyer's right to claim delivery.

(vi) In *Thames Sack, etc. v. Knowles*<sup>2</sup>, under "spot" contract (which meant that the goods were available and ready for delivery) delivery and payment were to be by a certain date, upto which time the risk would be with the seller. The buyer failed to pay on that day but tendered the price the next day. *Held*, time was of the essence of the contract under the circumstances of the case and the seller was entitled to cancel the contract.

(vii) Where the contract is for delivery of goods by instalments, each instalment to be paid for on delivery, failure to pay for one instalment may entitle the seller to repudiate the contract.<sup>3</sup>

(viii) In a c. i. f. contract, where the stipulation is cash against documents, a refusal by the buyer to pay on tender of the documents will entitle the seller to treat the contract as repudiated and immediately to sue the buyer for non-acceptance.<sup>4</sup>

(ix) Where seller allows buyer a discount for payment within a stated period, the full purchase price becomes due forthwith at the end of the period.<sup>5</sup>

#### (4) Other stipulations regarding time.

This section provides that "whether any other stipulation as to time, is of the essence of the contract or not depends on the terms of the contract." Generally speaking, stipulations regarding time other than those relating to time of payment, such as for delivery of goods, are deemed to be of the essence of the contract in mercantile transactions. As was observed in *Bowes v. Shand*:<sup>6</sup>

"Merchants are not in the habit of placing on their contract stipulations to which they do not attach some value and importance."

As a general rule, in mercantile contracts, such as contracts "f.o.b." and "c.i.f." the time of shipment or delivery is of the essence of the

1. (1877) 2 Q.B.D. 355.

2. (1918) 88 L.J.K.B. 585.

3. See section 38 (2) of the Act. *Ebbw Vale Co. v. Blaina etc.* (1901) 6 Com. Cas. 33, payment for each instalment as a condition precedent to further deliveries.

4; *Biddell Brothers v. E. Clemens Horst*

& Co. (1912) A.C. 18; *Ryan v. Ridley*, *supra*.

5. *Amos Wood Ltd. v. Kaprow*, (1948) 54 T.L.R. 110.

6. (1877) 2 A.C. 455; *Sri Krishan Khanna, In re.* (1934) Sind 29; 148 I.C. 977; *Sanders v. Maclean*, (1883) 11 Q.B.D. at p. 387.



contract<sup>1</sup> strict performance of which is a condition precedent to the claim for price. The reason for the general rule is obvious. A mercantile contract is not always an isolated transaction, but a link in a chain of transactions and if A does not keep his contract with B, then B may not be able to keep his contract with C, so that punctual performance may go to the whole consideration for the sale.<sup>2</sup>

In *Wasoo Enterpriser v. J. J. Oil Mills*, A.I.R. 1968 Guj. 57, there was a stipulation in a contract for supply of certain tins of oil provided for the shipment of the goods by a certain ship and the goods were required to be put on board in a particular month. It was held on facts: Both these conditions as stated above were conditions precedent and if either condition was not fulfilled, the buyer was entitled to reject the goods tendered by the seller. It was observed: A stipulation as to the time of shipment contained in a commercial contract is a part of the description of the goods sold and is a condition precedent which must be fulfilled in order to the performance of the contract. If the intention of the parties to the contract, however, can be shown to be not to regard such a stipulation as of the essence of the contract, it would not be regarded as a condition of the contract, but the burden of showing that such was the intention of the parties lies upon the party asserting it and the burden would clearly be a heavy one.

*M/s. China Cotton Exporters v. Beharilal Ramcharan Cotton Mills Ltd.*, A.I.R. 1961 S.C. 1295 was relied upon in the above case. In that case there was a contract to supply goods in shipment "October/November 1950". It was stated in the remarks column in manuscript in the printed document of agreement—"This contract is subject to import licence and therefore the shipment date is not guaranteed." It was held: Considering that in commercial contracts time is ordinarily of the essence of the contract, and giving the word "therefore" its natural, grammatical meaning, it must be held that what the parties intended was that to the extent that the delay in obtaining import licence stood in the way of keeping to the shipment date October/November 1950, the shipment date was not guaranteed; but with this exception shipment October/November 1950 was guaranteed.<sup>3</sup>

In *Ramdhan Das v. Kishori Chand Geor firm*<sup>4</sup> the Orissa High Court has held: Though S. 11 makes it clear that stipulations as to time of payment would ordinarily be not of the essence of a contract for sale of goods, yet on the question whether the time of delivery of goods would

1. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 45; *Reuter v. Sala*; (1879) 4 C.P.D. 239, 246, 249. C.A. (Sale of pepper); *Sharp v. Christmas*, (1892) 8 T.L.R. 687 (Sale of potatoes).

2. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 45 (f.n.1.); see also *Volkart Bros. v. Rutnavelu*, (1894) 18 Mad. 63; *Balaram v. Govinda* (1925) Mad. 1232; 91 I.C. 257; *Bhudar Chandra v. Betts*, 33 I.C. 347; *Baij Nath v. Johar Chand*, A.I.R. 1933 All. 404; 144 I.C. 82; *Delhi Cloth Mills Co. v. Kanhia*, 80 P.R. 1913; 19 I.C. 93;

*Baldeo Dass v. Howe*, 6 Cal. 64; *Lucknow Automobiles v. The Replacement Parts Co.* A.I.R. 1940 Oudh 443; *Mohanlal v. Giani Ram*, A.I.R. 1935 Nag. 111.

3. See also *Bilasiram Thakursidas v. Ezekiel Aluham*, A.I.R. 1917 Cal. 721; *Phoenix Mills Ltd. v. Madhadas Rupchand & Co.*, 24 Bom. L.R. 142—shipment; Question whether delivery should be spread over a period arises only in case of instalment contract.

4. A.I.R. 1954 Orissa 254.



also be not of the essence of the contract the section merely says that it depends on the terms of the contract. But in ordinary commercial contracts for sale of goods time is *prima facie* of the essence with respect to delivery. Where forward contracts are entered into by the parties who are anticipating fluctuations in prices in the absence of any evidence to the contrary, the *prima facie* view that in commercial transactions of this type time is of the essence of delivery may be accepted. The parties who were gambling on fluctuations in price must obviously have intended that time was of the essence of the contract.

In *Pulgaon Cotton Mills v. Mst. Gulabai*<sup>1</sup>, there was a contract for sale of 51 bales of yarn. The plaintiff could not take delivery by the end of June 1940, the stipulated period and requested the defendant for extension which was granted upto the end of July 1940. One of the terms in the agreement provided :

“If the purchaser does not take delivery within the time mentioned in the contract, those goods shall remain with the Mills on the purchaser’s account and risk and the purchaser shall pay to the Mills the price of the goods, interest at the rate of twelve annas per cent (per mensem) godown rent and insurance charges at the rate of four annas per bale per month. The responsibility of loss, damage and deterioration of quality of the goods that might remain in the Mills in this way shall be on the purchaser and the Mills shall be entitled to sell at their will by auction or privately such goods on the account of the purchaser by giving a notice of at least three days. If the sale proceeds fall short of satisfying the amount due from the purchaser, the purchaser shall pay the balance to the Mills ; if the sale proceeds exceed (the amount due from the purchaser) the Mills shall pay the excess to the purchaser.”

It was *held* : The first part of S. 11 of the Sale of Goods Act makes an exception only in favour of time of payment and is dependent on the intention of the parties. The second part is merely a matter of contract. In contract for the sale of immoveable property, time is usually not of the essence of the contract but in mercantile contracts for the sale of commodities liable to fluctuations in price from day to day, time is always regarded as of the essence. In the present case, parties had fixed the end of June 1940 for the fulfilment of the contract. This was extended to the end of July 1940 at the request of the plaintiff. The very fact that he asked for an extension shows that time was of the essence.<sup>2</sup> Where time is of the essence and is extended, the extended date is also of the essence of the contract.<sup>3</sup> The fact that while extending the time the seller makes it clear that he was reluctant to extend the time and that some of the ordered goods must be taken in time also points to time as being of the essence of the contract.

Provision for payment by purchaser of godown rent, interest and insurance charges and for sale of goods in case delivery was not taken in time, does not make time not essence of contract.

1. A.I.R. 1953 Nag 345 : I.L.R. (1958) Nag. 201.

2. See Bhudar Chandra v. Betts, A.I.R.

1916 Cal. 901, 902 : 33 I.C. 347.

3. See Haji Fakir Mohammed v. Shaik Abdulla, 12 Bom. 658, 672.



In *Payton & Sons v. Payne & Co.*<sup>1</sup> it was, however, *held* that in a contract for the sale and delivery of a printing machine, time was not of the essence of the contract.

In *Orissa Textile Mills Ltd. v. Ganesh Das Ramkishan*,<sup>2</sup> it was *held* : Under S.11 of the Act, time of payment would ordinarily be not of the essence of the contract for sale of goods and the intention of the parties is the decisive factor, whereas in the case of the delivery of goods, the terms of the contract are the decisive factor.

In *British Paints v. Union of India*, A.I.R. 1971 Cal. 393 it was *held* : "The result, therefore, is that we find that in this case time was of the essence of the contract and that the time was extended up to the 30th of April 1953 by the mutual consent of the parties and that the goods had not been offered or delivered in time, and were also not of the requisite quality. The defendant, therefore, was within its right to repudiate the contract for the supply of the remaining portion of the goods."

Generally speaking, stipulations regarding time for delivery of the goods are deemed to be of the essence of the contract in mercantile transactions.

Time is always considered of the essence of the contract in the following cases :

- (1) Where the parties have expressly agreed to treat it as of the essence of the contract ;
- (2) Where delay operates as an injury ; and
- (3) Where the nature and necessity of the contract require it to be so construed.

Where time is of the essence of the contract and is extended, the extended date is also of the essence of the contract.

Reference has already been made<sup>3</sup> to stipulations contained in a contract of sale of goods "to arrive", and their interpretation. Other stipulations may be as to the date of shipment,<sup>4</sup> as to the date a bill of lading bears or shall bear,<sup>5</sup> or as to the date of the clearance of the ship on which the goods are loaded,<sup>6</sup> and these are usually of the essence of the contract.

The following illustrations will be found helpful :

- (i) In *Bowes v. Shand*<sup>7</sup> the contract was for the sale of 600 tons of "Madras rice to be shipped at Madras or coast during the months of March and [or] April, 1874, per *Rajah of Cochin*." By far the larger portion of the rice was put on board in February, and bills of lading for various portions were given on the 23rd, 24th, and 28th of February,
- Sales of goods "to be shipped" within a certain time.

1. (1897), 35 S.L.R. 112, an isolated transaction.

2. A.I.R. 1961 Pat. 107.

3. See pages 150 to 155.

4. *Bowes v. Shand*, (1877) 2 App. Cas. 455 ; *Aron & Co. v. Cumpioir Wegimont*, (1921) 3 K.B. 435. As to the meaning of "shipment" see *Mowbray*

*Robinson & Co. v. Rosser*, (1922) 91 L.J.K.B. 525 C.A. ; *Foreman & Ellams v. Blackburn*, (1928) 2 K.B. 60.

5. (1877), 2 App. Cas. 455 ; 46 L.J.Q.B. 561.

6. (1921) 3 K.B. 435 ; 90 L.J.K.B. 1233.

7. (1877) 2 App. Cas. 455 ; 46 L.J.Q.B. 561.



and 3rd of March, but all except a very small portion of the parcel shipped under this last bill of lading also had been put on board in February. There was nothing to show that the words "to be shipped during the months of March and [or] April" had in the trade any special or technical meaning. It was *held* that the natural meaning of the stipulation as to time was that *the whole* of the rice should be put on board *during* the months mentioned, and that, in the absence of any trade usage to affect the meaning of the words, it was for the court to construe the contract.

(ii) In *Aron v. Comptoir Wegimont*<sup>1</sup>, a contract of sale of cocoa powder, c.i.f. Antwerp provided for "shipment from U.S.A. ports during October, 1910", and it contained a clause that "whatever the difference of the shipment may be in value from the grade, type or *description* specified, any such question shall not entitle the buyers to reject the delivery or any part thereof." The goods were not shipped until November and the buyers rejected the document when tendered. It was argued for the seller that the date of shipment was part of the "description" of the goods and therefore under the clause mentioned the buyers were not entitled to reject. McCardie J. observed :

I agree in one sense the time of shipment is part of the description of the goods. Indeed, in *Bowes v. Shand*, Lord Cairns said : "That is part of the description of the subject-matter of what is said. So it is I agree but the express requirement of a contract that goods shall be shipped at a particular period is a good deal more than a mere description of the goods within section 13 of the Sale of Goods Act, 1893 (corresponding to section 15 of the Indian Act) ; it is an express term of the contract independent of that which is generally known as the description of the goods. It is I think condition precedent that the goods shall be shipped as required by the contract."

(iii) Sale of goods to be shipped and bill of lading to be dated December-January. Goods were shipped on January 30th but the bill of lading was dated February 22nd. The buyer may reject the shipment, the situation regarding the date of the bill of lading being a condition precedent.<sup>2</sup>

(iv) In sale of goods "to arrive" it is quite a usual condition that the seller shall give notice of the name of the ship on which the goods are expected as soon as it becomes known to him, and a strict compliance with this promise is a condition precedent to his right to enforce the contract.<sup>3</sup>

(v) Another stipulation as to time when goods are to be shipped is that the ship should be "cleared" by a particular date. "Clearance" by a certain time. Clearance means a compliance with custom regulations so that the vessel is authorised to sail.<sup>4</sup>

1. (1921) 3 K.B. 435.

2. Re General Trading Co. & Van Stolk's Commissiehandel, (1911) 16 Com. Cas. 95 ; see also *Finlay & Co. v. Kwik*, (1929) 1 K.B. 400 (C.A.) ; 98 L.J.K.B. 251 ; *Berg & Sons v. Landauer*, (1925) 42 T.L.R. 142 ; Statement of the date of the bill of lading in the provisional invoice was

a condition.

3. See *Reuter v. Sala*, (1879) 4 C.P.D. 239 ; *Busk v. Spence*, (1815) 5 Camp. 329 ; *Graves v. Legg*, (1845) 9 Ex. 709, 96 R.R. 931.

4. See *Thalman v. Texas Star Flour Mill*, 82 L.T. 833 ; *Kidston & Co. v. Moneau Ironworks Co.*, 86 L.T. 556.



(vi) In ordinary commercial contracts for sale of goods, time is *prima facie* of the essence with respect to delivery.<sup>1</sup> In *Shaw v. Bill*, (1884) 8 Mad. 38, 58 : presence of the vessel at port in particular month was not essential. *Buch v. Gordhandas*, (1922) 24 Bom. L.R. 911 : "shipment from October approximately", did not mean "October shipment." *Winshurst v. Deeby*, (1845) 2 C.B. 253 : time of delivery of engine to be fixed to the ship. See *Norrington v. Wright*, (1884) 115 U.S. 188 : "a statement of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a condition precedent." *Sanday & Co. v. Keighley Maxted & Co.*, (1922) 27 Com. Cas. 296 : "expected to be ready to load late September" but the ship was not ready to load till middle of November, buyer was not bound to take. *Juggernath v. Maclachlan*, (1881) 6 Cal. 681 : "delivery was to be taken and given in the whole of November on seven days' notice from the buyer." *Held*, under the contract the buyer had the right of fixing the particular time in November at which the delivery was to commence and the seller was bound to commence delivery on the expiration of seven days' notice.

So also when the seller is to declare the name of vessel or vessels or other particulars relating to the goods within a specified time it should be strictly complied with. These particulars are necessary to enable the buyer to effect sub-sale. *Reuter v. Sala*, (1879) 4 C.P.D. 246 : name of vessel or vessels, marks and particulars to be declared within sixty days of date of the bill of lading. *Graves v. Legg*, (1854) 9 Ex. 709 : declaration of the name of the ship to buyer's brokers was held notice to the buyer. *Kidston & Co. v. Monceau Ironworks*, (1902) 86 L.T. 556 where the delivery of specification by the time mentioned was not in the circumstances a condition precedent. *Sanders v. Maclean*, (1883) 11 Q.B.D. 327 : documents should be seen as soon as possible after shipment. *Barber v. Taylor*, (1839) 9 L. J. Ex. 21 : buyer was entitled to reject as the bill of lading not delivered within a reasonable time after its receipt by the seller.

As is evident from the observations of McCardie, J. in *Aron & Co. v. Comptoir Wegimont*, *supra*, stipulations as to time, such as the time of the shipment or delivery, are distinct from the description of the goods, and are treated separately both by the English Act, and this Act. Thus, a buyer, notwithstanding the clause precluding him from rejecting the goods for errors in the description, might reject the goods, for instance on the ground they were shipped late.

It is also to be remembered that although the courts of equity in England in dealing with contracts for sale of land do not regard time of the essence of the contract except in peculiar circumstances, this is not applicable to mercantile contracts relating to goods.<sup>2</sup>

Where time is of the essence of a contract for the sale of goods, the seller is entitled on the buyer's default to put an end to the contract even though the property in the goods has been transferred to the buyer.<sup>3</sup> Even where time is not of the essence, a contract must be performed within a reasonable time, and, if there is unnecessary delay by one of the parties,

1. *Hartley v. Hymans*, (1920) 3 K.B. 475;  
*Bhudar Chandra v. Betts*, (1915) 22  
Cal. L.J. 566.

2. See remarks of Cotton L.J. in *Reuter*

*v. Sala*, (1879) 4 C.P.D. 249 at p. 259,  
C.A.

3. *Buldeo v. Howe*, (1881) 6 Cal. 64.



the other party may give him notice fixing a reasonable time at the end of which he will treat the contract as broken.<sup>1</sup>

English Common Law generally deemed stipulations as to time to be of the essence of the contract. On the other hand, in the case of contract subject to jurisdiction of the Court of Chancery, such stipulations were *prima facie* deemed to be not of the essence of the contract, unless made so either expressly or by necessary implication. It is this rule of the English Chancery Court that is stated in the first clause of this section.<sup>2</sup>

Time is always considered of the essence of the contract in the following cases :

(1) Where the parties have expressly agreed to treat it as of the essence of the contract.

(2) Where delay operates as injury.

(3) Where the nature and necessity of the contract require it to be so construed.<sup>3</sup>

A new agreement extending the time of performance is evidence that the parties considered time as of the essence of the contract, otherwise there would have been no need for such agreement.<sup>4</sup>

It has been held that excepting the case of stipulation as to time of payment, in every other case whenever a specific time is fixed it is presumed to be of the essence of the contract and the burden of proof of that it is not so lies on the person who claims a departure from the rule to show that it is not of the essence of the contract. A distinction is, however, drawn between the contracts of sale of goods and those of the sale of land. In the latter class of cases the presumption generally is that time, even if specified in the contract, is not of the essence of the contract and specific performance of them can be sought even after such time has passed.<sup>5</sup> These cases should be carefully distinguished from those of the former class inasmuch as they are not good law under this Act which relates only to the sale of goods.

In *Vishram Arjun v. I. Shankariah*,<sup>6</sup> the plaintiff who had taken a contract from the P.W.D. for clearing the forest produce from certain forest area entered into an agreement with the defendants for sale of the felled timber. On failure by the defendants to pay agreed amounts, the plaintiff applied to the forest authorities to prevent the removal of timber by the defendants till the entire amount was paid by them. The forest authorities in order to ensure their amounts attached the timber and placed certain restrictions on its movement and sale. Eventually the parties settled their disputes and entered into an agreement with regard to the payment of money. The question was whether failure to get the attachment vacated within a week as undertaken by the plaintiff rendered the performance of the contract nugatory and whether such a failure had put an end to the contract itself. It was held : As the defendants did not like to avoid the

1. *Stickney v. Keeble*, (1915) A.C. 386.

2. See *Kishen Prasad v. Purnendu Narain*, 16 C.W.N. 753.

3. *Story on Contract*, S. 970.

4. *Marshall v. Powell*, 4 A. & E. (N.S.)

779.

5. *Jamshed Khoda Ram Irani v. Bur Jorji Dhunjibhai*, 40 Bom. 289 P.C. ; 43 I.A. 26.

6. A.I.R. 1957 A.P. 784.



contract notwithstanding the attachment and had availed of the benefits of the contract (on the facts of the case) even though there was default on the part of the plaintiff, it could not be said that time was the essence of the contract or that the condition of raising the attachment within a week went to the root of the matter to give a just cause for avoidance of the contract. The defendants, however, could claim damages, if entitled to any.

**Non mercantile contracts—Time when essence of contract—Question of intention of parties—Correspondence between parties subsequent to contract cannot be looked at—Contract Act, S. 55.**

*In the Dominion of India v. Bhikhray Jaipuria*<sup>1</sup> it was held :

Under both the Contract Act and the Sale of Goods Act there is no legal presumption that time is of the essence of the contract. Whether or not time should be regarded as an essential condition of the contract is purely a question of intention of the parties to be gathered from the terms of the contract and the surrounding circumstances of the case.

What passed between the parties subsequent to the execution of the contract does not afford any evidence as to the actual intention of the parties at the time when the contracts were made.

Where the railway administration entered into the contracts with the plaintiff for supply of foodgrains to the railway, needed for the consumption of railway staff, during war period when the foodgrains were becoming scarce and prices were rising abnormally, and it appeared that the parties intended that not only the entire quantity should be delivered within the stipulated period but also the supply should commence immediately, the time was of the essence of the contracts.

#### **(5) Effect of waiver of the stipulations.**

Like any other condition stipulations as to time may be waived by the party in whose favour they are inserted either expressly or by implication. After such waiver, he has no right to rescind the contract on the ground waived.<sup>2</sup>

#### **(6) Meaning of "month".**

In India by the General Clauses Act, 1897 [S. 3(35)] it is provided that the word "month" when used in the Act, shall mean 'a month reckoned according to the British Calendar.' Again, S. 24 of the Indian Limitation Act, 1963, provides that 'all instruments shall, for the purposes of the Act, be deemed to be made with reference to the Gregorian calendar.'

It does not follow that when a particular word in an Act is to be construed as having a particular meaning, the same meaning should be given to it when used in a contract. The present Act is silent as to the meaning of word 'month' when used in a contract of sale of goods. In India there are various calendars in use and in computing time regard should be had to the intention of the parties in this respect. In *South British Insurance Co. v. Brajanath*,<sup>3</sup> the policy of insurance provided that

1. A.I.R. 1957 Pat. 586.

2. See *Levey v. Goldberg*, (1922) 1 K.B. 628; *Muhammad Habibullah v. Bird & Co.*, (1921) 43 All. 257; *Hickman*

*v. Haynes*, (1875) L.R. 10 C.P. 598; *Potts & Co. v. Brown, Macfarlane & Co.*, (1925) 30 Com. Cas. 64 H.L.  
3. (1909) 36 Cal. 516.



no suit or action thereunder should be sustainable unless commenced within six months next after any loss. It was *held* that month meant, as under English common law, lunar month though in that case it was not necessary to construe the word 'month' as the suit was out of time whether month meant lunar or calendar month. See *Roshan Ali v. Chaudhuri Basir Ahmed*,<sup>1</sup> where a special reference was made in the contract to Hindi calendar, a case under the Limitation Act.

When computing number of days within which the performance is to be made it is usual to exclude the day of the contract.<sup>2</sup> Delivery in two months from 5th October is fulfilled by delivery at any time on the whole day of the 5th December.<sup>3</sup>

S. 10(2) of the English Act provides that in a contract of sale, "month" means *prima facie calender month*.

### (7) Stipulation as to time whether a condition or a warranty.

It is thus clear from what has been stated above that where the stipulation as to time is of the essence of the contract it is a *condition* while where it is not of the essence of the contract it is only a *warranty*. In the former case the other party can treat the contract as repudiated and is entitled to rescind it on that ground.<sup>4</sup> In that latter case the other party cannot avoid the contract but can only claim compensation for delay as in the case of the breach of a warranty.<sup>5</sup> In the former case, however, if the promisee accepts performance of the contract at any other time he cannot claim compensation for delay whatever loss might have been caused to him thereby, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.<sup>6</sup> His mere acceptance amounts to the waiver of such right<sup>7</sup> unless he gives notice to the other party that he accepts it subject to his right to claim compensation for the loss caused to him by delay in the performance. So, where the plaintiff promised to pay the price and the defendant to deliver the goods on a given day, and it was found that the time specified in the contract was of the essence of the contract, it was *held* that if the buyer was not ready and willing to pay the price at the time agreed upon, the seller had a right to rescind the contract and to refuse to deliver the goods.<sup>8</sup> The rules, herein stated, apply equally to contracts where property in the goods has passed to the buyer as well as to contracts where it has not passed.<sup>9</sup> In the absence of statutory provisions or trade custom or usage, the fact that the performance of the contract falls due on a holiday, does not alter the rights of parties by suspending the transaction of private business and a seller is bound to establish not only he was entitled to perform the contract on the day following the holiday by reason of the existence of a valid usage which is deemed to have been incorporated in the contract between the parties, but also that such usage when read into the written contract does not make it insensible or inconsistent.<sup>10</sup>

1. (1924) 47 All. 66.

2. (1909) 36 Cal. 516.

3. *Caddington v. Dabologo*, L.R. 2 Ex. 163.

4. See also *Doultaram v. Ali Bhai*, 33 I.C. 688.

5. *Ibid.*

6. See S. 55, Clause 3, Indian Contract

Act & S. 13, *infra*.

7. *Parbhu Ram v. Mst. Jheso*, 43 I.C. 408 (Pat.).

8. *Baldeo Das v. Howe*, 6 Cal. 64

9. *Ibid.*

10. *Kasiram v. Harnandray*, 58 I.C. 396 (Cal.).



**\*12.** (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

Conditions and warranties.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

### Synopsis

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|---|---|
| (1) <i>Nature and scope of section 12.</i>        | (5) <i>Warranties—express or implied.</i>           |
| (2) <i>Representations.</i>                       | (6) <i>Effect of breach of conditions—Remedies.</i> |
| (3) <i>Conditions and warranties—Distinction.</i> | (7) <i>Effect of breach of warranties—Remedies.</i> |
| (4) <i>Conditions—express or implied.</i>         |   |

#### (1) Nature and scope of section 12.

A contract of sale may be absolute or conditional.<sup>1</sup> A stipulation in a contract of sale with reference to goods which are the subject thereof may be either a condition or a warranty. The present section draws a clear distinction between the two.

There is no definition of "condition" in the English Act but "warranty" is defined in S. 62 in identical language. In the Indian Contract Act the word "warranty" has been used without any definition and also indiscriminately both in the sense of a *warranty* proper or a condition (*i.e.* S. 118 since repealed). The result has been to treat a particular stipulation in a contract as a condition or warranty according to the intention of the parties.<sup>2</sup>

In the English law the distinction between stipulations which are essential and those which are non-essential has been well recognised, though the use of the words 'condition' and 'warranty' has not been consistent. "From a very early period of our law it has been recognised

\*Analogous law.

Section 11(1)(b) of the English Sale of Goods Act, 1893 (See Appendix A).  
1. Section 4(2) of the Act.  
2. See *Buch v. Gordhandas*, A.I.R. 1923 Bom. 92 : (1922) 24 Bom. L.R. 99 ;

170 I.C. 877 ; *Nagardas v. Valmahomed*, A.I.R. 1933 Bom. 249. See definition of "warranty" given in the notes on *Cutter v. Powell*, in 2 Sm. L.C. 7th edn., p. 30.



that all obligations are not of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any of them entitles the other to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognising this distinction between the two classes of obligations under a contract there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term 'condition' to describe an obligation of the former class and 'warranty' to describe an obligation of the latter class."<sup>1</sup>

The reason why the word "condition" does not appear in the Indian Contract Act and has not been defined in the English Act is that the word has been used in many other connections and has a considerable variety of meanings. The definition of 'warranty' in the English Act which is adopted here was adopted from the notes to *Cutter v. Powell*.<sup>2</sup> As regards the definition of the term 'condition' in this section the word 'essential' has been borrowed from the classical judgment of Williams J in *Behn v. Burness*.<sup>3</sup> The Indian Legislature has defined 'condition' and has distinguished between 'condition' and 'warranty' to bring the law in India in harmony with that in England on this point, and to give to the Indian Courts the guidance of the decisions of the English Courts.<sup>4</sup> Sub-section (4) of this section corresponds to clause (b) of section 11 of the English Act.

Section 12 of the Act is purely declaratory in its character. It classifies the stipulations relating to the goods which form the subject-matter of a contract into two classes, namely, conditions and warranties. It is confined to the conditions and warranties given in respect of the goods which are the subject of reference. It does not take note of other contingencies or conditions which the parties to the contract of the sale may choose to make their contract subject to. These conditions and warranties or contingencies will be regulated as before by the general law of contract as contained in the unrepealed portion of the Indian Contract Act, 1872, so far as they are consistent with the provisions of this Act.<sup>5</sup> It however appears that the principle which provides this section and draws a distinction between a condition and a warranty as to the effect of their breach on the contract will also govern the conditions and warranties given by the buyer to the seller and which the former is required by the contract to fulfil.

1. Per Fletcher Moulton L.J. in *Wallis v. Pratt*, (1910) 2 K.B. at p. 1012, approved by the House of Lords in 1911 A.C. 394. See also *Heilbutt & Co. v. Buckleton*, (1913) A.C. 30.  
2. 2 Smith's Leading Cases, (7th Edn.)

p. 30.  
3. (1863) 32 L.J..Q.B. 204.  
4. See Special Committee's Report Appendix C, note on clause (12).  
5. Vide section 3 of the Act.



**(2) Representations.**

When negotiating a contract a party may make a statement or assertion with a view to inducing the other party to enter into the contract. Such statements or assertions when made before at the time of the contract are known as *representations*; when embodied into the agreement itself they constitute the terms and stipulations of the contract.

A representation may be a mere expression of opinion or a simple commendation of the goods. It may or may not be an *integral* part of the contract, and this is a question of construction of the terms of the contract in words or in writing. Where it is *not an integral* part of the contract, it has no legal consequences : *simplex commendatio non obligat*.

On the other hand, a representation may be a statement of a material fact which is relied upon as true by the other party when entering into the contract. If it is an integral part of the contract, it may be either a condition or a warranty. If such a representation is false, legal consequences might ensue; a contract procured by misrepresentation, whether innocent or fraudulent, may in certain circumstances be voidable at the option of the party deceived : in addition, if the party deceived can prove that the misrepresentation was fraudulent, he is entitled to recover damages because the tort of deceit has been committed.

Chalmers observes<sup>1</sup> :

**“Representations.**—In the course of the formation of a contract of sale, representations may be made by either party which may have the following consequences :

(1) The representation may be a mere expression of opinion, or a mere commendation by the seller of his wares—what is often called a “puff”. Such a representation will give rise to no legal liability : *simplex commendatio non obligat*.

(2) The representation may or may not become incorporated into the contract. Whether or not it does will depend upon the intention of the parties. If made in the course of negotiations for a contract for the purpose of inducing the other party to act on it, and it actually induces him to act on it, it is *prima facie* a term of the contract. If it is a term of the contract, it will be either a condition or a warranty.

(a) If it is a condition, the other party will be entitled to rescind if it is broken ;

(b) If it is only a warranty, the other party will in the event of a breach be entitled only to damages for the breach of warranty. His right, if any, to rescind for misrepresentation, however, is not lost just because the misrepresentation has become a term of the contract (See Misrepresentation Act, 1967, S. 1.)

1. Sale of Goods Act, 16th Edn., pp. 5 to 7. There is no statute in India corres-

ponding to the (English) Misrepresentation Act, 1967.



(3) Whether or not incorporated into the contract, the representation may be made before or at the time of contracting about some existing fact or past event, and be one of the causes inducing the making of the contract. In that event,

(a) if the representation prove to be false in a material respect (regardless of whether or not made fraudulently), equity will *prima facie* allow the party who has been misled to rescind the contract ; but where the misrepresentation was not fraudulent, the court or an arbitrator has a discretion to award damages in lieu of rescission if of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party [See Misrepresentation Act, 1967, S. 2(2)].

(b) if the representation was made fraudulently, the party deceived will be entitled to damages for the tort of deceit and also to rescind the contract ;

(c) if the representation was not made fraudulently, but was made in such circumstances that had it been fraudulent, the person making it would have been liable to damages, then that person will be so liable unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true [See Misrepresentation Act, 1967, S. 2(1)].

(d) the representation may create an estoppel against its maker.

Although the decision to rescind should normally be communicated to the other contracting party, this may not be essential at any rate where that other party is a rogue who has deliberately absconded. In such a case it is sufficient if the rescinding party takes all possible steps to recover the goods. It may be that this is also the position in other cases where the communication of the intention to rescind cannot readily be effected."

It must depend upon the intention of the parties whether an affirmation made at the time of, or during the negotiation for the sale, is to be treated as a condition, a warranty or a mere representation ; and although an assertion made by the seller of a fact unknown to the purchaser may be strong evidence that it was intended as a warranty,<sup>1</sup> it is not necessarily so in law.<sup>2</sup> It must depend on the intention of the parties to be inferred from all the circumstances of the case, whether it be a condition or a warranty ;<sup>3</sup> and the mere fact that it is called a warranty will not necessarily prevent it from being a condition.<sup>4</sup>

In *Heilbutt Symons & Co. v. Buckleton*,<sup>5</sup> the plaintiff asked the local manager of a firm of rubber merchants who had under-written a large

1. *De Lessalle v. Guildford*, (1931) 2 K.B. 215, at p. 221 C.A.,  
 2. *Heilbutt, Symons & Co. v. Buckleton*, (1913) A.C. 30 per Lord Moulton and Viscount Haldane L.C.  
 3. *Behn v. Burness*, (1863) 3 B. & S. 751; 124 R.R. 794 ; *Bentsen v. Taylor*, (1893) 2 Q.B. 274, at p. 280 C.A. ;

*Harrison v. Knowles & Foster*, (1917) 2 K.B. 606, at p. 610 ; *Brys & Gylson Ltd. v. Imperial Steamship Co.*, (1918) 34 T.L.R. 536.  
 4. Sub-section (4) ; *Bernard v. Faber*, (1893) 1 Q.B. 340 C.A.,  
 5. (1913) A.C. 30.



number of shares in a rubber and produce Co. then in the course of formation, whether his firm were bringing out a rubber Co. He replied that they were. The plaintiff then asked him whether the Co. was all right. The manager replied that his firm were bringing it out, to which the plaintiff rejoined that was good enough for him. In answer to further inquiries the manager told the plaintiff that he could let him have 500 shares at a certain premium. The plaintiff agreed to take the shares, which were subsequently allotted to him. The shares having fallen in value, the plaintiff brought an action against the firm for fraudulent misrepresentation and for breach of warranty, the alleged warranty being that the Co. was a rubber Co. The jury negatived fraudulent misrepresentation, but found that the Co. could not be properly described as a rubber Co. and that the manager had given a warranty as alleged. It was held that there was no evidence proper to be submitted to the jury upon the question of warranty. Lord Moulton (with the concurrence of Viscount Haldane L.C.) observed :

The question whether an affirmation made by the vendor at the time of sale constitutes a warranty depends on the intention of the parties to be deduced from the whole of the evidence, and the circumstances that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention, is not conclusive of the question.<sup>1</sup>

A representation of fact should be distinguished from a mere expression of opinion, belief or expectation. Thus, when a seller says that goods are worth so much, he merely expresses an opinion. In *Lindsay v. Hurd*,<sup>2</sup> the statement as to value was meant to be acted upon and so was held to be representation.

A material misrepresentation, whether fraudulent or not, is sufficient to avoid the contract.<sup>3</sup> At common law innocent misrepresentation was not sufficient to avoid the contract and the tendency of the courts was to bring, if possible, any statement which is important enough to effect the consent of the party into the terms of the contract. In *Bannerman v. White*,<sup>4</sup> there was the sale of hops by sample, the seller representing that sulphur had not been used in their growth (use of which would make the goods unsaleable). Held, that the contract was conditional on sulphur not being used in the growth of hops, and if sulphur had been so used the buyer was at liberty to reject the hops, although they corresponded with sample by which they had been sold.

Section 13 of the Act gives the buyer an option to treat a breach of any condition to be fulfilled by the seller as a breach of warranty only, or in other words, a seller's undertaking may be such that the buyer may waive it as a condition by accepting performance or otherwise, but may still have a remedy in damages for the failure in that particular undertaking.

1. The dicta of Bayley J. in *Cave v. Coleman*, (1828) 3 Man. & Ry, 2 and of A.L. Smith M.R., delivering the judgment of the C.A. in *De Lessalle v. Guildford*, (1901) 2 K.B. 215, at p. 221, cannot be supported.  
2. (1874) L.R. 5 P.C. 221, 239. See also

*Power v. Barham*, (1830) 4 A. & E. 473 (sale of pictures).  
3. See S. 19, Indian Contract Act, (1872). See also *Harrison v. Knowles*, (1918) 1 K.B. 608; *Abram etc. Co. v. Westville Shipping Co.*, (1923) A.C. 773.  
4. (1861) 81 L.J.C.P. 28.



It has been held under the English law that where an affirmation made at the time of sale amounts to a warranty and contract is reduced into writing, evidence of a contemporaneous oral warranty would not be admissible.<sup>1</sup>

In *Long v. Lloyd*,<sup>2</sup> the defendant had advertised for sale his lorry in 'exceptional condition'. On seeing the advertisement in a newspaper the plaintiff contracted the defendant on phone and was told, that the lorry was in 'first class condition'. Next day the plaintiff saw the lorry at the defendant's premises. It was represented that the lorry gave 11 miles per gallon of fuel and that it was capable of making 40 M.A.H. speed. Both the plaintiff and defendant had a trial run. The plaintiff detected some minor faults but was assured by the defendant that there was nothing wrong. The price advertised was £ 850, but the bargain was struck at £ 750. The plaintiff paid half the amount and took the delivery of the lorry. Three days afterwards the defendant passed a receipt acknowledging that he received £ 375 half the price of the vehicle 'as tried and approved'. Next day the plaintiff took the lorry to his place of business to pick up a small load. On the journey the dynamo stopped working. Plaintiff noticed also that there was a leakage from the oil chamber and that there was a crack in one of the wheels. He also discovered that the vehicle had consumed 8 gallons of fuel for a journey of 40 miles. When these defects were brought to the notice of the defendant, the defendant agreed to bear half the cost of reconstructed dynamo. As to other defects the defendant denied any knowledge. Next day the dynamo was fitted and the plaintiff's brother took the lorry out of station, for business. From his brother the plaintiff learnt that the vehicle had broken down on the way. The plaintiff wrote to the defendant complaining about leakage of fuel, consumption of 9 miles per gallon and of the fact that the lorry could keep up hardly 25 miles per hour with a great effort, with 4 ton load. The plaintiff filed a suit for rescission of contract on the ground of innocent misrepresentation. It was *held*: Assuming that the innocent misrepresentation gave rise to the rescission of the contract after its exemption, by acceptance of the lorry and by the act of the plaintiff in despatching it on a business trip, **amounted to a trial acceptance of the vehicle** and his right to rescission was therefore barred.

### (3) Conditions and warranties—Distinction.

A stipulation in a contract of sale with reference to goods which form its subject-matter may be either essential to the main purpose of the contract or only collateral to it. Where it is essential to the main purpose of the contract it is a '*condition*' and its breach gives rise to a right to treat the contract as repudiated. Where it is only collateral to the main purpose of the contract, it is a '*warranty*' and its breach does not defeat the purpose of the contract, and it gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Whether stipulation is a condition or warranty depends on the true construction of the contract, and is not a question of nomenclature. A so-called warranty may be in fact a condition. "There is no way of deciding the question except by looking at the contract in the light of the

1. *Harnor v. Groves*, (1855) 15 C.B. 667, *aliter* if the writing be a mere memorandum of the contract; *Allen*

*v. Pink*, (1838) 4 M. & W. 140 (horse).  
2. (1958) 1 W.L.R. 753,



surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out.”<sup>1</sup> To put briefly, where the fulfilment of the main purpose of the contract depends on the fulfilment of the stipulation, the stipulation is a ‘condition’ and where it is not so, the stipulation is only ‘a warranty’.<sup>2</sup>

Thus to raise a statement or promise to the dignity of a condition it must be vital to go to the root of the whole contract, so that non-fulfilment on the part of the seller will deprive the buyer of all the benefits he was entitled to expect from the contract, and give him a right to reject the goods and treat the contract as repudiated. As noted above, whether a stipulation in a contract is a condition or warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.<sup>3</sup> The intention of the parties must be ascertained, and their expressed intention must override any view the court might otherwise have taken of the importance or unimportance of a particular stipulation.

Parties may think some matter, apparently of very little importance essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie*, is not really vital, and may be compensated for in damages, and if they sufficiently express such an intention, it will not be a condition precedent.<sup>4</sup>

Thus, it may well be that the same phrase in two different contracts may in one case amount to a condition and in other merely to a warranty.

In June, 1955, the defendant sold to the plaintiffs, who were motor dealers, a second-hand Morris motor car for £ 290, this sum being credited to the defendant on the purchase of a new car through the dealers. The car sold to the dealers had been obtained by the defendant's mother in 1954 under a hire-purchase contract, and was shown in the registration book to have been first registered in 1948. There had been five changes of ownership between 1943 and 1954. The defendant, who honestly believed that the car was a 1948 model, described it as such to L., the

1. Per Owen L.J. in *Bentsen v. Taylor Sons & Co.*, (1893) 2 Q.B. 274, 281, where the description of the ship as “now sailed or about to sail,” was held to be of the substance of the contract.

2. See *Wallis v. Pratt*, (1910) 2 K.B. p. 1012, “A condition is a term which goes so directly to the substance of the contract or, in other words, (is) so essential to its very nature that (its) non-performance may fairly be consi-

dered by the other party as a substantial failure to perform the contract at all” per Fletcher Moulton L.J. A warranty is a term which “though (it) must be performed is not so vital that a failure to perform (it) goes to the substance of the contract.” (Ibid). See p. 262 *ante*.

3. Section 12(4).

4. *Bettini v. Gye*, (1876) 1 Q.B.D. at p. 187, per Blackburn J.



salesman who acted for the plaintiffs in the matter, and showed L. the registration book. L., who had frequently been given lifts in the car, also believed that it was a 1948 model, and the purchase price £ 290 was calculated on this basis. In January, 1956, the plaintiffs sent the chassis and engine numbers of the car to the manufacturers and were informed by them that the car was a 1939 model. If the plaintiffs had known at the time of the purchase that the car was a 1939 model, they would have paid only £ 175 for it. In an action brought by them against the defendant eight months after the sale the plaintiffs claimed the sum of £ 115 as damages for breach of warranty, either on the basis that it had been a condition, *i.e.*, an essential term of the contract that the car was a 1948 model or there had been a collateral warranty that it was. *Held* (Morris, L.J. dissenting): The defendant was not liable to the plaintiffs in damages for breach of warranty because, having regard particularly to the fact that the defendant had no personal knowledge (as the plaintiffs knew) of the date of manufacture of the car and the date was a matter on which the plaintiffs might well also form their own opinion, the true inference from the whole of the facts was that the defendant did not intend to bind himself in contract that the car was a 1948 model, but made an innocent misrepresentation as to the date of its manufacture.<sup>1</sup>

As noted by the editor of the case as reported in All England Law Reports, the above case contained a full discussion of the question whether representation is to be regarded as a warranty or not. The majority of the Court held that there was no warranty that the car was a 1948 model. There was only an innocent misrepresentation which gave no right to damages. It was intimated however that the purchaser, if he had acted promptly, might have set the contract aside on the ground of mis-statement. If the representation had been fraudulent, it could have been actionable. An example of this is afforded by the decision of the same Court in *Hornal v. Neuberger Products Ltd.*<sup>2</sup> In that case the plaintiff acquired a capstan lathe from the defendants under a hire-purchase arrangement with a finance company. The lathe proved defective, and the plaintiff brought an action for damages against the defendants, alleging that it had been represented to him on their behalf that the lathe was "Soag re-conditioned". The action was based alternatively on contractual warranty or fraudulent misrepresentation. The Judge at the trial decided that the misrepresentation was proved but no damage was suffered. It was *held*: In determining the question of fact, *viz.* whether the representation had been made, the same standard of proof should be applied whether the cause of action was contractual warranty or fraud, and the standard of proof applicable was the civil standard of a preponderance of probability, which, however, was not an absolute standard since within it the degree of probability required to establish proof might vary according to the gravity of the allegation to be proved; in the present case the Judge had not misdirected himself on the question of proof, but as some damage flowed from the fraudulent misrepresentation the plaintiff was entitled to judgment.

In *Mc Dougall v. Aeromarine of Emsworth Ltd.*<sup>3</sup>, it was *held*: Regarding a ship-building contract it does not follow that because, when the

1. *Oscar Chess, Ltd. v. Williams*, (1957) 1 All E.R. 325.

2. (1956) 3 All E.R. 970.

3. (1958) 1 W.L.R. 1126.



vessel is first tendered by the seller for acceptance trials, the buyer is reasonably dissatisfied with her; he is entitled to treat the defects then existing as a breach of condition, so as to enable him to treat the contract as repudiated and to revert in the seller any property in the craft or any part thereof which may have been vested in the buyer by virtue of the terms of the contract. The buyer is entitled to refuse to accept delivery of the vessel in its existing state, but if the defect is one that can be remedied and remedied within a time which will still enable the seller to deliver within the period of delivery permitted by the contract, the buyer is not entitled to treat the contract as repudiated by the seller by reason of the existence of such defects at the time when the vessel is first tendered for acceptance.

In *Antony Thomas v. Ayuppunni Mani*,<sup>1</sup> it was held: The distinction between a condition and a warranty is of great importance. The breach of a condition entitles the injured party to repudiate the contract, to refuse the goods and, if he has already paid for them, to recover the price. The only remedy for the breach of a warranty is the recovery of damages. Thus a condition is a more vital undertaking than a warranty.

Where a contract for sale of cashewnuts the terms of which were contained in a letter, provided that the bad nuts shall not exceed twenty per cent of the total and the purchaser entered into the contract relying upon that description, it was held:

The sale was by description within S. 15 and the above term being a basic element of the description of the goods agreed to be supplied, the purchaser was entitled to reject the goods if the bad nuts exceeded the stipulated percentages and was entitled to claim back the part of price paid to the seller.

A warranty may be either included in the contract of sale, or may be given after the contract of sale is completed. There is no necessity that the word 'warrant' or 'promise' should occur in the bargain. Nor is it necessary that the statement or representation should be simultaneous with the close of the bargain; if it be a part of the contract it matters not at what period of the negotiation it is made.<sup>2</sup> In *Hopkins v. Tanqueray*,<sup>3</sup> A sent his horse to Tattersalls' for sale by public auction, where he was to be sold without a warranty. On the day prior to the intended sale, meeting B at the stable, and seeing him in the act of examining the horse's legs, A said, "You have nothing to look for: I assure you he is perfectly sound in every respect"; whereupon B replied, "If you say so, I am perfectly satisfied," and, upon the faith of the representation so made to him by A which was admitted to have been made in perfect good faith, purchased the horse. It was held that there was no evidence of warranty to go to a jury, the representation made by A, on the day preceding the auction forming no part of the contract of sale. Maule J. observed: The fact of that conversation passing between plaintiff and defendant at the time when it was known to both that the sale was to take place by public com-

1. A.I.R. 1960 Ker. 176; I.L.R. (1960) Ker. 62.

2. Per Jervis C.J. in *Hopkins v. Tanqueray*, (1854) 15 C.B. 130.

3. (1854) 15 C.B. 130. Cf. *Bannerman v. White*, (1861) 10 C.B.N.S. 844 (hops sold by sample).



petition on the following day, affords to my mind a very strong reason for thinking that the defendant could not have intended what he then said to be imported as a warranty into the transaction.

When warranty is given after the contract of sale is completed it must be supported by fresh consideration. In *Roscorla v. Thomas*,<sup>1</sup> the declaration stated that heretofore, to wit, on Sept. 29, 1840, in consideration that plaintiff at the request of the defendant had bought of defendant, a certain horse, at a certain price to wit, £30, defendant promised plaintiff that the horse was sound and free from vice. It was *held*: The promise appeared to have been made in respect of a precedent executed consideration; it must be taken to have been an express promise, but that no express promise on such a consideration though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; at the time of sale the only implied promise was to deliver the horse on request, and after the sale therefore there was no consideration for the subsequent express promise of warranty. As to the *warrantizaudo vendidit*<sup>2</sup>, Hold C.J. in *Lysney v. Selby*<sup>3</sup> observed, "that will be so, as if upon a treaty about the buying of certain goods, the buyer should ask the seller if he would warrant them to be of such a value and to be his own goods, and the seller set the price, and then the buyer should take time to consider for two or three days and then should come and give the seller his price, though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is selling with a warranty."

"But it is otherwise if the warranty be after the sale; as if a man sells goods and afterwards warrants them, such a warranty is not good. But in other case the warranty is part of the contract."

In *Cave v. Colman*,<sup>4</sup> it was held: A verbal representation by the seller to the buyer, in the course of dealing, that he "may depend upon it; the horse perfectly quiet and free from vice" is a warranty. The representation amounts to a warranty if made before the bargain takes place. The term warrant or warranty is not necessary.

In *Stucley v. Bailey*,<sup>5</sup> it was observed: Where it is sought to import a warranty into a contract of sale contained in letters which are ambiguous in their terms, it is competent to the party sought to be charged to give evidence of all the surrounding facts and circumstances, for the purpose of showing that a warranty was not contemplated by the parties.

In *Meyer v. Kivisto*<sup>6</sup> there was sale of timber to be properly seasoned for shipment and in the event of dispute the buyer was not to reject the goods but to accept or pay for them against shipping documents. It was held that the provision as to seasoning was not a condition but only a warranty. In *Romariz v. Zeyen & Co.*,<sup>7</sup> refusal to pay was held justified as the dock warrants were not

1. (1842) 2 Q.B. 234.

2. Which meant that the defendant had sold by warranting.

3. 2 Ld. Raym 1120.

4. (1828), 3 Man & Ry. 2 K.B. 2.

5. (1862) 1 H. & C. 405.

6. (1930) 40 T.L.R. 162

7. (1919) 35 T.L.R. 299.



"clean". Where the promise goes only to part of consideration breach of it may be compensated by damage.<sup>1</sup>

In *Messers. Ltd. v. Morrison Export Co. Ltd.*,<sup>2</sup> a contract for sale of timber contained the provision "to be loaded, on deck one-third and shipment January and February one-third." More than one-third was shipped on deck. Buyers rejected the parcel. It was held that the buyers were entitled to reject.

In the case of a sale of a radio set by a dealer to a layman there is definitely an implied condition within the meaning of section 12(2) of the Act as to its fitness for the purpose intended. Hence one who buys a radio set upon such implied guarantee amounting to a condition is entitled if the machine turns out to be defective and useless to treat the contract as repudiated. But where the property in the machine has passed to the buyer, it is not open to him to repudiate the contract and claim a refund of the amount paid because the breach of condition could only be treated as a breach of warranty. He can only claim damages.<sup>3</sup>

When the subject-matter of the contract is an existing specific chattel, a statement as to some quality possessed by or attaching to such chattel is generally taken to be a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from thing as described in the contract.<sup>4</sup> In *Behn v. Burness*<sup>5</sup> there was sale of a specific thing with a description as to quality under such circumstances that the property passed by the sale. It was held that the buyer's remedy was by way of damages only.

Generally speaking there is no warranty with regard to defects which are known or apparent on a simple inspection.<sup>6</sup>

In shipping contracts or charter parties' statements that a vessel is to sail or be ready to receive cargo on or before a particular day, or statements as to the location of the vessel at the date of the contract have been held to be conditions, as in such contracts considering winds, markets and dependent contracts the time of a ship's arrival to load is an essential fact. *Glaholm v. Hays*, (1841) M. & G. 257: the ship to sail on or before a particular day, *Olliver, v. Booker*, (1847) 1 Exch. 4162 "the ship now at sea, having sailed three weeks ago". *Behn v. Burness*, (1863) 32 L.J.Q.B. 204: the location of the ship at the date of the contract. *Compagnie Chemindefer etc. v. Leeston*, (1919) 36 T.L.R. 68: now at Liverpool, ready tomorrow. *Tarrabochia v. Hickie*, (1856) 1 H. and N. 183. But see *Dimech v. Corlett* (1853) 12 Moo. P.C. 199 where there was knowledge and acquiescence on the part of the buyer as to the ship being in dry dock. But a statement that the ship shall sail with all convenient speed or within a reasonable time has been held to be a warranty.

1. *Graves v. Legg*, (1854) 9 Ex. 709, 716.  
2. (1939) 1 All E.R. 92 (K.B.): 55 T.L.R. 245.

3. *British Radio Corporation v. Qamorz-Zaman*, (1944) A.L.W. 512.

4. *Harrison v. Knowles*, (1917) 2 K.B. 606, 610 [affirmed in (1918) 1 K.B. 608 on a different ground] where the statement as to the dead weight capacity of a ship was held to be warranty.

5. (1863) 3 B. & S. 751. See *Chanter v. Hopkins*, (1838) 4 M. & W. 399 as to the distinction between a sale of ascertained and unascertained goods.

6. *Butterfield v. Burroughs*, (1706) 1 Salk. 211; *Margetson v. Wright*, 8 Bing. 455 (1832).



In *M. Alvi v. State*,<sup>1</sup> it was held : In cases of contract for the purchase of the right to cut and remove trees, if the quantity is named with the qualification of "about" or "more or less" or words of like import and the contract applies to a specific lot, the naming of the quantity is not regarded as in the nature of a warranty, but only an estimate of the probable amount in reference to which good faith is all that is required of the party making it.

#### (4) Conditions—express or implied.

Conditions may be express or may be implied. *Express conditions* are those which the parties make in so many words. *Implied conditions* are such as the law incorporates into the contract unless the parties stipulate to the contrary.

The ordinary rule is that conditions and warranties are not implied ; the buyer must make his stipulations, or take his chance [Sec. 16] *caveat emptor*. The Act, however, provides many important exceptions to this.

The Act implies in a contract of sale the following conditions :

1. *Condition of title*.—Unless the circumstances of the contract are such as to show a different intention, the seller impliedly undertakes that in the case of a sale, he has the right to sell the goods and that, in the case of an agreement to sell he will have a right to sell goods at the time when the property is to pass [Sec. 14 (a)].

2. *On sale of goods by description*.—There is an implied condition that the goods shall correspond to the description, and if the sale is by sample as well as by description, a condition that if the bulk of the goods corresponds with the sample, the goods should also correspond with the description [Sec. 15].

If goods are bought by description from a seller who deals in goods of that description (whether he be a manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed [Sec. 16, Exception (2)].

3. *Goods wanted for a particular purpose*.—Where the buyer expressly or by implication makes known to the seller the particular purpose for which goods are required, so as to show he relies on the seller's skill or judgment (except in the cases mentioned below), and the goods are of description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods are reasonably fit for the intended purpose, *provided that* there is no implied condition as to the fitness of a specified article for any particular purpose in case of contract for its sale under its patent or other trade name [Sec. 16, Exception (1)].

An implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade [Sec. 16, Exception 3].

1. A.I.R. 1960 Ker. 94.



An express condition inconsistent with any implied condition will negative the latter [Sec. 16, *Exception 4*].

4. *Sale by sample*.—There is an implied condition—

1. That the bulk shall correspond with the sample in quality.
2. That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
3. That the goods shall be free from any defect, rendering them unmerchantable which would not be apparent on reasonable examination of the sample [Sec. 17].

Conditions which are usually implied may be negated by express agreement or by the course of dealing between the parties or by usage, if the usage is such as to bind both the parties. Conditions may also be impliedly waived, and when the express terms are inconsistent with the existence of conditions usually implied, the implication is defeated [Sec. 16, *Exception 4*].

#### (5) Warranties—express or implied.

A warranty, like a condition, may be express or implied. It is *express* if entered into a contract, and implied if attaching to contract by operation of law or usage of trade.

Implied warranties are the exception, the rule being *caveat emptor* and even when warranties are implied by law, the implications may (as in the case of condition) be rebutted by the usage of trade or the agreement of parties,<sup>1</sup> and any express warranty inconsistent with any implied warranty will negative the latter [Sec. 16].

Warranties implied under the provisions of the sale of Goods Act, 1930, are the following :

Unless the circumstances of the contract are such as to show a different intention,

1. an implied warranty that the buyer shall have and enjoy quiet possession of the goods [Sec. 14] ;
2. an implied warranty that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before at the time when the contract is made [Sec. 14].

Implied conditions and warranties are enforced on the grounds that the law infers from all the circumstances of the case that the parties intended to add such a stipulation to their contract but did not put it into express words.<sup>2</sup>

1. Sec. 62, post.

2. See the *Moorcock*, (1869) 14 P.D. 64 at p. 68, Bowen L.J. See also *Luxor (East-bourne) Ltd. v. Cooper*, (1941) A.C. 108, 137, per Lord Wright, (1941)

I All E.R. 33 H.L.—The expression "implied term" denotes sometimes term which does not depend on the actual intention of the parties but on a rule of law.



**Implied warranty—It extends to normal persons—Fitness of materials for particular purpose—Hair dye producing dermatitis—Seller when not liable for breach of warranty.**

In 1954 the plaintiff, who wished to have her hair dyed at the establishment of the defendant who was a ladies' hairdresser, agreed to undergo a test of Inecto, a hair dye which was known to be dangerous in certain cases. The plaintiff read the instructions on the Inecto package which included a warning that the use of Inecto Rapid without a test might be dangerous and prescribed a simple test for discovering whether a person had a predisposition to skin trouble as a result of using the dye. The test was duly applied to the plaintiff and proved negative, but when subsequently used to dye the plaintiff's hair, the Inecto produced acute dermatitis. In 1947 Inecto had been used on the plaintiff's hair by another hairdresser and had a bad effect on the plaintiff. She did not tell the defendant at the time when the use of Inecto was being considered, that Inecto had previously been used and had a bad effect. The plaintiff was one of a rare class of person who reacted normally to the small test of Inecto but for whom a full application of the dye might still be harmful. In an action for damages for breach of warranty that the Inecto was suitable for use for the purpose for which it was required, viz., for dyeing the plaintiff's hair, it was *held*: The defendant was not liable since, although a warranty by the defendant was to be implied that Inecto was suitable for dyeing the hair of a person whose reaction to Inecto was normal, yet the plaintiff, by failing to warn the defendant at the time of the test and treatment about the plaintiff's previous experience of the use of the dye, and thus in effect of the fact that the plaintiff was abnormally sensitive to Inecto, was disabled from relying on the warranty.<sup>1</sup>

#### **(6) Effect of breach of condition—Remedies.**

Unless the buyer waives the condition, breach of it entitles him to rescind the contract, or he may, at his option, treat it as a breach of warranty, and claim damages (*Sec. 13.*)

In two cases the breach of condition must be treated as a breach of warranty unless there be a term of contract, express or implied, to the contrary, viz.,

1. If the contract of sale is not severable, and the buyer has accepted the goods or part thereof; or

2. If the contract is for specific goods the property in which has passed to the buyer (*Sec. 13.*)

When there is a breach of condition, the contract may be treated as repudiated, and the aggrieved party may refuse to perform his own obligations and either treat the contract as closed, or bring an action for breach of contract. If he is the seller, he may, in appropriate circumstances, sue for the price (*Sec. 55*), or claim damages for non-acceptance of the goods (*Sec. 56*); if he is buyer, he may claim damages for non-delivery (*Sec. 57*) or for delayed delivery (*See. under sec. 57 post*) or claim specific performance (*Sec. 58*), or bring any other action permissible under the law. Goods which do not correspond to a stipulated condition e.g., the agreed description or quality, may be rejected (*Ss. 41—43*).

1. *Ingham v. Emes*, (1955), 2 All E.R. 240.



**(7) Effect of breach of warranty—Remedies.**

The buyer may not on account of breach of warranty repudiate the contract, but he may :

1. Set up the breach of warranty in diminution or extinction of the price (*Sec. 59*) ; and
2. he may bring an action against the seller, and claim damages for the breach (*Sec. 59*).

*Some more illustrations*

- (1) A breach of contract as to the goods being of merchantable quality and the failure to deliver a part of the goods contracted to be sold amount only to breaches of warranty and not of conditions.<sup>1</sup>
- (2) Where there is sale of specific goods, buyers can avoid contract only if there is a breach of condition or under S. 37 of the Act.<sup>2</sup>
- (3) A quantity mentioned in a contract may be a mere estimate of the goods or it may be a warranty. "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse and the quantity is named with qualification of 'about' or 'more or less' or words of like import, the contract applies to a specific lot ; and the naming of the quantity is not regarded as in the nature of a warranty but only as an estimate of the probable amount in reference to which good faith is all that is required of the party making it..... But when no such independent circumstances are referred to, and the engagement is to furnish goods of certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words, "about", "more or less", and the like in such cases, is only for the purposes of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.

"If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions."<sup>3</sup>

Accordingly, where the contract of sale in respect of a large quantity of *bidi* leaves specified the amount prefixed with the word 'about' and the price of the goods was stated at a lump sum, the element of quantity must be treated as material and the statement amounted to warranty.<sup>4</sup>

- (4) The plaintiff, in September, 1947, entered into an agreement with the defendants for the hire-purchase of a motor-car. The agreement was in the usual form ; the defendants therein were described as the owners of the car, the plaintiff paid a certain sum on the signing of

1. *Harnarain v. Firm Radhakisan Narayandas*, A.I.R. 1949 Nag. 178.

2. *Ibid.*

3. *Daniel F. Brawley v. United States*,

96 U.S. 168 quoted with approval and followed in A.I.R. 1949 Nag. 178, *ibid.*

4. A.I.R. 1949 Nag. 178, *ibid.*



the agreement and agreed to pay monthly, for twelve months specified sums as "rent" for the hire of the car and when all the payments were completed he was to have the option of purchasing the car for 1 s. 0 d. In January, 1948, he became aware that another company claimed to be the owners of the car, but continued to pay the monthly rent and in April, 1948, despite further communications from the claimant in February and March, in pursuance of his rights under the agreement paid to the defendants the remaining six monthly instalments and the 1s. 0d. in the exercise of option. On the same day he was served with a writ by the other company claiming the return of the car, and in May he returned it to them. It was *held*: (1) It was an express condition of the contract that the defendants were at the time when they entered into the contract, owners of the car and entitled to give the plaintiff an option to purchase it; that the plaintiff was entitled to rely on that condition and treat it as a warranty and to continue to make the payments under the contract, notwithstanding his knowledge that some other person claimed to be the owner of the car; and was entitled to recover all monies paid by him, whether before or after he had knowledge of that claim, as for breach of warranty. (2) The real object of a hire-purchase agreement being to enable the hire-purchaser to buy the article in question, there had been a total failure of consideration and the defendants were not entitled to claim anything for the hire of the car.<sup>1</sup>

- (5) Paint manufacturers represented to the owners of a pier that a paint which they manufactured was suitable for repainting the pier. In reliance on this representation the pier owners specified that contractor under a contract with them to repaint the pier should use that paint. The paint proved to be a failure and the pier owners suffered loss in consequence. It was *held*: On the facts the representation was a warranty; the consideration for the warranty was that the plaintiffs should cause the contractors to enter into a contract with the manufacturers for the supply of the paint for repainting the pier; and, therefore, the warranty was enforceable and the paint manufacturers were liable in damages for its breach.<sup>2</sup>
- (6) An affirmation at the time of sale is a warranty, provided it appears on evidence to have been so intended. Thus, where seller has the possession of chattels, the bare affirming these to be his makes it a warranty.<sup>3</sup>
- (7) Acting on representations by motor-car dealers that a car was in perfect condition, a purchaser paid a deposit, and, in respect of the purchase price, entered into a hire-purchase agreement with a finance company to whom the dealers had sold the car under which the car was let to him on hire-purchase terms. He paid all the instalments due under the agreement, and the property in the car passed to him.

1. *Warman v. Southern Counties Car Finance Corporation Ltd.*, W.J. Ameris Car Sales (Third Party), (1949) 1 All E.R. 711; (1949) 2 K.B. 576.

2. *Shanklin Pier Ltd. v. Detel Products Ltd.*, (1951) 2 All E.R. 471; *Drury v. Victor Buckland Ltd.*, (1941) 1 All E.R. 269 distinguished—a case of hire-

purchase agreement.  
3. *Medina v. Stoughton*, (1700) 1 Salk. 210; see also *Crosse v. Gardner*, (1688) Carth. 90—falsely affirming the goods to be his own, and see *Palsey v. Freedom*, (1789) 3 T.R. 57—holds good even when the seller is out of possession.



The car was not in perfect condition and the purchaser was compelled to have considerable repairs done to it. In an action by the purchaser against the dealers for damages for breach of warranty, it was *held*: The dealers had given a warranty as to the condition of the car which had induced the purchaser to enter not into a contract for the sale of the car, but into the hire-purchase agreement; the warranty had been broken; and, accordingly, the dealers were liable for the damage suffered by the purchaser through his paying a larger sum for the car under the hire-purchase agreement than the car was worth and he would have paid if the warranty had not been given.<sup>1</sup>

- (8) By a hire-purchase agreement, dated 3rd January, 1951, the owners of a motor-car hired it to R, on the usual hire-purchase terms. On August, 1951, before all the instalments had been paid, the hirer, not realising that she was acting in an unlawful manner, purported to sell the car to the fourth party for £ 1,000. On Aug. 11, fourth party acting in good faith, purported to sell it to the third party for £ 1,015, and on the same day the third party, also in good faith, purported to sell it to the defendants for £ 1,030. The defendants on Aug. 30 sold the car to the plaintiff for £ 1,275, believing that they had the right to sell. The hirer continued to pay to the owners the monthly instalments due under the hire-purchase agreement until in 1952, she learnt that she had no right to sell the car. She then informed the owners of the position. On July 15, 1952, the owners wrote to the plaintiff informing him, that the car was their property and asking him to arrange for it to be returned into their possession. On or about July 25, 1952, the hirer completed payment under the agreement, and the owners accepted payment by her in discharge of their interests under the agreement. On Sept. 12, 1952, the plaintiff commenced an action against the defendants for the sum of £ 1,275 as money received by them to his use and payable by them to him on a consideration which had wholly failed. The defendants brought in the third party, claiming indemnity in respect of the plaintiff's claim; the third party brought in the fourth party, who brought in the hirer as a fifth party, preferring similar claims. It was *held*: (1) The letter of July 17, 1952, from the plaintiff's solicitors to the defendant's solicitors constituted a rescission of the contract of sale, and on that date the plaintiff was entitled to rescind and to receive payment of the purchase price as money paid on a consideration which had wholly failed in that the defendants had no title to the car which they purported to sell; after July 17 the plaintiff was entitled to maintain, as he consistently did, the position that he had no claim to possession of the car but a right to re-payment of the purchase price, and therefore, he was entitled to recover the price from the defendants, notwithstanding that, at the date of the issue of the writ, he was still in undisturbed possession of the car and there was no outstanding adverse claim against him. (2) The hirer having completed payments to the owners in full on or about July 25, 1952, and having induced them to relinquish any claim which they had to the car, then acquired title to the car as between herself and the owners; the title thus acquired went to feed the previously defective titles of the subse-

1. *Brown v. Sheen and Richmond Car Sales Ltd.*, (1950) 1 All E.R. 1102;

*Drury v. Victor Buckland Ltd.*, (1941) 1 All E.R. 269 distinguished.



quent purchasers and enured to their benefit, and, accordingly, on or about July 25, the ownership of the car vested in the defendants. (3) The defendants were entitled to recover from the third party, as damages for breach of warranty, the sum of £575 which was the difference between the price which the defendants paid and the value of the car in July, 1952, the third and fourth parties were similarly entitled to recover the same sum as damages against the fourth party and the hirer respectively.<sup>1</sup>

- (9) The first defendant A company owned tractor equipment which it let out on hire. The second defendant, B company, bought and sold such equipment. The third defendant C was the substantial shareholder and sole active director of both companies. In June, 1952, A owned six D. 8 tractors and six scrapers, and four T.D. 14 tractors and scrapers, which were being reconditioned. In the course of that month the plaintiff agreed at various times to buy from A, in all, the six D. 8. units and two T.D. 14 units on terms which included a condition that "all these machines are to be supplied with the Hunts Engineering certificate that they have been fully reconditioned to their (*i.e.* Hunts') satisfaction." Hunts carried on a business of inspecting new and second-hand machines and reporting on their condition. Their method was to inspect the machinery, to issue periodical progress reports and a final report to their customer. Their reports were not described as certificates of quality or condition and were not intended to be such, although it was commonly understood in the engineering trade that they had a standard of full reconditioning. Hunts sent finally to the liquidator of A (which had gone into voluntary liquidation at the time of sales) certain documents which were described as "Inspection Reports", not as certificates, and the tractors and scrapers were described therein as "used and fully reconditioned." Each report stated, among other statements, that "the inspections made during the course of the reconditioning..... have proved that this unit had been "over-hauled" in the case of tractors, and "reconditioned" in the case of scrapers "in a workmanlike and satisfactory manner and the completed unit is accepted as reconditioned to the required standard." On defects found in the working of the machines, regarding claim of plaintiffs against A it was *held* :

- (i) The inclusion of the provision in the contract of sale that "all these machines are to be supplied with the Engineering certificate that they have been fully reconditioned to their satisfaction", expressly or impliedly contained the terms (a) that the machines to be fully reconditioned upto Hunts' standard, (b) that a valid certificate by Hunts "in the terms prescribed" would be conclusive that the machines had been fully reconditioned upto that standard, and (c) that the seller would supply such a certificate; and the certificate so required was a certificate of condition for the benefit of all persons who might be concerned with the machinery: *i.e.*, a certificate in *rem*, as distinct from a certificate in *personam*, that is to say, a certificate



based on standards required by a particular contractor or customer ;

- (ii) the plaintiffs were entitled to damages for breach of contract (a) because the documents tendered by A to the plaintiffs were factual reports, not certificates of quality such, as the contracts required, and (b) because the phrase in the reports "the completed unit is accepted as reconditioned to the required standards" was ambiguous and thus did not comply with the contracts of sale for the satisfying of which an unambiguous certificate that was really understandable was required ;
  - (iii) the measure of damages was the difference between the value of the machines fully reconditioned in accordance with the contract and their value as delivered and as the market value could not be determined, the amount of the damages should be assessed by reference to the time (as hire would be lost) and the cost of putting the machines into the contractual condition.<sup>1</sup>
- (10) In *Wells (Merstham) Ltd. v. Buckland Sand and Silicia Co. Ltd.*<sup>2</sup>, the defendants warranted to the plaintiffs that their "B. W. sand" conformed to a certain analysis. Sand conforming to that analysis would be suitable for use in chrysanthemum growing, which was the purpose, as the defendants knew, for which sand was required by the plaintiffs. To save carriage costs, the plaintiffs placed their orders with a third party who then bought B. W. sand from the defendants, but did not tell the defendants that the sand was for resale to the plaintiffs. The sand delivered did not conform to the warranty, in consequence of which the plaintiffs suffered loss. In an action for breach of damages it was *held* : The only two ingredients required to bring about a collateral contract containing a warranty were a promise or assertion by the vendor as to the nature, quality or quantity of the goods, which the purchaser might reasonably regard as being made *animo contrahendi*, and acquisition by the purchaser of the goods in reliance on that promise or assertion. In the present case a warranty was here expressed that the constituents of B. W. sand were as stated in the analysis, so that it was irrelevant that the order was placed by the plaintiffs through a third party, and the plaintiffs were entitled to recover damages for breach of warranty.

The existence of an implied condition or warranty may be rebutted by proof of facts which show a contrary intention.

- (11) In *Peter Cassidy Ltd. v. Osuustukkukauppa I.L.*<sup>3</sup> the sellers a Finish concern, agreed to sell to the buyers, an English company, a quantity of ants' eggs f. o. b. Helsinki. The contract contained the clause "Delivery :

1. *Minister Trust Ltd. v. Traps Tractors Ltd.*, (1954) 3 All E.R. 136. *Quaere* whether there was an implied warranty that whatever sort of certificate was to be supplied under the contracts of sale, it must be result of the uninfluenced and independent judgment of the certifier applying his own standards.

2. (1964) 1 All E.R. 41. See also *Yeoman Credit Ltd. v. Odgers Vospers Motor*

*House (Plymouth) Ltd. Third Party*, (1962) 1 All E.R. 289—Hire-purchase—Dealers warranting motor car in good condition—Motor car unroad-worthy—Hirer liable to finance company—Action by finance company against hirer—Liability of dealers to compensate hirer in respect of his liability under purchase agreement and of the cost of action.

3. (1957) 1 All E.R. 484.



prompt, as soon as export licence granted." Under Finish law, at all material times, the export of ants' eggs was prohibited except under licence and an export licence was granted only if the Ant Exporters' Association approved the application. The sellers applied for an export licence but their application was refused on the ground that they were not members of the Association, which was a necessity according to the practice of the Association and which the sellers did not know. The sellers were unable to deliver the goods according to the contract. It was held : The clause "Delivery : prompt, as soon as export licence granted" showed that the assumption of both the parties underlying the contract was that an export licence would certainly be granted and that the only question was when it would be granted. In the circumstances the sellers warranted absolutely that they would obtain an export licence ; the sellers were, therefore, liable in damages.

**Per curiam :** Where a warranty regarding licences has to be implied in a contract for the sale of goods the warranty will generally be to use all reasonable diligence to obtain a licence but each case must be decided according to its own circumstances.

**13. (1)** Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof,<sup>1</sup> the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

### Synopsis

- |   |   |
|---|---|
| (1) <i>Analogous law.</i>   | —sub-section (2).   |
| (2) <i>Waiver of condition or to treat it as a warranty.</i>  | (6) <i>Divisible promise : What degree of failure of performance discharges the contract.</i> |
| (3) <i>Voluntary waiver of a condition—sub-section (1).</i>   | (7) <i>Sale of specific goods.</i>  |
| (4) <i>Temporary waiver—waiving condition as to time—subsequent notice to complete within a reasonable specified time—effect.</i> | (8) <i>"Unless there is a term of the contract express or implied to that effect."</i>        |
| (5) <i>Compulsory treatment of a breach of condition as breach of warranty</i>  | (9) <i>Impossibility of performance—sub-section (3).</i>                                      |

1. The words "or where the contract is for specific goods the property in which has passed to buyer" have been

omitted in India by the Indian Sale of Goods (Amendment) Act, 1963, S.3



**(1) Analogous law.**

This section corresponds to section 11 of the English Act, sub-sections (1), (2) and (3), being respectively the same as sub-section (1), clauses (a) and (c) and sub-section (3) of the said Act, with only certain verbal changes here and there. Sub-section (1), clause (b) of section 11, of the English Act is already included in sub-section (4) of section 12, of the Indian Act and sub-section (2) of the English Act, which is applicable only to Scotland, has been omitted. The provisions of sections 117 and 118 of the Indian Contract Act, since repealed, have been represented by the first two sub-sections of this section—See Appendix A and Appendix B.

**Amendment of sub-section (2).**

In sub-section (2) of section 13 of the Act, the words “or where the contract is for specific goods the property in which has passed to the buyer” have been omitted in India by the Indian Sale of Goods (Amendment) Act, 1963, S. 3. These words had given rise to some difficulty. Property in specific goods in a deliverable state passes to the buyer when the contract is made. When there is a contract of sale of specific goods by sample, there would be an implied condition under sub-section (2) of section 17 of the Act that the bulk should correspond with the sample in quality. But in a case where property has passed to the buyer when the contract is made (section 20) and the property is delivered subsequently but it does not correspond with the sample, an implied condition raised under sub-section (2) of section 17 will have to be treated as warranty under sub-section (2) of section 13. While the breach of a condition entitles a buyer to repudiate the contract altogether, the breach of a warranty entitles him to claim damages only. In order to resolve the conflict between sub-section (2) of section 13 and sub-section (2) of section 17, the Law Commission had recommended that the case of sale of specific goods by sample be taken out of sub-section (2) of section 13. Hence this amendment.

It is to be noted that in clause (c) of sub-section (1) of section 11 of the (English) Sale of Goods Act, 1893, also the words “*or where the contract is for specific goods, the property in which has passed to the buyer*” have been repealed by S. 4 (1) of the Misrepresentation Act, 1967, in respect of contracts made on or after 22nd April, 1967.<sup>1</sup>

**(2) Waiver of condition or to treat it as warranty.**

Section 13 gives three cases in which a condition may be waived or treated as warranty, two of which given in sub-section (1) are voluntary depending on the volition of the buyer, namely : (1) where he waives the condition, or (2) elects to treat the breach of it as a breach of warranty. The third given in sub-section (2), does not depend on the will of the buyer but creates an estoppel against him by his conduct and wherein waiver is comprehensively presumed by law. It arises when the contract being unseverable the buyer has accepted the goods or part thereof.<sup>2</sup> In

1. See Chalmers, 16th Edn. p. 82.

2. Graves v. Legg, (1854), 9 Exch. 709, at p. 717 ; Behn v. Burness, (1863) 3 B.

& S. 751, Ex. Ch.; Heilbutt v. Hickson, (1872) L.R. 7 C.P. 438, 450.



such a case he can claim compensation for the loss suffered by him by breach of the condition in respect of the goods accepted by him as he would have a right to in the case of a breach of warranty and in the case of severable contract, as for instance, a contract by instalments, can at the same time treat the contract for the undelivered part as repudiated.<sup>1</sup> Parties may, however, contract themselves out of this rule by including stipulation to that effect in their contract either expressly or by necessary implication in which case the terms of the contract must strictly be adhered to and will not be affected by the provision of sub-section(2) of the section.<sup>2</sup> Sub-section (3) provides that the provisions of this section do not apply to any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

In *J. Rosenthal & Sons Ltd. v. Esmail*,<sup>3</sup> by a c. i. f. contract for the sale of a quantity of cloth it was provided for, shipments : February, 1961 and by clause (5) that "each shipment under this contract shall be deemed as a separate contract" and therefore under the contract the seller had an option to perform it by making one or more shipments. Goods were shipped in two consignments in one ship on the same date under separate bills of lading. The buyers rejected the second consignment of goods following acceptance of the first. The House of Lords held : The buyers had not proved that the goods were not in conformity with the contract and accordingly they had not been entitled to reject the second consignment.

### (3) Voluntary waiver of a condition—sub-section (1).

As is clear from the previous section, the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other party to comply with his promise. Thus the failure of the seller to fulfil a condition to be performed by him entitles the buyer to treat the contract as repudiated and to refuse to accept the goods, and, if he has already paid for them, to recover the price. Even if the goods have been delivered to him, he has the right to reject them if on examination he finds they are not according to contract for he has got the right to examine them,<sup>4</sup> and can repudiate the contract.

Sub-section (1) is based on the general principle of the law of contract that a party may waive a stipulation which is for his own benefit,<sup>5</sup> according to the maxim *Cuilibet licet renunciare juri pro se introducto*.<sup>6</sup> This is known as a voluntary waiver. Where, however, a stipulation operates for the benefit of both parties, it cannot be waived by one party without the consent of the other but only by mutual consent.<sup>7</sup>

It is to be noted that the right of a buyer of goods to sue for damages for breach of warranty proceeds upon the basis that he has

1. See *Jackson v. Rotax Motor & Cycle Co.* (1910) 2 K.B. 937.

2. *Bannerman v. White*, 31 L.J.C.P. 28; *Bead v. Tattersall* L.R. 7 Exch. 7.

3. (1955) 2 All E.R. 860.

4. Section 41, and compare section 17(2).

5. See *Hartley v. Hymans*, (1920) 3 K.B. 475; *In re Moore & Landauer*, (1921) 26 Com. Cas. 267, at p. 276, C.A., (waiver of condition before exami-

nation of the goods); see *Panoutsos v. Raymond*, (1917) 2 K.B. 473, C.A.

6. *Chalmers*, 16th Edn., p. 23.

7. *Maine Sp. Co. v. Sutcliffe & Co.*, (1917), 87 L.J.K.B. 382 ("delivery f.o.b. Liverpool"); *Fibrosa S.A. v. Fairbairn Lawson Combe Barbour, Ltd.*, (1941) 2 All E.R. 300 ("delivery c.i.f. Gdynia").



accepted the goods delivered to him. The right of rejection of a buyer and his right to sue for damages for a breach of warranty are alternative remedies and can never be cumulative for they proceed upon contrary state of facts. Thus, where goods not answering to the description contracted for are delivered to a buyer by the seller, the buyer has a right to one of two alternative remedies :

(a) he can reject the goods and obtain a refund of the price if paid in advance and sue for damages for non-delivery. In such an event the damages he would obtain would be the difference between the contract price and the market price of the goods on the date of the breach if the latter were higher ;

(b) he can waive the condition and accept the goods and sue for damages for breach of warranty. When he accepts the goods he has to pay the contract price less any claim for set-off for the breach of warranty. Section 59 of the Act does not state the principle on which such damages are to be computed. But this is set out by section 53 of the English Sale of Goods Act. The measure of damages in such cases is the difference between the value of the goods so delivered and their value if they had answered to the contracted description. The law in India is exactly the same. Once a buyer elects to reject the goods it follows that he cannot thereafter without the consent of the seller reappropriate the goods to the contract and purport to accept them as in performance of the original contract.<sup>1</sup>

The words "impossibility or otherwise" in sub-section (3) are wide enough to cover the three cases of implied waiver of conditions, viz., hindrance by the promisor of performance of conditions, or his own refusal to perform his promise, or his disabling himself. When the fulfilment of a condition by one party is prevented by the other, the condition is waived ;<sup>2</sup> and the wrongful repudiation of a contract by one party may operate as a waiver of conditions precedent to be performed by the other.<sup>3</sup> Similarly, a part may incapacitate itself from carrying out conditions and the result would be the same.<sup>4</sup>

But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient ; it must be a distinct and unequivocal refusal to perform the promise, and must be treated and acted upon as such by the other party<sup>5</sup>.

Waiver may be express or it may be implied from the acts and conduct of the promisee,<sup>6</sup> or it may arise by implication of law.<sup>7</sup> The promise must, on discovering the breach of a condition precedent, exercise his right to avoid or to affirm the contract.<sup>8</sup> If the promise after breach of a condition precedent

1. *Sha Thilokchand Poosaji v. Crystal & Co.*, (1955) 1 Mad. L.J. 494.

2. *Mackay v. Dick*, (1881) 6 App. Cas. 251 (digging machine, condition to be fulfilled by seller prevented by buyer, followed *Kleinert v. Abosso Gold Mining Co.*, (1913) 58 S.J. 48 P.C. (defective crusher supplied).

3. *Cort v. Ambergate Railway Co.*, (1851) 17 Q.B. 127 ; *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K.B. 543 C.A.

4. *Inchbald v. Western Neilgherry Coffee Co.*, (1864) 17 C.B.N.S. 733, 142 R.R. 603.

5. See Benjamin on Sale, 8th Edn., page 560.

6. *E.G. Dupont v. British S. African Co.*, (1901) 18 T.L.R. 24.

7. *E.g. Measures v. Measures*, (1914) 3 Ch. D. 248.

8. *United Shoe Machinery Co. v. Brunet*, (1909) A.C. 339, P.C. ; *Workman v. Lloyd*, (1908) 1 K.B. 968.



agrees to proceed with the contract, the condition is waived.<sup>1</sup> If he even induces the promisor to a reasonable belief that he is still bound by the contract,<sup>2</sup> or that the strict fulfilment of the condition will not be insisted upon<sup>3</sup> or continues to treat the contract as subsisting, or allows the promisor to go on with the performance of subsequent stipulation,<sup>4</sup> he has thereby waived the right and estopped himself from setting up the unperformed condition as an answer to the claim of the party to the contract,<sup>5</sup> inasmuch as waiver may be evinced by any conduct inconsistent with the continuance of the right waived.<sup>6</sup> Where a promisee having the right to insist on performance of a condition precedent before performance of his part of the contract, chooses to go on performing his part of the contract without insisting on the performance of the condition precedent before that, he waives the right to performance of such condition and cannot subsequently rescind the contract for its non-fulfilment.<sup>7</sup> So also where on a dispute, that the goods delivered were not of the contract quality, that matter is submitted to an arbitrator who gives an allowance on the examination of samples, it is not open to the buyer to sue for damages for breach of the warranty of quality, unless he can show that the samples sent to the arbitrator were fraudulent.<sup>8</sup>

Besides the provisions contained in sub-section (3) of section 13 of the Act, waiver of a condition precedent may also be implied by law in the following cases :

- (1) Where the promisee prevents or hinders performance of it ;<sup>9</sup>
- (2) When the promisor incapacitates himself from performing it ;<sup>10</sup>
- (3) Where either party to the contract repudiates it ;<sup>11</sup>
- (4) Where the promisee accepts the benefit of part performance,<sup>12</sup> as where he accepts the whole or part of the goods ;<sup>13</sup>
- (5) Where the buyer incapacitates himself from returning the goods.<sup>14</sup>

Where one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented and he is entitled to compensation.<sup>15</sup>

1. See S. 39, Indian Contract Act ; *Alexander v. Gardner*, 1 Bing. N.C. 671 ; *Wing v. Harney*, 23 L.J. Ch. 511.  
 2. *Workman v. Llyod*, (1908) 1 K.B. 968 ; *Bentsen v. Taylor*, (1893) 2 Q.B. 274 C.A.  
 3. *Reuter v. Sala*, 4 C.P.D. 243 (249).  
 4. *Roberts v. Brett*, 11 H.L. Cas., p. 357  
 5. *Shyama v. Heras*, 26 Cal. 160.  
 6. *Remfry*, p. 518 ; *Cooverji Bhogee v. R.N. Mookerjee*, 36 Cal. 617.  
 7. *Sooltan Chand v. Schiller*, 4 Cal. 252.  
 8. *Fornara v. Ramnarain*, 14 Beng. L.R. 180.  
 9. *Narain v. Mahendra*, 15 Cal. L.J. 332. Section 57 of the Indian Contract Act provides that unless reasonable facilities for performance are afforded, the promisor is excused by such neglect

or refusal as to any non-performance caused thereby.  
 10. *Subba Rao v. Davar*, 18 Mad. 126. See also Ss. 34 and 39 of the Indian Contract Act.  
 11. S. 39, Indian Contract Act ; *Gueret v. Andony*, 65 L.J.Q.B. 633.  
 12. *Dimech v. Corlett*, 12 Moo. P.C. 199 ; *Ellen v. Topp*, 6 Ex. 424 ; *Behn v. Burness*, 32 L.J.Q.B. 204 (206) ; *Wallis v. Pratt*, (1910) 2 K.B. 1003 C.A. ; *Jackson v. Rotax Co.*, 80 L.J. Q.B. 38.  
 13. S. 13 (2), supra.  
 14. *Remfry*, p. 591.  
 15. As to what amounts to prevention, see *Lodder v. Slowey*, (1904) A.C. 442 P.C.



Similarly, the promisor is excused where performance is rendered impossible by the promisee and the law implies a waiver.<sup>1</sup>

Such impossibility must, however, relate to some substantial or essential part of the contract.<sup>2</sup> The rule is not confined to a case of direct and forcible prevention but extends even to default or neglect in doing or providing anything which a party ought to do or provide and without which the other party cannot perform the condition,<sup>3</sup> as where the promisee so acts that the contract cannot be performed in time,<sup>4</sup> or as to expose the promisor to a civil suit if he carried out the contract.<sup>5</sup> But the promisee must be *causa causans* and not the *causa sine qua non*<sup>6</sup> and the promisor must prove that he was prevented or hindered by the act of the promisee or his agent.<sup>7</sup> The case of third party preventing performance, however, falls under section 56 of the Indian Contract Act,<sup>8</sup> and renders the contract void unless the promisor could foresee and prevent the third party from doing so. If the promisee refuses to accept the stipulated benefit which the promisee is ready and willing to give, his refusal as already noted would amount to waiver and the promisee may be charged with his promise as absolute of the fact that the promisor on account of refusal has not performed his part of the contract.<sup>9</sup>

If a person sells specific goods to be delivered on the request of the buyer and afterwards sells and delivers the same goods to another he dispenses with the request of the former buyer for delivery as a condition precedent to deliver.<sup>10</sup> So where a party makes it possible for himself by his own acts or conduct, to complete his contract, it amounts to repudiation of the contract and a waiver of condition precedent.<sup>11</sup> Although mere inability to perform a condition prior to the day fixed for its performance is no ground for repudiation of the contract unless it is warranted by some express agreement or custom,<sup>12</sup> yet the promisee is not always bound to wait until the due date and if he can show by sufficient evidence that the condition cannot be practically fulfilled by the due date or that the promisor has substantially admitted that the condition is incapable of fulfilment, the law will imply a waiver and will allow him to treat the contract as repudiated notwithstanding the fact that the time for the performance of the condition precedent has not yet arrived.<sup>13</sup> So where the promisor incapacitates himself before the time of performance, the promisee may treat it as an immediate breach and sue at once without waiting for the due date.<sup>14</sup>

1. O'Neil v. Armstrong, (1895) 2 Q.B. 418 C.A.; Planche v. Colburn, 8 Bing. 14.
2. Panama Tele. Co. v. India Rubber Co., L.R. 10 Ch., p. 532.
3. S. 67, Indian Contract Act; Giles v. Edwards, 7 T.R. 181; Roberts v. Bury Commissioners, L.R. 5 C.P. 310; Holme v. Guppy, 3 M. & W. 387.
4. Roberts v. Bury Commissioners, supra.
5. European Royal Mail v. Royal Mail, 30 L.J.C.P. 247.
6. Alston v. Herring, 11 Exch. 822; Lodder v. Slowey, (1904) A.C. 442 P.C.
7. Budgett v. Binnington, (1891) 1 Q.B. 35; O'Neil v. Armstrong, (1895) 2 Q.B. 70; (1895) 2 Q.B. 418 C.A.

8. Volkart v. Nusservanji, 13 Bom. 392.
9. Bradley v. Benjamin, 45 L.J.Q.B. 590; Gibs v. Gibs, 9 Q.B. 164; Stewart v. Rogerson, L.R. 6 C.P. 424 (where promisee was held liable for full freight for refusing to name place for delivery). Strictly speaking these cases also fall under express waiver and waiver by conduct.
10. Bowdell v. Parsons, 10 East 395; Hotham v. East India Co., 1 T.R. 638, 645; Forrest v. Aramayo, 83 L.T. 335 C.A.
11. Ford v. Tiley, 6 B. & C. 325; Lovelock v. Franklyn, 8 Q. B. 371.
12. Smith v. Butler, (1900) 1 Q.B. 694.
13. (1900) 1 Q.B. 694; Remfry, p. 529.
14. Synge v. Synge, (1894) 1 Q.B. 466 C.A.; Frost v. Knight, 5 Ex. 322.



Where the contract itself is repudiated by either party before the performance of a condition becomes due there being no contract subsisting the condition is deemed to be waived<sup>1</sup> provided such repudiation is communicated to the other party,<sup>2</sup> and the latter accepts it and acts upon it as such;<sup>3</sup> otherwise it is a mere nullity.<sup>4</sup> There is no such case, where the contract is repudiated and repudiation accepted by the other party, to tender the goods.<sup>5</sup>

But unless and until the repudiation is accepted by the other party the contract remains subsisting notwithstanding such repudiation<sup>6</sup> and the party making the repudiation may retract or withdraw it<sup>7</sup> and avail himself of any intervening circumstances as a justification of his action<sup>8</sup> or as defence either wholly or in part against the other party's claim.<sup>9</sup> Repudiation may be express or it may be inferred from the facts of the case.<sup>10</sup> Repudiation by one of several joint promisors is sufficient to justify avoidance of the contract inasmuch as a promisee has a right to call upon any of them to perform the contract and such repudiation injuriously affects that right.<sup>11</sup>

If the buyer so deals with the goods accepted by him as to render it impossible to return them to seller, a waiver will be implied even if the goods did not answer the description and even if he had stipulated for such return inasmuch as he cannot put the seller in the position in which he would have been if the goods were returned without dealing with them; he is estopped from denying that he accepted the goods in full performance of the contract.<sup>12</sup> The buyer's right to reject the goods depends on his power to restore the seller to his original condition.<sup>13</sup> But if the change has been caused by the legitimate exercise of rights given by the contract as for example testing the goods in a reasonable manner<sup>14</sup> or by an act of God without any fault of the buyer<sup>15</sup> it will not preclude the buyer from exercising his right of rejection.

Acceptance of goods may also imply waiver of condition precedent in the absence of a stipulation inconsistent with such implication as where the parties stipulate that goods may be returned even after what would otherwise amount to acceptance.<sup>16</sup>

1. R.Y.R.M.C. *Chattiar v. S.S. Pather*, 19 Mad. L.J. 28.

2. *Ibid.*

3. *Ibid.*

4. *Mansukhdas v. Rangayya*, 7 Mad. H.C. 662; *Gorret v. Inomy*, 62 L.J. Q.B. 633.

5. *Wertheim v. Chicoutimi*, (1910) 16 Com. Cas. 297 P.C.; (1911) A.C. 301; *Beyts Craig & Co. v. Otto Martin*, 16 Bom. 389 P.C.

6. *Mackertich v. Nobo Coomer*, 30 Cal. 477.

7. *Cort v. Ambergate Railway Co.*, 17 Q.B. 127; Ss. 6 and 66, Indian Contract Act.

8. *Frost v. Knight*, *supra*; *Braithwaite v. Foreign Hardwood Co.*, (1905) 2

K.B. 543.

9. *Remfry*, p. 527.

10. *Remfry*, p. 535.

11. R.Y.R.M.C. *Chattiar v. S.S. Pather*, 19 Mad. L.J. 28.

12. See S. 30, Specific Relief Act, 1963 & Ss. 39 & 64, Indian Contract Act; *Subba Rao v. Davar Shetti*, 18 Mad. 128.

13. *Ibid.*

14. *Head v. Tattersall*, (1871) L.R. 7 Ex. 7; *Urquhart v. Macpherson*, 3 Ap. Cas. 831, P.C.

15. *Ibid*, *Remfry*, 545.

16. *Couston v. Chapman*, L.R. 2 H.L. p. 254; *Lamond v. Davall*, 9 Q.B. 1030.



The acceptance of anything tendered under the contract is a bar to a suit for non-delivery, even though it is made without knowledge of a breach of condition.<sup>1</sup> Similarly, under a c.i.f. contract the acceptance of a policy was held a waiver of its form.<sup>2</sup> Where, however, goods are accepted conditionally by arrangement, the acceptance may be withdrawn and the goods returned on failure of the condition.<sup>3</sup>

*See also notes under sub-section (2), infra.*

It is well established in English law that although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet if he has received and accepted a substantial part<sup>4</sup> of that which was to be performed in his favour, the condition precedent must be treated as if it had become a warranty or independent agreement, affording no defence to an action but giving right to a cross-action or counter-claim for damages.<sup>5</sup> But in that case the buyer remains liable to the seller for the price.

**(4) Temporary waiver—Waiving condition as to time—Subsequent notice to complete within a reasonable specified time—Effect.**

Where a party waives a condition, e.g. delivery at a fixed time, and he presses for delivery after that date, or payment is to be made under a confirmed banker's credit and seller ships with knowledge that the credit opened in his favour is unconfirmed, the party who has acquiesced in the breach of the condition may again make the stipulation the essence of the contract by giving the other party reasonable notice of his intention to do so. It is, however, obvious that where the waiver creates an irreparable situation, the party who waived the condition cannot later reintroduce it.

Thus, where, as a condition of its performance, time is of the essence of a contract, either of sale of goods or for work and labour done, and, on the lapse of the stipulated time, the buyer or the person ordering the work, as the case may be, continues to press for delivery or for completion of the work, thus waiving his right to cancel the contract, thereafter, he has the right to give notice to the seller or contractor, fixing a *reasonable* time for the delivery of the article bought or for the completion of the work, thus again making time of essence of the contract, which, if not completed, he can then cancel. The reasonableness of the time fixed by the notice must be judged when the notice is given and the notice remains valid although, after it is given, the seller or contractor finds himself in unanticipated difficulty in making delivery or effecting completion.<sup>6</sup>

Singleton L.J. cited with approval the following text from Halsbury's Laws of England :<sup>7</sup>

1. Wallis v. Pratt, (1911) A.C. 394.
2. Dupont v. British South African Co., 18 T.L.R. 24.
3. Lucy v. Moullet, 29 L.J. Ex. 110; Heilbutt v. Hickson, L.R. 7 C.P. 438; Couston v. Chapman, *supra*.
4. See Wallis v. Pratt, (1911) A.C. 394; Ellen v. Topp, (1851) 6 Ex. 424; 86 R.R. 353; Behn v. Burness, (1863) 3

- B. & S. 751; Mondel v. Steel, (1841) 8 M. & W. 858, 58 R.R. 899.
5. See Benjamin on Sale, 8th Edn., p. 557.
6. Charles Rickards Ltd. v. Oppenheim, (1950) 1 K.B. 616; (1950) 1 All E.R. 420.
7. See now Halsbury, Laws of England, Vol. III, (3rd Edn.), Para. 840, p. 443.



"In cases where time has not been made of the essence of the contract, or where, although time originally was of the essence of the contract, the time so fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer has still a right by notice to fix a reasonable time for the completion of the work, and in case the contractor does not complete by that time, to dismiss the contractor, just as a vendor would be entitled to rescind the contract in case of a contract for sale of land."

In *Hartley v. Hymans*<sup>1</sup>; by a contract the plaintiff agreed to sell to defendant 11,000 lb. of cotton yarn, delivery to begin in Sept...1918, and to be at the rate of 1,100 lb. per week, failure to deliver within the stipulated time to render the contract liable to cancellation by the defendant and incomplete deliveries not to be taken into account. Delivery should have been completed by Nov. 15, 1918. The plaintiff delivered no yarn till Oct. 26, 1918, when he delivered 550 lb., and thereafter on various dates from the end of Nov. 1918, to the end of Feb., 1919, he delivered seven further quantities averaging upwards of 550 lb. each. During all this period and the early part of March, 1919, the defendant by his letters complained of the delay and asked better deliveries, but thereby led the plaintiff to entertain the belief that the contract still subsisted, and to act upon that belief at expense to himself. On March 13, 1919, the defendant *having given no previous notice* requiring the delivery in any reasonable time, wrote to the plaintiff cancelling the order, and he thereupon refused to take any further quantity of the yarn. In an action by the plaintiff against the defendant for damages for refusing to take the remainder of the yarn, it was *held* that though time was of the essence of the contract with respect to delivery which should *prima facie* have been completed by Nov. 15, 1918, yet the defendant by his letters though written after that date, had waived his right to insist that the period for delivery terminated on that date, that the defendant was also thereby estopped from alleging that that period terminated on that date; that the letters between the parties implied a new agreement that delivery might be within an extended and reasonable period, of which notice was to be given by the defendant to the plaintiff, and as the defendant had given no such notice, no period had been fixed within which the plaintiff should make delivery, and in these circumstances the defendant had no right to cancel on March 13, 1919, and the plaintiff was entitled to damages to be assessed as at that date.

In *Panoutsos v. Raymond Hadley Corporation of New York*<sup>2</sup>, a contract made in September for the sale and shipment of 4,000 tons of flour, to be "shipped to Greece not later than November 7, provided that "each shipment shall be deemed a separate contract", and that payment should be by confirmed banker's credit." The buyer opened a banker's credit which was not in fact "confirmed" and the seller, with notice of that fact, made some shipments and received payments therefor by means of the credit, and also obtained from the buyer an extension of time to November 30, for shipment of the balance of the flour. On November 25, the seller cancelled the contract as to shipment of the balance of the flour, *without any previous notice*, upon the ground that the credit was not in accordance with the contract. It was *held*, that the seller, by waiving for a time the

1. (1920) 3 K.B., p. 475.

2. (1917) 2 K.B. 473 C.A. See also Bird

*v. Hildage*, (1948) 1 K.B. 91 wherein this has been explained.



breach of the condition as to a confirmed credit, was thereby bound to act upon that credit upto the end of contract, but that he was not entitled to cancel the contract without giving the buyer reasonable notice of his intention to cancel so as to give the buyer an opportunity of complying with the condition.

As to what is a reasonable notice in such a case the following observations of Lord Parker in *Stickney v. Keeble*<sup>1</sup> were followed by Denning L.J. in *Charles Rickards Ltd. v. Oppenheim* :<sup>2</sup>

“In considering whether the time so limited is a reasonable time the court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continuously been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts...”

Denning L. J. further observed :

“To that statement I would add, in the present case, the fact that the original contract made time of the essence. In this case, not only did the defendant press continually for delivery, not only was he given promises of speedy delivery, but, on the very day before he gave notice, he was told by the sub-contractor’s manager, who was in charge of the work, that it would be ready within two weeks. He then gave four weeks’ notice. The Judge found that it was a reasonable notice and in my judgment, there is no ground on which the court could in any way differ from that finding. The reasonableness of the notice must, of course, be judged at the time at which it is given. It cannot be held to be a bad notice because after it is given, the suppliers find themselves in unanticipated difficulties in making delivery.”

To constitute waiver there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted on. The whole essence of waiver is that there must be an intention to affect the legal relations of the parties. If that cannot properly be inferred from the conduct, there is no waiver.<sup>3</sup>

#### **(5) Compulsory treatment of a breach of condition as breach of warranty—Sub-section (2).**

Sub-section (2) relates to the specific case, viz., where a contract of sale is not severable and the buyer has *accepted* the goods wholly or partly. The sub-section is based on the principle that once the buyer has accepted the goods, he cannot reject them on any ground, but can only maintain an action for damages, as if the conditions were only a warranty.<sup>4</sup> Where,

1. (1915) A.C. 386, 419.

2. (1950) 1 All E. R. 420, 424.

3. Per Denning L.J. in *Charles Rickards Ltd. v. Oppenheim*, (1950) 1 All E.R. 420, 425, See also *Foot Clinics (1943), Limited v. Cooper’s Gowns Ltd.*, (1947) 1 K.B. 506 and *Bird v. Hildage*, (1947) 2 All E.R. 7 relating to waiver

of condition of time of essence in contracts of leases of premises.

4. *Wallis v. Pratt*, (1910) 2 K.B. 1013 at p. 1015 ; *G.A. Graves v. Legg* (1854) 9 Exch. 709, 96 R.R. 931 ; *Nagardas v. Velmahomed*, (1930) 32 Bom. L.R. 454 : A.I.R. 1930 Bom. 249.



however, the contract is severable, the buyer is not precluded from exercising his right of rejection if a condition is broken, by a mere acceptance of a part of the goods.

Thus in a contract by instalments or a contract which according to its terms is treated as an instalment-contract, the buyer can reject the quantity under any instalment. But under an indivisible contract, the buyer loses his right to reject if he accepts part.<sup>1</sup>

In *Jackson v. Rotax Motor and Cycle Co.*,<sup>2</sup> an English dealer ordered from a foreign manufacturer a large number of motor horns of different descriptions and prices 'delivery as required' and the horns being delivered in several instalments the buyer accepted some instalments but rejected the others on the ground that the goods were not of a merchantable quality. It was held that the buyer was not precluded from doing so and the goods being unmerchantable he was quite justified in doing so.

In *Wallis, Son and Wells v. Pratt Haynes*<sup>3</sup>, there was a contract for the sale by sample of a quantity of seed described as "common English Sainfoin". The contract contained the following clause : 'Seller gives no warranty express or implied as to growth, description or any other matters.' The sellers delivered giant sainfoin, a different kind of seed, the difference not being discoverable except by sowing, and the defect also existing in the sample. The buyers resold the seed to a sub-buyer who sowed it and produced a crop of giant sainfoin, an entirely different article and the market value of which was considerably lower than that of common English sainfoin. It was held by the House of Lords that the buyers were entitled to damages. Lord Loreburn L.C. said : "A sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of different description is accepted in the belief that it is according to the contract, then the buyer...may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty."

The above case was applied in *Harling v. Eddy*.<sup>4</sup> In that case a catalogue relating to a sale by auction of cattle described therein as tuberculin-tested Guernseys contained the condition : "No, (12) No animal, article or thing is sold with a 'warranty' unless specifically mentioned at the time of offering, and no warranty so given shall have any legal force or effect unless the terms thereof appear on the purchaser's account". At the sale, the defendant offered for sale a freshly calved heifer. Buyers were reluctant to bid owing to the unpromising appearance of the heifer, and the defendant thereupon stated that nothing was wrong with her, that he would absolutely guarantee her, and that he would be willing to take her back if she proved not to be as he stated. The plaintiff bought the heifer, but no reference to the defendant's statement appeared on the plaintiff's account. The heifer yielded little milk, and died soon after the sale from tuberculosis. The plaintiff claimed damages. It was held : The defendant's statement at the sale amounted to a condition and not a mere

1. In re Andrew Yule & Co., A.I.R. 1932 Cal. 879 : 59 Cal. 928 : 140 I.C. 877 ; Jackson v. Rotax etc., (1910) 2 K.B. 937 followed.

2. (1910) 2 K.B. 937. See also Simpson

v. Crippin, L.R. 8 Q.B. 14 ; Brandt v. Lawrence, 1 Q.B.D. 344.

3. (1911) A.C. 394 ; 80 L.J.K.B. 1058.

4. (1951) 2 All E.R. 212.



warranty, and as condition No. 12 related only to warranty the plaintiff was not precluded thereby from claiming damages for breach of the condition; even if the statement were merely a warranty, the defendant thereby implied that the heifer should be sold on the faith thereof to the exclusion of condition No. 12; and, therefore, the plaintiff was entitled to succeed.

In *Chandris v. Isbrandtsen-Moller Co. Inc.*,<sup>1</sup> by Cl. 26 of a charter-party: "Cargo to consist of lawful general merchandise, excluding acids, explosives, arms, ammunition or other dangerous cargo." It was held that as the principle that general words *prima facie* have their natural and larger meaning and are not to be restricted to things *ejusdem generis* with those previously enumerated, unless there is something to show an intention so to restrict them, "other dangerous cargo" was not restricted to cargo in the nature of "acids, explosives, arms, ammunition" but included turpentine, and, therefore, the charterers were in breach of the charter-party.

In *Couchman v. Hill*,<sup>2</sup> the plaintiff purchased at an auction sale a heifer belonging to the defendant which was described in the sale catalogue as "unserved". The catalogue stated that the sale would be subject to the auctioneers' usual conditions and that all lots must be taken subject to all faults or errors of description; and the conditions of sale, which were exhibited at the auction, stated that the lots were sold "with all faults, imperfections and errors of description." At the sale the plaintiff asked both the defendant and the auctioneer whether they could confirm that the heifer in question was unserved and received from both the answers "Yes". Later the heifer was found to be in calf and died as a result of carrying a calf at too young an age. In an action in the county court for damages for breach of warranty the county court Judge held that the value of the confirmation by the defendant and the auctioneer that the heifer was unserved was destroyed by the conditions of sale and gave judgment for the defendant. It was held on appeal: In the circumstances the answers of the defendant and the auctioneer to the plaintiff's question amounted to an offer of a warranty overriding the conditions of sale. Such offer was accepted by the plaintiff's bid for the heifer. The description amounted to a condition on the breach of which the plaintiff was entitled to treat it as warranty and recover damages. Scott L.J. observed: Every item in a description which constitutes a substantial ingredient in the identity of the thing sold is a condition.

In *Hardy v. Hillerns*,<sup>3</sup> the contract was for the sale of wheat on c.i.f. terms. The buyers took up the documents and resold and delivered part of the wheat to sub-buyers without making a proper examination of the wheat. Later, having found, as the result of further examination, that wheat was of inferior quality, they claimed to reject. Held, that the resale and delivery of part of the wheat was an act "inconsistent with the ownership of the seller," and thereby the right of rejection was lost.

Unless there is something in the contract to the contrary a buyer cannot be compelled to take non-specific goods with an allowance for inferiority in quality. But the right to reject the goods as being of an inferior quality is not exercised by the purchaser when the goods are tendered, but a right of proprietary character in respect of the goods is

1. (1950) 1 All E.R. 768.

2. (1947) 1 All E.R. 103; (1947) K.B. 544 C.A.

3. (1923) 2 K.B. 490.



exercised by directing delivery to be made to third parties when the buyer accepts the goods.<sup>1</sup>

Similarly, buyer may accept the goods because the examination has not revealed some latent defect or has failed to show that they are not of the stipulated description.<sup>2</sup> In all such cases the buyer is in the same position as if he had voluntarily and intentionally waived the performance of the condition, and can rely upon his right to claim damages from the seller.

In the case of *Shoshi Mohan v. Noba Kristo*,<sup>3</sup> it was observed that the buyer to whom the property in goods had been transferred and part-delivery had been made could only avoid the sale if he could show fraud or misrepresentation.<sup>4</sup>

Section 13 (2) of the Act has been framed with an eye to the special case of "bargain and sale"; and its operation is limited to genuine cases of "bargain and sale" according to the Common Law of England as distinguished from cases of goods "sold and delivered". In the case of transaction giving rise to a claim on account of goods "sold and delivered" where the sale is a sale of specific goods by sample, the buyer in the event of the goods being inferior to sample, has not only a right to damages, but also a right to reject the goods.<sup>5</sup>

What amounts to "acceptance" within the meaning of this section is stated in sections 41 and 42 *post*. As to when the property in goods passes from the seller to the buyer, see sections 19 to 24 *post*. In order that the buyer's conduct should have the effect stated in this sub-section, it must amount to an acceptance, as distinguished from a mere receipt of the goods. For example, there is no acceptance by merely retaining part of the goods delivered by instalments where each instalment is not to be separately paid for.<sup>6</sup>

Where the buyer has not accepted a part of the benefit of the execution of the contract in his favour, or has not waived the performance of the condition, the condition must in the case of a contract for unascertained goods, be complied with by the seller, and the buyer cannot be called upon to accept the goods with an allowance for a partial failure to perform it. Thus, where the goods actually delivered are not of the quality stipulated for in the contract, it cannot be shown that a custom of the trade requires the buyer to accept the goods with an allowance for inferior quality, such a custom being inconsistent with the express terms of the contract.<sup>7</sup>

It is to be noted that the words 'treated as a breach of warranty' do not mean become warranty '*ex post facto*', but that the remedy of the buyer after an acceptance of the goods, whether voluntary or compulsory, is a suit for damages as if the conditions were a warranty.<sup>8</sup> The

1. *Haridas v. Kalumull*, (1903) 30 Cal. 649; see also *Ruttonsi Rowji v. The Bombay United Spinning & Weaving Co. Ltd.*, (1917) 41 Bom. 518, 530, 540.

2. *Nagardas v. Velmahomed*, A.I.R. 1930 Bom. 249; 126 I.C. 312; *Jatinder Chandra Banerjee v. Murali Dhur*, A.I.R. 1926 Cal. 749; 94 I.C. 874.

3. (1879) 4 Cal. 801, 806.

4. See also *Heilbutt v. Hickson*, (1872), L.R. 7 C.P. 431 at pp. 449, 450.

5. *Lal Chand Deep Chand v. Baij Nath Jugal Kishore*, A.I.R. 1937 Cal. 140.

6. See *Waddington v. Oliver*, (1805) 2 B. & P.N.R. 61, 9 R.R. 614 and notes under section 38.

7. *Ruttonsi Rowji v. Bombay United Spinning & Weaving Co. Ltd.*, (1917) 41 Bom. 518, 538-540; 37 I.C. 271.

8. Per *Fletcher Moulton* L.J. in *Wallis v. Pratt*, (1910) 2 K.B. 1003 (1015).



buyer by accepting when he is entitled to reject waives the condition but may still treat the breach of it as a breach of warranty.<sup>1</sup> This section does not lay down that the condition becomes a warranty if the goods are accepted but only that the legal remedies for the breach of a condition become limited to the single remedy which exists in the case of the breach of warranty, namely, a suit for damages. Hence a term in the contract expressly excluding warranty does not affect the buyer's right to recover damages for the breach of a condition.<sup>2</sup> Whether an obligation is a condition or a warranty is decided by the contract and not by matters subsequent thereto.<sup>3</sup>

Referring to sub-section 1 (c) of section 11 of the (English) Sale of Goods Act, 1893, (corresponding to sub-section (2) of S. 13 of the Indian Act) Chalmers says :<sup>4</sup> "Where under this sub-section, the buyer has lost his right to reject and sues for damages, he is still suing for a breach of condition, not for breach of warranty, and will not be barred by a clause in the contract which provides against actions for breach of warranty. For this sub-section to apply, the contract must not be severable at the time when the buyer has to decide how to treat the breach of condition. If the contract is not severable then, it is irrelevant that it could have been severed at an earlier time."<sup>5</sup>

### Acceptance of goods or part thereof.

In *Heilbutt v. Hickson*, (1872) L.R. 7 C.P. 438, A entered into a contract with B for the supply of army shoes, as per sample, which was deposited and was approved of by A and also by the French Government for whom the shoes were ordered. The delivery and payment was to be made according to the contract. It was discovered that some of the shoes contained paper fillings in the soles, and upon opening the sample shoes, it was found that that sole contained paper. Thereupon A stopped deliveries of the shoes, but on B's agreeing to take back those which might be thrown on A's hands, continued the deliveries. The French authorities rejected the whole number. The jury found that no reasonable inspection would have discovered the defects in the shoes. It was held: Although by the original contract A must be taken to have accepted the shoes yet that, upon the construction of the contract, coupled with B's agreement to take back any shoes that might be thrown on A's hands in consequence of paper being found in them, A was entitled to throw back all shoes upon B's hands, notwithstanding his acceptance of them at the wharf, and to recover the price paid, and also the loss of profit arising from the shoes not being according to sample. It was observed: In contracts of sale by sample there must be an opportunity for the inspection of the goods, and if the goods are of such a character that the inspection cannot take place until the time for the delivery and payment for the goods has elapsed, the

1. Cf. *Barker Junior & Co. v. Agius Ltd.*, (1928) 43 T.L.R. 751; 33 Com. Cas. 120.
2. *Wallis v. Pratt*, (1911) A.C. 394. See also *Couchman v. Hill*, (1947) 1 All E.R. 103 C.A.; *Harling v. Eddy*, (1951) 2 All E.R. 212, C.A.; *Sullivan v. Constable*, (1931) 48 T.L.R. 369 C.A., *Nicholson and Venn v. Smith Marriott*, (1947) 177 L.T. 189; Cf.

- Wilkinson v. Barclay*, (1946) 2 All E.R. 337, n., C.A. See Chalmers, 16th Edn., p. 84.
3. *Ibid*; *Baldry v. Marshall*, (1925) 1 K.B. 260 C.A.
4. *Sale of Goods Act*, 16th Edn., p. 84.
5. See *J. Rosenthal & Sons, Ltd. v. Esmail*, (1965) 2 All E.R. 860 cited at p. 282 ante.



purchaser is at liberty after such inspection, if the goods be not equal to sample, to return them to the vendor.

In *Graves v. Legg*, (1854), 9 Exch. 709, the agreement of sale of white-washed Donskoy fleece wool provided *inter alia* that the names of the vessels were to be declared as soon as the wools were shipped. To an action for breach of this contract, by not accepting the wools, the defendants pleaded that the wools were bought, with the knowledge of both parties, for the purpose of reselling in the course of the defendant's business; that wool is an article of fluctuating value, and not saleable until the names of the vessels in which it was shipped should have been declared according to the contract, and that the plaintiff had neglected to declare the names of the vessels in which the wools were shipped until after an unreasonable time after they had been shipped. It was held: The said condition was a condition precedent to defendant's obligations to accept and pay for them, and the plea was good. It was observed: After such acceptance, the defendants would have been bound to pay the price, or the residue of it, and could not have insisted on the neglect to name in due time, but, if there had been any such neglect, would nevertheless have had their remedy for the damage by cross action on the contract to declare the names.

See also *Behn v. Burness* (1863) 3 B. & S. 751, Ex Ch. cited at p. 155 *ante*.

#### **(6) Divisible promises—What degree of failure of performance discharges the contract?**

A case may arise in which it is alleged by one party to a contract that he is discharged from the performance of his party by the fact that the other party has failed to do so, either wholly or to such an extent as to defeat the objects for which the contract was made.

No argument is needed to hold that a total failure by A to do that which was the entire consideration for the promise of X, will exonerate X. But it may be that A has done something, though not all that he promised; or the performance of a contract may extend over a considerable time during which something has to be done by both parties, as in the case of delivery of goods and payment of their price by instalments. In these cases the question arises, has one party so far made default that the consideration for which the other gave his promise has in effect wholly failed?

The best illustrations of divisible promises are to be found in contracts to deliver and pay for goods by instalments. Where these are numerous, and extend over a long time, a default either of delivery or payment does not necessarily discharge the contract, though it must, of course, in every case give rise to an action of damages.<sup>1</sup>

The subject will be found dealt with fully under section 38 of the Act.

#### **(7) Sale of specific goods.**

The case of sale of specific goods the property in which has passed to the buyer, has been taken out of sub-section (2) of section 13 in India

1. See Anson's Law of Contract, 22nd

Edition. Part IV, Chapter XIV. p.447.



by the Indian Sale of Goods (Amendment) Act, 1963, S. 3 (*See notes on pages 280, 281 ante*). As explained therein, it really relates to the case of sale of specific goods by sample, to reconcile the provisions of sections 17 (2) and 13 (2) of the Act.

**(8) "Unless there is a term of the contract express or implied to that effect."**

The parties are free to make any contract and they can contract that none of the facts and circumstances stated above will preclude a party from treating the contract as rescinded or repudiated if a particular condition of the contract is not complied with.<sup>1</sup> If they so agree none of the facts and circumstances dealt with above as amounting to waiver of a condition will be taken in that light as waiver is but a sort of estoppel and if the other party knew that a particular result will follow a particular act according to the terms of the contract, he cannot claim the benefit of estoppel which is given only to the unwary and is based more or less in a change of position due to some wrong belief.<sup>2</sup>

**(9) Impossibility of performance—sub-section (3).**

Sub-section (3) lays down that nothing in section 13 of the Act shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise. Thus, in a contract for the sale of specific goods, the goods may have perished before the contract was made, or they may have perished after it was made, but before the risk passes to the buyer. In both cases the performance of the contract has become impossible, and the agreement is, therefore, void.<sup>3</sup> The fulfilment of conditions or warranties under such contracts is excused.<sup>4</sup>

The uniform rule that the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply with his promise, applies although non-performance is caused by the condition being at the time of the contract, or (except where it is by the fault of the promisor) subsequently becoming, impossible of performance.<sup>5</sup> Thus the buyer cannot be called upon to perform his promise, if a condition to be performed by the seller is not fulfilled by reason of its having, at the time of the contract or subsequently, become impossible of performance and he is released from liability. The seller may rely upon the impossibility as an excuse to himself, if sued by the buyer. But the buyer is not so released if the non-performance is due to his fault. In such cases the buyer must be deemed to have waived the condition and therefore is in the same position as if it had been fulfilled.<sup>6</sup>

"Impossibility" includes what is known as "legal impossibility."<sup>7</sup> A declaration of war operates as an Act of Legislature prohibiting all intercourse with the enemy so that performance of a contract made before war becomes impossible.<sup>8</sup>

1. See *Bannerman v. White*, 10 C.B.N.S. 844; *Head v. Tattersall*, L.R. 7 Ex. 7.

2. *Ibid.*

3. See sections 7 and 8 ante.

4. See *Chapman v. Withers*, (1888) 20 Q.B.D. 824.

5. See *Benjamin on Sale*, 8th Edn., pp. 563, 565.

6. See sections 53 and 56 of the Indian Contract Act, 1872.

7. See *United States v. Pelly*, (1899) 15 T.L.R. 166 (state of war).

8. See *Esposito v. Bowden*, (1877) 7 E. & B. 763, at p. 781, Ex. Ch. notes on pages 232, 233.



*See also notes under section, 8 supra.*

*Miscellaneous Case.*

**Sections 13 and 59—Breach of warranty—Diminution of price—Claim for damages—Principles for measure of—Contract Act, 1872, Section 73.**

In *Mangilal Karwa v. Shantibai*,<sup>1</sup> it was *held*: It is settled law that even after the goods have been delivered into the actual possession of the buyer, the performance of the seller's duties may still be incomplete by reason of the breach of some of the conditions or warranties express or implied whether as to title, or quality, or fitness to which he has bound himself by the contract. In such cases even if there be breach of a condition, the purchaser by taking delivery under S. 13 elects to treat it as a breach of warranty which under S. 59 entitles him to a diminution or extinction of the price.

Where the buyer has set up the breach of warranty of quality in order to claim a diminution of price under S. 59 (1) (a) he is entitled to all damages resulting as a natural and ordinary consequence of his breach of contract in supplying a damaged article or an article of an inferior quality than the one contracted for.

It is well established that damages are a pecuniary compensation for the injury which a party suffers because of the non-performance of a contract by the other contracting party. The law attempts as far as possible to place the injured party in the same position as if no default had occurred. S. 53 of the English Sale of Goods Act specifically provides how such damage is to be calculated in cases of a breach of warranty of quality. No similar provision is to be found in our Sale of Goods Act. But even under the common law, the principle was the same which has now been adopted in S. 53 of the English Act. The true measure of damages for a breach warranty is the amount which would put plaintiff in the position in which he would have been if the contract had been fulfilled. This correctly represents the natural and ordinary consequence of the breach of the seller in supplying the goods of an inferior quality.

It may be that in ascertaining the damages with reference to the market price on the date of delivery the Court may be ascertaining them without reference to the fall or rise in the market since the date of the contract. But this consideration can have no relevance to principle on which damages are awarded.

**14.** In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—  
**Implied under-**  
**taking as to title etc.**

(a) an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods and that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass ;



(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods ;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

### Synopsis

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|--|--|
| (1) <i>Analogous law.</i>  | <i>different intention."</i>                                 |
| (2) <i>Implied condition as to right to sell—clause (a).</i>               | (4) <i>Warranty of quiet possession—clause (b).</i>          |
| (3) <i>"Unless the circumstances of the contract are such as to show a</i> | (5) <i>Warranty of freedom from encumbrances—clause (c).</i> |

#### (1) Analogous law.

This section is a reproduction of S. 12 of the English Act. Prior to the passing of this Act, section 109 of the Indian Contract Act, implied that a stipulation regarding title was merely a warranty and breach of it entitled the buyer, as well as person claiming under him, to recover the loss sustained by him from the seller. It was a departure from the English law. Before 1893 the English law on the point was in an unsettled state. There was considerable uncertainty as to the nature of the seller's liability for defective title, and a distinction was drawn between the sale and an agreement to sell. The rule of *caveat emptor* was often applied in cases of defective quality as well as defective title. Again, in the case of sale of a specific chattel it was held that there was no implied warranty (used in the sense of a condition of title) and if there was no fraud the seller was not liable for a bad title, unless there was a warranty express or implied.<sup>1</sup> S. 12(1) settled the law in England regarding implied condition as to title and the older authorities should be considered in the light of that section. In every contract of sale, law now presumes an implied undertaking on the part of the seller : (1) that he has title or ability to sell ; (2) that he can put the buyer in quiet possession and enjoyment of the thing sold ; and (3) that this such possession or employment will not be disturbed by any third person by virtue of a charge or encumbrance on the thing sold.

#### (2) Implied condition as to right to sell—Clause (a).

Clause (a) of present section lays down that in the contract of sale *unless the circumstances of the contract are such as to show a different intention*, there is an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass. As a result of it, if the title turns out to be defective, the buyer is entitled to reject the goods, subject, of course, to the provisions of section 13 *ante*. Section 109 of the Indian Contract Act treated a stipulation regarding title as a "warranty" only the breach of

1. See *Morley v. Attenborough*, (1849) 3 Ex. 500 ; *Chapman v. Speller*, (1850)

14 Q.B. 621.



which gave a right to the buyer to claim damages from the seller. Inasmuch as it is an essential element of the contract of sale that there should be transfer of the absolute or general property in the thing from the seller to the buyer it would seem naturally to follow that by the very act of selling the goods the seller undertakes to transfer the *property* in the thing, and thus warrants his title or ability to sell.

Wherever a man sells goods *as owner*, he immediately undertakes that the goods are his own goods, and that he has a right to make the sale he professes to make ; and, if he was not the owner at the time of the sale, and was not selling his own goods but the goods of a third party, who subsequently claims them and deprives the purchaser of them, he is responsible in damages for the breach of such implied undertaking.<sup>1</sup> It was held that there was an "implied warranty of title" if the seller affirmed the goods to be his own, and he was deemed to make that affirmation when goods were sold at a shop or warehouse where the seller usually dealt with such goods.<sup>2</sup>

Formerly the rule in England was stated to be that on a sale of specific goods there was no implied warranty of title, and that, in the absence of fraud, the seller was "not liable for a bad title unless there was an express warranty, or an equivalent to it by declaration or conduct."<sup>3</sup> But as Lord Campbell said, in 1851, the "exceptions have well-nigh eaten up the rule"<sup>4</sup> and clause (a) [corresponding to sub-section (1) of the English Act] may be regarded as declaratory.

Where the seller has no right to sell the goods and the buyer has to return them to the owner, the buyer can recover the price from the seller because the consideration for its payment has totally failed ; no 'acceptance' of the goods on the part of the buyer can cure that vital defect.<sup>5</sup>

The expression "right to sell" bears its natural meaning ; it is not limited to a right to pass the property, and accordingly a sale which would be a breach of patent, copyright, or trade mark right may be repudiated by the buyer. The title which the seller must have is the complete right of disposal, and this will be incomplete if he can be stopped by process of law from selling. In *Niblett v. Confectioners' Materials Co.*,<sup>6</sup> the defendants sold to the plaintiffs condensed milk in tins c. i. f. from New York to London. Some of the goods arrived bearing a brand infringing the trade mark of third persons, at whose instance the Commissioners of Customs detained the goods. To get possession of the goods the buyers had to remove the brand. Having sold at a loss they claimed damages for breach of warranty. *Held*, by the Court of Appeal, that as the defendants had broken the implied condition of section 12(1) of the Act (English, corresponding to section 14 of the Indian Act) that they had the right to

1. *Eichholz v. Bannister*, 17 C.B.N.S. 708, 34 L.J.C.P. 105.  
 2. See *Sims v. Marryat*, (1851) 17 Q.B. 281 ; 85 R.R. 462 ; *Eichholz v. Bannister*, *supra*.  
 3. *Morley v. Attenborough*, (1849) 3 Exch. 500 at p. 512 (auction sale of forfeited pledges). See also *Williamson v. Albion*, (1802) 2 East 446, 448 ; *Ormrod v.*

*Huth*, (1845) M. & W. 651, 664 Exch.  
 4. *Sims v. Marryat*, (1851) 17 Q.B. 281 at p. 291 (sale of copyright).  
 5. See *Rowland v. Divall*, (1923) 2 K.B. 500 C.A.  
 6. (1921) 3 K.B. 387, 90 L.J.K.B. 984 C.A.



sell the goods and the buyer could reject the consignment. It was also *held* that the sellers had also broken the implied warranty as to quiet possession of the goods. "If a vendor can be stopped by process of law from selling, he has not the right to sell."

In *Rowland v. Divall*,<sup>1</sup> the plaintiff bought a motor car from the defendant and used it for several months. It then appeared that the defendant had had no title to it, and the plaintiff was compelled to surrender it to the true owner. The plaintiff sued the defendant to recover back the purchase money that he had paid, as on a total failure of consideration. It was *held*: Notwithstanding that he *had* had the use of the car the consideration had totally failed, and he was entitled to get the purchase money back. The use of the car that he had, was no part of the consideration that he had contracted for, which was the property in and lawful possession of the car whereas what he got was an unlawful possession which exposed him to the risk of an action at the suit of the true owner.

Again, the seller has no right to sell if the sale is without jurisdiction or is illegal.<sup>2</sup> *Summer etc. Co. v. Webb & Co.*, (1922) 1 K.B. 55 where the seller was not liable though the sale of the goods in the country where they were sent was illegal.

In *Dickenson v. Naul*<sup>3</sup> and in *Allen v. Hopkins*,<sup>4</sup> it was decided that where a party had bought and received delivery of goods from one not entitled to sell, and had afterwards paid the price to the true owner, he was not liable to an action by the first seller for the price.

It may also be noted that as in the case of other conditions, the buyer may, on a breach, either sue for a return of the price as on a total failure of consideration where he has been compelled to surrender the goods to the true owner, or he may elect to treat the condition as a warranty and sue for unliquidated damages for its breach.

There is an implied warranty of title in the case of the sale of goods and the *onus* is on the seller to prove his title to the goods sold by him. In a suit by the plaintiff who has been deprived of the property purchased by him from the defendant in pursuance of an order of a Criminal Court which held the property to be stolen property, the *onus* is on the defendant to prove that he had title to the property.<sup>5</sup>

There is no such condition or warranty in official sales, *e.g.* sales by Sheriff. In these cases he sells only such interest as the debtor may have in the goods ;<sup>6</sup> but if the Sheriff acts without jurisdiction (*e.g.* seizes property beyond jurisdiction) he stands in the same footing as an ordinary person.

1. (1923) 2 K.B. 500 C.A. See also *Mercantile Union Guarantee Corporation v. Wheatley*, (1937) 3 All E.R. 713 ; 54 T.L.R. 151—hire-purchase agreement ; *Felston Tile Co. v. Winget*, (1936) 3 All E.R. 473 ; *Karflex Ltd. v. Pook*, (1933) 2 K.B. 251—condition as to right of sale under S. 12 of the English Act implied ; cf. *Warman v. Southern Counties Car Finance Corpn.*, (1949) 1 All E.R. 711 ; *Mason*

*v. Birmingham*, (1949) 3 All E.R. 134.  
2. *Dorab Ally v. Khajah*, (1878) 5 I.A. 116 ; 3 Cal. 806 (without jurisdiction).  
3. (1833) 4 B. & Ad. 638.  
4. (1844) 13 M. & W. 94 ; 13 L.J. Ex. 316.  
5. *Kishan v. Bishan*, A.I.R. 1925 Lah. 366 ; 86 I.C. 1020 ; 26 P.L.R. 180.  
6. *Dorab Ally v. Executors of Khajah*, (1878) 3 Cal. 806 P.C.



Where the judgment-debtor has a saleable interest however small, the purchaser buys it at his own risk.<sup>1</sup> It was held under the Civil Procedure Code of 1882 that the purchaser could recover the purchase money on the ground that the judgment-debtor had no saleable interest.<sup>2</sup> In *Framji v. Hormasji*<sup>3</sup> the assertion that the goods were the property of the judgment-debtor was held to amount to a warranty.

As regards the position of an auctioneer, see notes under section 64.

**(5) "Unless the circumstances of the contract are such as to show different intention."**

The circumstances of the contract may, however, rebut the implied condition of title of the seller. Whenever a man does not sell goods as owner, but in some special character or capacity, and the purchaser has notice thereof, he is bound to look into the title of his vendor; for there is not, under such circumstances, any implied condition of title on the part of the vendor.<sup>4</sup> The latter merely undertakes and promises that he does not, at the time he sells, know of any defect in his authority or title to sell; and he cannot be made responsible for the repayment of the purchase money, unless it can be proved that he knew he had no right or title to sell, and that consequently his conduct was fraudulent. Thus in the case of sales by sheriffs of goods taken in execution, the sheriff does not impliedly warrant his title to sell, or warrant the purchaser against eviction; he merely promises that he does not, at the time he sells, know of any defect in his authority or that he has no right or title to sell.<sup>5</sup> So in the case of sale by pawnbrokers of unredeemed pledges, the pawnbroker only warrants the subject-matter of the sale to be a pledge the time for the redemption of which has expired. He does not warrant or promise that the pledger had a title to pledge the article; not does he impliedly warrant the purchaser against eviction.<sup>6</sup>

Where a bank presents a bill of exchange with bill of lading annexed, it is not taken to guarantee that the bills of lading are genuine.<sup>7</sup> So in a sale of a patent, the seller is not presumed to warrant that the patent is free from intrinsic defects which might make it voidable or defeasible,<sup>8</sup> or that it is void,<sup>9</sup> but only that he is the owner of the patent.<sup>10</sup>

The Indian authorities have followed the English rule,<sup>11</sup> although an express assertion that the goods are the property of the execution debtor will amount to a warranty to the buyer to the extent, at all events, of the purchase money in the hands of the sheriff or execution creditor.<sup>12</sup>

1. *Sonaram v. Mohiram*, (1900) 28 Cal. 235.
2. *Ram Kumar v. Ram Gour*, (1909) 13 C.W.N. 1082; see also *Moitheensa V. v. Apsa*, (1911) 36 Mad. 194.
3. (1877) 2 Bom. 258; see also (*Ex-parte Villars*, (1874) L.R. 9 Ch. 432, 437; *Peto v. Blades*, (1814) 5 Taunt 657.
4. *Baqueteley v. Hawley*, L.R. 2 C.P. 625, 36 L.J.C.P. 328.
5. *Chapman v. Speller*, 14 Q.B. 621; 19 L.J.Q.B. 239; *Ex-parte Villars*, (1874) L.R. 9 Ch. App. 432, 437; *Peto v. Blades*, (1814) 5 Taunt. 675 (Sheriff is only responsible if he knows that he has no title to sell); cf. *Dorab Ally*

- Khan v. Abdool Aziz*, (1878) L.R. 5 Ind. App. 116. Sale by a ship-master.
- Smith v. Neale*, 26 L.J.C.P. 143.
6. *Morley v. Attenborough*, 3 Exch. 500, 18 L.J. Ex. 148.
7. *Leatham v. Simpson*, L.R. 11 Eq. 398; *Baxter v. Chapman*, 29 L.T. 642.
8. *Hall v. Condor*, 2 C.B.N.S. 22.
9. *Smith v. Neale*, 2 C.B.N.S. 67.
10. *Remfry*, p. 591.
11. *Dorab Ally Khan v. Executors of Khajah Moheoodden*, (1878) 3 Cal. 806, 813, L.R.
12. *Framji v. Hormasji*, (1877) 2 Bom. 258.



There may also be an understanding in fact between the parties that the seller is dealing only with such interest as he may have ; in that case the implied condition is on general principles excluded.<sup>1</sup>

The following cases may be noted :

(i) In *Anderson v. Croall*, (1903) 6 F. (Ct. of Sess.) 153, there was a sale of horses by auction after a selling race. The auctioneer by mistake sold a horse which was not intended by the owner to be included in the sale. On finding out the mistake, the delivery of the horse was refused. It was held that the auctioneer was liable to the buyer in damages.

(ii) In *Payne v. Elsdon*, (1900) 17 T.L.R. 161, the defendant, an auctioneer, sold by auction to the plaintiff a piano which had been seized under a distress warrant for rent in arrear. The warrant was invalid and the piano was claimed from the plaintiff by the true owner, and was delivered up to him. In an action by the plaintiff against the defendant it was held : There was no implied warranty of title on the part of the defendant.

(iii) In *Warming's Used Cars Ltd. v. Tucker*, (1956) S.A.S.R. 249, A offered a motor car to B, who could not buy it himself. C asked B to buy the car and then immediately re-sell it to him. It turned out that the car was stolen. It was held that the circumstances were such as to exclude the operation of S. 12 of the English Act as between B and C.<sup>2</sup>

#### (4) Warranty of quiet possession—clause (b).

Under clause (b) above, where the buyer has obtained possession of the goods and his right to possession and enjoyment of the goods is in any way disturbed, he has right to sue the seller for damages so caused, unless the circumstances of the contract are such as to show different intention. In *Howell v. Richards*,<sup>3</sup> a case relating to immoveable property, Lord Ellenborough observed :

“The distinction between the condition to title and the warranty of quiet possession is similar to that between a covenant for title and for quiet enjoyment. The former is an assurance by the grantor that he has the very estate in quantity and quality which he purports to convey ; the latter is an assurance to the grantee against the consequences of a defective title.”

In *Niblett v. Confectioners' Materials Co.*<sup>4</sup> Atkin L.J. said rather *obiter* :

“Probably this warranty resembles the covenant for quiet enjoyment of real property by a vendor who conveys as beneficial owner in being subject to certain limitations and only purports to protect the purchaser against lawful acts of third persons and against breaches of the contract of sale and tortious act of the vendor himself.”

1. *Baquerley v. Hawley*, (1877) L.R. 2 C.P. 625—bargain at auction—purchase of—no warranty.

2. See *Chalmers, Sale of Goods Act*, 16th Edn., p. 85.

3. (1809) 103 E.R. 1150, 11 R.R. 287.

4. (1921) 3 K.B. 387 ; 90 L.J.K.B. 984 (C.A.) ; cf. *Anderson v. Ryan*, (1967) I.R. 34 ; *Healing (Sales) Pty. Ltd. v. Inglis Electrix Pty. Ltd.* (1968) 42 A.L.J.R. 280 (H.C. of Aus.). See *Chalmers*, 16th Edn., p. 85.



The scope of section 12 (2) of the English Act was thus stated by Lord Russel C.J. in *Manforts v. Marsden* :<sup>1</sup>

“What that undoubtedly meant is that nobody shall interfere with the possession of the goods by reason of want of title of the vendor, or of any act done or committed by any one having authority from the vendor. It is little more than a covenant for title. It is a warranty that the vendor shall not, nor shall anybody claiming under a superior title, or under his authority, interfere with the quiet enjoyment of the vendee.”

The remedy afforded by this clause does not, however, seem to be of much value. The condition as to title amounts to undertaking by the seller that he has the complete right of the disposal of the goods, as already referred to above, and if by reason of the seller's defective title the buyer is subsequently disturbed in his possession of the goods by the lawful act of a third party, the condition as to title is broken and the buyer gets his remedy. Warranty given by clause (b) would obviously be unnecessary in such a case. Similarly, when the buyer is prevented from obtaining possession of the goods by such act, section 31 of the Act appears to afford sufficient remedy to the buyer. The same remarks apply to other breaches of contract or tortious acts of the seller. Under the Civil Law (from which section 12 (2) of the English Act is borrowed) the warranty against eviction gave a very necessary and practical remedy, as the seller did not profess to transfer ownership, but only undisturbed possession,<sup>2</sup> and clause (b) seems to be of practical use in such cases only.

This clause also protects the buyer [as does clause (c)] where the seller has a right to sell the goods, but the goods are subject to the rights of a third party,<sup>3</sup> and would seem to give the buyer a contractual remedy in the event of the seller himself wrongfully seizing the goods.<sup>4</sup>

It may be observed that the warranty is that the buyer shall “have and enjoy.” If “have” is to be interpreted as meaning “obtain” the word is unnecessary as the seller is already liable under a condition to deliver the goods ;<sup>5</sup> moreover the word “enjoy” includes the meaning that the buyer shall get possession.<sup>6</sup>

Benjamin has observed :<sup>7</sup> “The implied warranty of quiet possession if the analogy of covenants for quiet possession under leases be a sound one, is a warranty against disturbance, and is not broken unless and until a disturbance has taken place. As it is couched in wide terms it should receive a reasonable construction and like all contracts for a general indemnity, should not be construed to extend to the tortious acts of strangers.” The implied warranty will probably be construed similarly to

1. (1895) 12 R. Pat. Cas. 266. See also *Jones v. Consolidated Collieries Ltd.* (1916) 1 K.B. at p. 136, where the true limits and extent of the covenant for quiet enjoyment under a mining lease are discussed.

2. See Benjamin on sale, 8th Edn., p. 682.

3. *Lloyd's and Scottish Finance Ltd. v. Modern Cars and Caravans (Kington) Ltd.*, (1964) 2 All E.R. 732.

4. *Healing (Sales) Pty. Ltd. v. Inglis Electrix Pty. Ltd.* (1968) 42 A.L.J.R. 280 (H.C. of Aus.). See Chalmers, 16th Edn., p. 87.

5. See *Buddle v. Green*, (1857) 27 L.J. Ex. 39.

6. *Ludwell v. Newman*, (1795) 6 T.R. 458.

7. Benjamin on Sale 8th Edn. pp. 681, 682.



express contracts of indemnity or for quiet enjoyment, that is to say, as applicable to *all* acts of the seller, but only to *lawful* acts of third persons.<sup>1</sup>

Thus, if the title is defective, the buyer may, under clause (a), reject the goods, but if he has accepted them and is afterwards disturbed, he has under clause (b) his remedy by action for breach of the warranty of quiet possession, the right of action arising on disturbance.

In *Mason v. Burningham*<sup>2</sup>, Lord Greene M.R., however, held that the warranty was wider and could be invoked by buyer where someone claiming by the paramount *e.g.*, the true owner of the goods, disturbed his possession. In this case, the plaintiff had purchased a typewriter from the defendant for £ 20. She subsequently spent £ 11 10s. on overhauling it. Unknown to the parties the typewriter had been stolen property and the plaintiff had to return it to the owner. The plaintiff claimed from the defendant under the warranty that she should have quiet possession implied in the contract of sale by virtue of the provisions of S. 12 of the English Sale of Goods Act, 1893, the repayment of £ 20, the purchase price she had paid and in addition £ 11 10s. being the sum she had spent on overhaul. The defendant repaid £ 20, but contended that he was not liable for the moneys spent on overhaul. The County Court Judge, held that although the plaintiff had done "the ordinary and natural thing" in having the typewriter overhauled, she was not entitled to recover the cost of such overhaul from the defendant as it was not a loss due the fact that the defendant had sold an article to which he had no title. Allowing the appeal, it was *held*: There had been a breach of warranty implied in the contract of sale by S. 12 of the Sale of Goods Act, 1893 that the buyer should have and enjoy quiet possession of the goods. The plaintiff was entitled under S. 53, sub-section (1)<sup>3</sup> of the Act of 1893, to treat the breach of the implied condition that the seller had a right to sell the goods as a breach of warranty. The cost of overhauling the typewriter was a loss "directly and naturally resulting in the course of events from that breach of warranty" within S. 53, sub-section (2) which the plaintiff was entitled to recover from the defendant.

#### (5) Warranty of freedom from encumbrance—Clause (c).

The second implied warranty afforded by clause (c) is that the goods *shall* be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made, or in other words, that the buyer's possession shall not be disturbed by reason of the existence of such encumbrances. A breach of this warranty will occur when the buyer discharges the amount of encumbrance.<sup>4</sup> The practical effect of it appears to be that, if buyer does discharge such an encumbrance, he may recover the amount from the seller, by virtue of the provisions of section 69 of the Indian Contract Act, as it will not be a voluntary payment. The clause obviously will not apply if such encumbrances are declared to the buyer when the contract is made or he has notice of them.

1. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 47, (f.n.s.)

2. (1949) 2K.B. 545, 563 ; (1949) 2 All E.R. 134.

3. Corresponding to S. 59 (1) of the

Indian Sale of Goods Act, 1930.

4. Collinge v. Heywood, (1839) 9 A. & E. 633 ; see also Nettidge v. Dering, (1909) 2 Ch. at p. 656.



As already noted, shares in a company are goods within the meaning of the Act. In the case of contract of sale of such shares, therefore there is an implied warranty under S. 14(c) of the Act, that the shares are free from any third party not declared or known to the buyer or at the time when the contract is made, unless the circumstances of the contract are such as to show a different intention. Assuming that the circumstances that the shares are sold by a pledgee of those shares under a power of sale shows a different intention within the meaning of the section, that circumstance can show different intention on the part of the parties to the contract only if it is known to the buyer. The burden is on the seller to show that the buyer was aware that the seller was selling not as owner but as pledgee. A buyer of shares in a company must, no doubt, be presumed to have notice of the provision of the Articles of Association of the company with respect to the shares generally. But it does not follow from that that he is to be presumed to have notice of circumstances affecting particular shares. If, therefore, the Articles of Association of a company provide that the directors may decline to register any transfer of shares upon which the company has a lien, the buyer will be presumed to have notice that shares in the company are liable to be affected by a lien where the registered shareholder is indebted to the company, but the buyer is still entitled to rely on the implied warranty given by the seller under S. 14 (c) that the shares with which he proposes to fulfil the contract are not shares which are so affected.<sup>1</sup>

**Breach of implied warranty—remedy of buyer.**

Where there is breach of the implied warranty under S. 14 (c) of the Act, the remedy of the buyer is to sue for damages. He is not entitled to ask for rescission of the contract.

**Section 14—Applicability—Defendant when liable to refund the price, on failure of consideration on doctrine of implied warranty of title.**

In *Khinwa Singh v. Nami Singh*,<sup>2</sup> the plaintiff who had purchased a she-buffalo from the defendant for Rs. 400 was deprived of its possession by the police who having found that the buffalo belonged to one P had seized it from the plaintiff's custody. The plaintiff filed a suit for recovery of the amount on account of the failure of the consideration alleging that the defendant knew all along that the buffalo belonged to P and he had falsely represented, for the purpose of cheating him that he had purchased it from S as it belonged to him. The evidence on record was sufficient to prove that the defendant gave an unqualified assurance to plaintiff that he was the owner of the buffalo. Even when the plaintiff expressed a doubt that the buffalo might be of P, the defendant assured him that he was its owner by purchase. It was *held*: The defendant was liable to refund the price on failure of consideration on the doctrine of implied warranty of title.

When the defendant sold the property as owner, there was not reason why the plaintiff should not be entitled to the implied warranty of title, for it is an essential characteristic of an ordinary sale that it transfers the absolute or general property in the sold goods to the buyer. The plea of

1. *Kissenchand v. Ram Pratap*, 44 C.W.N. 505. 2. 1966 Raj. L.W. 148.



implied warranty of title would not be available if it could be shown that the plaintiff had guilty knowledge that the property did not belong to the seller. It was not the defendant's case that there was any infirmity in his title or that he pointed out the doubtful character of his title to the plaintiff so as to take the case away from the purview of the law of implied warranty of title.

**\*15.** Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

### Synopsis

- |   |   |
|---|---|
| (1) <i>Analogous law.</i>   | <i>tion—other conditions regarding</i>            |
| (2) <i>Sale by description—implied condition.</i>                           | <i>place of origin, size of bags etc.</i>         |
| (3) <i>Effect of examination of bulk or sample.</i>                         | (7) <i>Sale by sample as well as description.</i> |
| (4) <i>Misdescription.</i>  | (8) <i>Sale of specific goods by description.</i> |
| (5) <i>Goods sold under a trade name.</i>                                   | (9) <i>Sale of stocks and shares.</i>             |
| (6) <i>A statement of quality or ingredients whether part of a descrip-</i> | (10) <i>Evidence of trade usage.</i>              |
|   | (11) <i>Damages.</i>                              |

#### (1) Analogous law.

This section corresponds to section 13 of the English Sale of Goods Act, 1893. Section 113 of the Contract Act (since repealed) contained similar provisions where the words were 'where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination.' The word "denomination" appears in some of the earlier English cases, but the word "description" is more convenient. It is to be remembered that in the Contract Act the word "warranty" had often been used, as in this case, in the sense of a 'condition'.

#### (2) Sale by description—implied condition.

This section represents a universal principle—*Si aes pro auro veneat, non valet*.<sup>1</sup> "If you contract to sell peas, you cannot oblige a party to take beans. If the description, of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it."<sup>2</sup> In contract for the sale of goods by description, there is thus an implied condition that the goods shall correspond with the description, and

#### \*Analogous law

Section 13 of the English Sale of Goods Act, 1893, which is the same as the present section in the Indian Act.

Repealed section 113 of the Indian

Contract Act, 1872 (See Appendix B).

1. Kennedy v. Panama etc. Mail Co., (1867) L.R. 2 Q.B. 580, at p. 588.
2. Bowes v. Shand, (1877) 2 App. Cas. 455, per Lord Blackburn at p. 480.



if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

The section applies whether the goods are unascertained or specific, or whether the buyer had an opportunity of examining the goods or not. The sole question is whether the buyer relied on the description above, *i.e.* whether the description was the basis of the contract or whether it merely amounted to a collateral warranty. Previous inspection of the goods by the buyer may be evidence that the buyer did not depend on the description alone as a condition, but not conclusive.<sup>1</sup> The goods are not only to be described but they must be *contracted for* by description; that is to say, the buyer must rely on the description.

No definition of what constitutes a description has been given. Halsbury states it thus<sup>2</sup>: Goods are sold by description where the buyer enters into the contract of sale in reliance on the description of the goods given by or on behalf of the seller. There may be a sale by description although the goods are specific; and goods may be sold by description although sold across the counter.<sup>3</sup> The expression "description" usually means a particular class or kind of goods; but it also includes any statement which may be essential to the identity of the goods as contracted for, as *e.g.* as to their quality or fitness, place of origin or of shipment, time of despatch or delivery, mode of packing, etc. The question is whether the untruth of the statement makes the goods delivered or tendered different things from what were contracted for.

At common law, the most usual instance of a contract of sale of goods "by description" was an agreement to sell unascertained or future goods of a certain description *i.e.* kind or class. In *Heyworth v. Hutchinson*,<sup>4</sup> a case where specific bales of wool were sold "guaranteed about similar to samples," and the question was as to the right of the buyer to reject them for inferiority, Blackburn J. said: "Generally speaking, when the contract is as to *any* goods, such a clause is a condition going to the essence of the contract, but when the contract is as to specific goods, the clause is only collateral to the contract."

A specific chattel could also be sold by description at common law. Here some distinction existed. Unascertained goods can have no description but what is given them by the contract, but a specific chattel had also a physical identity, either corporeally present in the sight of the buyer or mentally identified by him. As a general rule, a contract for the sale of a specific article was a contract for that article as it was.<sup>5</sup> The property passed by the contract, and any superadded description was either a mere representation having no legal effect (except where it was fraudulent, or, being material, justified the buyer in repudiating the contract on the ground of misrepresentation) or was almost a warranty or collateral engagement entered into by the seller in consideration of the contract of

1. *Varley v. Whipp*, (1900) 1 Q.B. 513.

2. Halsbury, *Laws of England*, (3rd Edn.), Vol. 34, pp. 47, 48 and authorities cited therein.

3. *Morelli v. Fitch & Gibbons*, (1928) 2 K.B. 636; (1928) All E.R. Rep. 610.

cited under S. 16 *post*.

4. (1867) L.R. 2 Q.B. 447, at p. 451; 36 L.J.Q.B. 270.

5. Per Brett L.J. in *Robertson v. Amazon Tug Co.*, (1881) 7 Q.B.D. 598, at 606.



sale, on breach of which he was liable in damages. But if the circumstances of the case showed that the description given to specific goods was *essential to their identity* as the subject matter of the contract, in other words, that the buyer contracted for them *as described*, so that the falsity of the description made the goods substantially different things from those that were described, so as to constitute failure of consideration, the sale was by description.<sup>1</sup> As an illustration of it, it was decided in *Lomi v. Tucker*<sup>2</sup> that a buyer who had bought two pictures described as "a couple of Poussins" could reject the pictures if not genuine works of that artist.<sup>3</sup>

Ordinary common law principles described will apply under the Act also.<sup>4</sup> The term would probably apply also to a case in which the buyer had seen the goods but relied, at least in part, upon the description. In *Varley v. Whipp*<sup>5</sup>, the plaintiff contracted to sell to the defendant a "self-binder" reaping machine, which he described as having been used one season, and having cut only above fifty to sixty acres. The defendant, who had not seen the machine, said he would take it on the plaintiff's word, as according to the plaintiff's description, the machine was practically new. The statement that the machine had cut only fifty to sixty acres was untrue. The defendant rejected the reaper, writing to the plaintiff: "It is not what I expected etc." The plaintiff sued for the price. *Held*, that the sale was by description and the defendant was not liable, as there was an implied condition that the goods should correspond with the description, and there had been no acceptance of the machine by the defendant.

In *Sarabji Hormusha Joshi & Co. v. V.M. Ismail*<sup>6</sup>, it was *held*: In the case of a sale of goods by description where the description of the goods is the basis of the contract, the falsity of the description would make the goods substantially different from those that were described so as to constitute a failure of consideration. Where goods are brought by description there is an implied condition that the goods shall be of merchantable quality. Merchantable quality means that the goods comply with the description in the contract so that to a purchaser buying goods of that description the goods would be good tender. Goods are of merchantable quality if they are of such a quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept them under the circumstances of the case in performance of the offer to buy them, whether he buys for his own use or to sell again.

Goods cease to be merchantable because of defects rendering them unfit for the purpose for which they are usually sold. Merchantability is fulfilled when the goods do not differ from the normal quality of the described goods including, under the term quality, the state or condition as required by the contract. The goods should be immediately saleable under the description by which they are known in the market.

The proviso to S. 16 of the Act, however, divides all such defects into two kinds, often called patent and latent defects. Patent defects are

1. Per Blackburn J. in *Kennedy v. Panama Mail Co.*, (1867) L.R. 2 Q.B. 580.

2. (1829) 4 C. & P. 15 : 34 R.R. 769.

3. See Benjamin on Sale, 8th Edn., pages

610 to 612, from which the above has been digested.

4. See *ibid*, p. 613.

5. (1900) 1 Q.B. 513.

6. A.I.R. 1960 Mad. 520.



those which can be found on examination by a person of ordinary prudence with the exercise of due care and attention. Latent defects are those which cannot be discovered on such examination. There is an implied condition on the seller's part that the goods are free from latent defects.

Whether a defect is latent or patent will depend on the nature of the goods and the nature of the defect and the extent of examination, needed for its discovery. It is a question of fact in each case.

Under the Act an actual examination is necessary (S. 41). But if the buyer's examination of the goods is superficial, the implied condition as regards defects which such examination, if more careful and thorough, would have revealed, is destroyed.

A mere receipt of goods does not amount to acceptance and before the buyer can be called upon to accept the goods, he can claim a reasonable opportunity of examining the goods. The opportunity is to be given by the seller on request by the buyer. Whether the opportunity offered by the seller for the examination of the goods was reasonable would, like any other question of fact, depend on the circumstances of each case. It would also depend on the circumstances of the contract.

The inspection and rejection must be without practicable delay.

*Prima facie* the place and the time of examination are the time and place of delivery. The general rule may, however, be replaced by the circumstances of the particular contract.

The right of examination is closely connected with the acceptance of the goods and the passing of property.

If it is a condition precedent, the goods must be merchantable on arrival at destination in order to conform to the contract and the risk of deterioration and the loss would be wholly upon the seller. Where it is treated as a condition subsequent, the risk of description would rest upon the buyer. His right of examination would be there, but it would be only for the purpose of determining whether at the time the title passed, that is to say, at the time the sale was made or at the time the delivery was made to the carrier, the goods conformed to the contract and were merchantable.

Delivery to be operative as a transfer of the property must be assented to by the buyer.

Where the plaintiff buyer has not shown that the goods supplied by the seller were not of merchantable quality as described in the sold notes and on the facts, the goods supplied were of merchantable quality as they were capable of being used for purposes for which they were bought, and the buyer had an opportunity to inspect the goods but he did not avail himself of the same and was content to take delivery, he is precluded from saying afterwards that unmerchantable goods were fraudulently palmed off on him and from holding the seller liable for any damage done to the goods.

In *Kulsekharapatnam, Hand Match Workers' Co-operative Cottage Industrial Society Ltd. v. Radhelal Lailoolal*<sup>1</sup> it was held : In case of sale

1. (1971) M.P.L.J. 552. See Yearly Digest, 1971 (August issue), Colmns.



of goods by description the rule is that the goods must correspond with the description. The test to apply to determine whether or not the goods correspond with the description is a strict one. In such a contract substantial failure of the seller to deliver the goods that correspond with the description means in effect that he has failed to perform the contract.

It depends upon the construction of the contract whether any statement is a description, or a collateral warranty only, or a mere representation.<sup>1</sup> Similarly, it is a question of fact whether the thing delivered by what was really intended by both parties as the subject-matter of sale, although not very accurately described.<sup>2</sup> The following examples by way of illustrations may be studied with advantage :

(1) The plaintiff agreed to sell to the defendants two parcels of sawn laths "of about the specification" mentioned, the property to pass to the buyer on shipment and "should any dispute arise under the stipulations of the contract, the buyer should not be entitled to reject any of the goods but the dispute should be referred to arbitrators." The goods did not substantially agree with the specification. *Held*, that the arbitration clause applied only to goods substantially of the description contracted for, and the buyers could reject the goods as not being of such description.<sup>3</sup>

(2) In *Shepherd v. Kain*<sup>4</sup>, a vessel was advertised for sale as a "copper fastened" vessel, on the terms that she was to be "taken with all faults without allowance for any defects whatsoever." She was only partially copper-fastened, and would not be called in the trade a copper-fastened vessel. *Held*, that the seller was liable for the misdescription, the court saying that the words "with all faults" meant all faults which the vessel might have "consistently with it being the thing described," i.e. a copper-fastened vessel.

(3) Sale of copra cake 'not warranted free from defect rendering same unmerchantable, which would not be apparent on reasonable examination.' The cake was adulterated with castor beans so that it would not be described as copra cake. The buyers having accepted the goods and resold were held still entitled to recover damages for the breach of the condition.<sup>5</sup>

(4) In *Nichol v. Godts*<sup>6</sup>, the sale was of 'foreign refined rape oil warranted only equal to sample.' The oil tendered corresponded with the sample, but was adulterated with hemp oil. The jury found that such an admixture was not commercially known as 'foreign refined rape oil'. The buyers were held entitled to reject the oil.

(5) In *Wallis v. Pratt*<sup>7</sup>, the sale was by sample of a quantity of seed described as 'common English sainfoin'. The sellers delivered giant sainfoin,

1. *Allan v. Lake*, (1852) 18 Q.B. 560, p. 566.

2. See *Mitchell v. Newshall*, 15 M. & W. 308 ; 15 L.J. Ex. 292.

3. *Vigers v. Sanderson*, (1901) 1 K.B. 608, 70 L.J.K.B. 383.

4. 5 B. & A. 240 ; 24 R.R. 344 ; but see *Taylor v. Bullen*, 5 Ex. 779, 20 L.J. Ex. 21, 85 R.R. 875, where in a very similar case a vessel described as a "barge, A.I. teak-built" with the

terms "with all faults, and without any allowance for any defect or error whatever" and the vessel was not teak-built, was held not to constitute binding description.

5. *Pinnock Brothers v. Lewis & Peat Ltd.* (1923) 1 K.B. 690.

6. 10 Ex. 191, 23 L. Ex. 314 ; 102 R.R. 523.

7. (1911) A.C. 394.



a different kind of seed, the difference not being discoverable except by sowing, and the defect also existing in the sample. The contract of sale contained a clause that "the sellers gave no warranty express or implied as to growth, description or any other matters." It was when the crop was produced that it was found it was giant sainfoin. *Held*, that the buyer may recover damages for the breach of the condition.

(6) In *Gompertz v. Bartlett*,<sup>1</sup> the sale was of a foreign bill of exchange; it turned out that the bill was not a foreign bill, and therefore worthless, because unstamped. The purchaser was held entitled to recover back the price, because the thing sold was not of the kind described, the court, however, saying that decision would have been otherwise had the defect been one consistent with the character of a bill.

(7) Where 3,100 cases of Australian canned fruits represented to be packed thirty tins to a case were sold and it was found on delivery that part of the cases contained thirty and the rest twenty-four tins to a case, though there was no difference in price, it was held that this formed part of the description and the buyer could reject the whole.<sup>2</sup>

(8) In *White Sea Timber v. North*,<sup>3</sup> there was a contract for the sale of timber containing a term that the goods were to be shipped "under deck". The buyer was held entitled to reject the whole shipment when it was found that a quarter of the whole quantity was shipped "on deck" and had suffered injury by being so carried. The term was treated as part of description.

In a case reported as *Messers, Ltd. v. Morrison Export Co.*,<sup>4</sup> where the contract contained a similar condition to be loaded on deck 'one-third' and in fact more than a third was shipped on deck the buyers were held justified in rejecting the goods.

(9) In *Arcos v. Ronaasen & Son*,<sup>5</sup> the contract was to supply timber of 1/2 inch thickness for being made into cement barrels. The timber supplied varied in thickness from 1/4 inch to 3/4 inch. The House of Lords held that the buyer was entitled to reject the timber on the ground of a breach of condition as to description though it was merchantable and commercially fit for the purpose for which it was ordered.

(10) A shipment of Siam rice in single bags was held liable to rejection where the contract was for Siam rice packed in 'double bags'—more easily saleable and essential for transit to a long distance.<sup>6</sup>

(11) Where the contract was for the purpose of 'new singer cars' and one of the terms excluded liability 'for all warranties or conditions implied by common law, statute or otherwise', the court held that the supply of a used car amounted to a breach of contract, the breach being of an express term amounting to a description and not of an implied term.<sup>7</sup>

1. 2 E. & B. 849, 96 R.R. 851.

2. *Moore & Co. and Landauer & Co.*, Re. (1921) 2 K.B. 519.

3. (1932) 148 L.T. 263.

4. (1939) 1 All E.R. 92. See also *Wilson v. Wright*, (1937) 4 All E.R. 371 (Agreement to load by Saturday's steamer—steamer heavily laden and

so loaded later—right to reject).

5. (1933) A.C. 470: (1933) All E.R. Rep. 646.

6. *Makin v. London Rice Mill Co.*, (1869) 20 L.T. 705.

7. *Andrews Bros. v. Singer & Co.*, (1934) 1 K.B. 17.



(12) In the case of an instalment contract, each instalment must conform to the description. Where car cases were to be shipped in two instalments (to be considered as separate contracts) "average weight not to exceed 62 lbs.", it was held that each shipment must not exceed the average of 62 lbs. and it was not enough if the average of two shipments did not exceed 62 lbs.<sup>1</sup>

(13) In *Johnson v. Raylton*<sup>2</sup>, it was held that on the sale of goods by a manufacturer of such goods who is not otherwise a dealer in them, there is (in the absence of any usage in the particular trade, or as regards the particular goods, to supply goods of other makers) an implied condition that the goods shall be those of the manufacturers' own make and the purchaser is entitled to reject others, although they are of the quality contracted for.

(14) Where a purchaser forwarded a written order to the vendor for 'scarlet cuttings', to be shipped on his account for the Chinese market, and the vendor sent on board a different article, it was held that the plaintiff was entitled to recover from the vendor all the loss he had sustained in consequence of his not having had in China the goods which he had ordered.<sup>3</sup>

(15) Sale of "the cargo" on board a named ship as per certain bills of lading; other goods of a different kind smuggled on board were not mentioned in the bill of lading; held buyer was not entitled to reject.<sup>4</sup>

(16) In *Sazuki & Co. v. Uttamchand*<sup>5</sup>, the defendants agreed to buy sugar of certain description, shipment November to December, free Bombay Harbour. Held, there was no condition that the goods were to be imported by the sellers directly, and tender of goods of contract shipment, quality and description imported by another firm, was a good tender.

(17) A contract to sell goods to be ordered from Europe was held not fulfilled by offering goods of same quality purchased from a firm in Bombay.<sup>6</sup>

(18) In *Smeaton Hanscomb v. Sassoon I Setty*,<sup>7</sup> by a clause in a contract for the sale of about 35 tons of round mahogany logs f.o.b. Lagos for shipment to Liverpool: "Should any dispute arise with respect to any matter connected with this contract, the buyers shall nevertheless accept the goods as shipped and make due payment...such payment, however, shall not affect their right, if any, to claim compensation for breach of this contract by the sellers...Any claim must be made within fourteen days from the final discharge of the goods and before they are removed." Final discharge of the ship carrying the logs was completed on June 6, 1951, and on July 12 or 13, 1951, the buyers complained of the quality of the logs, there being a shortage in measure as well as a serious percentage undergrade. They also claimed to reject the consignment. It was held: It was a principle of construction that exceptions in a contract were to be construed as not being applicable for the protection of those for whose

1. *Ballantine v. Camp*, (1929) 129 L.T. 502.

2. 7 Q.B.D. 438, 50 L.J.Q.B. 753 (C.A.).

3. *Bridge v. Wain*, 1 Stark 504.

4. *Paul v. Pim & Co.*, (1922) 2 K.B. 360.

5. (1925) 50 Bom. 318.

6. *Bombay United Merchants Co. v. Doolubram*, (1887) 12 Bom. 50, 62.

7. (1953) 2 All E.R. 1471.



benefit they were inserted if the beneficiary had committed a breach of a fundamental term of the contract, and a clause requiring a claim to be brought within a specified period was an exception for this purpose, but in the present case the goods delivered were round mahogany logs, and the fact that there was shortage in measure as well as a substantial percentage undergrade did not render the performance totally different from what the contract contemplated and so was not sufficient to bring that principle into operation, and, therefore, the sellers were entitled to rely on the time clause.

The implied condition that the goods shall answer to the description under which they are sold is not excluded by an express but inconsistent warranty or condition in the contract<sup>1</sup> or by a provision negating any responsibility on the part of the seller<sup>2</sup>; or stipulating for an allowance for inferiority in quality<sup>3</sup>; or excluding a right of rejection; or providing for arbitration in case of dispute.<sup>4</sup> No such stipulation will be construed so as to nullify or qualify the description under which the goods are sold, although it may be construed so as to show that the goods were not in fact sold under any description.<sup>5</sup> Where, however, several statements are made about the goods a clause excluding liability for errors of description may turn one or more of such statements into mere representation.<sup>6</sup>

The general principle of this implied condition is clear and founded upon the consensual basis of the law of contract. If the description of goods tendered is different from that of the goods agreed to be sold, it is not the article bargained for and the buyer is not bound to take it. While it is possible in theory to exclude this implied condition by express agreement,<sup>7</sup> the courts are reluctant to construe the contract so as to permit this to be done, and clauses in contracts for the sale of goods purporting expressly to exclude the implied condition that the goods shall correspond with the description are narrowly construed so as to avoid as far as possible, defeating the fundamental right of a buyer to receive the article bargained for.<sup>8</sup>

"In general on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description and if they do not, it is unnecessary to put any other question to jury."<sup>9</sup> Whether, therefore, the property in goods sold passes to purchaser or not, he is entitled to reject the goods, if they are not in accordance with the description in the contract, provided that the description forms an actual part of the condition of the contract and not something collateral to it. Under the law in this country a man is not bound, unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for.<sup>10</sup>

1. Section 16 (4).

2. *Howcroft v. Laycock*, (1898) 14 T.L.R. 460; *Wallis v. Pratt*, supra.

3. *Azemar v. Casella*, infra.

4. *Vigers v. Sanderson*, (1901) 1 K.B. 608; *Pinnock v. Lewis & Peat*, supra.

5. See *Benjamin on Sale*, 8th Edn., pp. 619, 620.

6. *Taylor v. Bullen*, 5 Exch. 779; *Reynolds v. Lorence*, 23 L.J.N.C. 27;

*Howcroft v. Watkins v. Perkins*, 16 T.L.R. 217.

7. Section 62 of the Act.

8. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 50.

9. *Jones v. Just*, (1878) L.R. 3 Q.B. 197, 204.

10. *Mitchell Reid & Co. v. Buldeo Dass Khettry*, (1887) 15 Cal. at p. 5.



(19) In *National Traders v. Hindustan Soap Works*<sup>1</sup>, it was held : The expression "description" in the phrase, "sale by description" usually means a particular class of goods. It also includes the statement which may be essential to the identity of the goods as contracted for e.g. as to quality or fitness, place of origin, or of shipment, time of despatch or delivery, mode of packing etc. The sale of 5 tons of "Caustic Soda Solid No. 97/98 U.S.A. origin" is descriptive of the article and would be essential for the identification of the goods, even though the caustic soda was packed in certain drums and they were specific goods within the meaning of S. 2(14) of the Act, when what was agreed to be sold and paid for was not the drums nor any caustic soda contained in the drums as such, but the caustic soda of the specification stated to be contained in the drums.

It cannot be said that specific goods cannot be sold by description. Ss. 15 and 16 of the Act are not restricted to sales of ascertained goods. The proviso to S. 16 (2) implies that a sale of specific goods was within the terms of the section. But there may be cases in which specific goods may be agreed to be bought as such without any description or with a description to which the parties attached no significance. It is therefore a question of the construction of a contract of sale in any particular case to find out whether it is a sale by description.

In this particular case description in the contract about the goods being "solid 97/98 U.S.A. origin" was a description regarding its quality, fitness and place of origin and was necessary for the identification of what the appellant agreed to buy and that the sale though of specific goods was one by description as well.

It was further held in the above case : In every contract to supply goods of a specific description, which the buyer had no opportunity to inspect, the goods must not only answer the description but must be saleable or merchantable under that description. These two conditions namely, (1) answering the description in the contract, and (2) merchantable quality are embodied in Ss. 15 and 16 of the Act. Under S. 15 if there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. Under S. 16 (2) there is a further implied condition where there had been no previous inspection by the buyer, that the goods are of merchantable quality. The effect of these two definitions is to give a right or an occasion to the buyer to reject the goods in case what was tendered did not answer the description or was not of merchantable quality. The passing of property in the goods is not the test as to the applicability of this right. If the goods do not conform to the description, there is no performance of the contract at all. If the goods are not of the merchantable quality, the thing for which the buyer bargained for was not given. In either case the default of the seller goes to the root of the transaction and therefore the occasion would arise to the buyer to reject the goods and sue for the price if he had paid the price.

It is also open to the buyer to accept the goods and sue on the basis of a warranty under S. 59. The remedy of a buyer he has accepted the goods is only to sue for damages.

1. A.I.R. 1959 Mad. 112.



When the buyer is said to have accepted the goods, is provided for in S. 42.

Although the buyer did not have inspection of the goods before the contract was entered into they did have such inspection before the price was paid. The unexplained delay in complaining about the quality of the goods showed they had accepted the goods.

The buyer having accepted the goods regardless of the breach of the conditions as to the description and quality, precluded themselves from rejecting the goods and suing for a refund of the price. They could, however, treat the breach as one of warranty and sue for damages. The measure of damages in such a case was the difference between the value of goods as delivered and their value if it answered to contract description.

(20) In *Beale v. Taylor*, (1967) 3 All E.R. 253, a car was advertised as 1961 model. The car in fact was made up of year of 1961 car and front of earlier model. Deviation from the description in the advertisement was not apparent on reasonable examination and was not known to either buyer or seller. The buyer, on discovering the true position, kept the car and brought an action against the seller for damages for breach of condition implied by S. 13 of the (English) Sale of Goods Act, 1893 (corresponding to S. 15 of the Indian Sale of goods Act. 1930), on a contract for the sale of goods by description. The seller contended that the thing sold was seen by the buyer and bought on the buyer's own assessment of its value. It was held that the buyer was entitled to damages because, although the description of the car was not false to the knowledge of either the seller or the buyer, yet fundamentally the seller was selling a car of the description advertised.

(21) In *Travers v. Longel*, (1947) 64 T.L.R. 150, there was a contract for sale of large overboots described as "waders". A sample was sent to the buyer before he placed his order. The "waders" were not articles known to ordinary commercial trading and formed part of the anti-gas equipment which had been made for the Government during the Second World War. The slightest examination of them would have cast great doubt upon any inference that they were waterproof. It was held that the buyer did not rely on the description and the sale was not a sale by description.

(22) In *Munro & Co. v. Meyer*, (1930) 2 K.B. 312, the sale was by instalments "each delivery or shipment to be treated as a separate contract." The contract also provided: "The goods to be taken with all faults and defects.....at valuation to be arranged." There was delivery of some instalments after which the buyer requested for cancellation of contract as regards balance of instalment. He agreed to pay sum of money for cancellation. Subsequently, the buyer discovered that goods delivered did not answer contract description and might have been rejected. The seller was ignorant as to defect in quality. It was held in the circumstances of the case: The buyer was entitled to damages in respect of the defective quality of the meal that had been delivered, and to a declaration that, in view of the defective quality of the meal, he was not bound to take delivery of the meal that was undelivered.



It was observed : "The 'goods to be taken with all faults and defects at valuation' does not exclude the section and applies only to goods answering the trade description."<sup>1</sup>

(23) In *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, (1971) 1 All E.R. 847, H.L., A sold to B a food compounded in accordance with an agreed formula, a sale by description. The formula included herring meal. A used herring meal which (unknown to either party) was contaminated by dimethyl-nitrosamine (D.M.N.A.) produced by a chemical reaction following the use of sodium nitrite as a preservative. D.M.N.A. (unknown to either party) is toxic to mink, for which, as A knew, B required the food. It was held : The food corresponded with its description. D.M.N.A. was not an extraneous substance added to herring meal. It was just herring meal gone wrong. The defect was a matter of quality or condition rather than of description.<sup>2</sup>

(24) In *G. Jevat & Co. v. C.S. & W. Mills*, A.I.R. 1968 Kerala 310, there was contract of sale of cotton of 'Hubli Jayadhar' variety. Actual supply that was made was of Indian cotton and not of 'Hubli Jayadhar'. It was held that the contract was for cotton by description and sample and not merely by sample, the breach of contract was breach of condition, and the buyer was entitled to repudiate the contract.

### (3) Effect of examination of bulk or sample.

Examination of bulk or sample does not necessarily negative a sale by description.<sup>3</sup> But an examination, where at least the nature of the goods is discoverable, may show that the buyer bought on his own judgment, and not by description.<sup>4</sup> In *Attwater v. Kinnes*<sup>5</sup>, a specific bulk of Arctic mica, lying in the rough, as came from the quarry, on the seller's premises was on two occasions exhibited to and inspected by the buyers, who agreed to buy the lot, described as "all the block mica in stock" and also as "the whole stock of the mica in blocks as they lie." It was held that the sale was an ordinary sale of specific goods of the bulk as it lay, without warranty or condition, and not a sale by description.

### (4) Misdescription.

The defendant Railway Company invited tenders for certain goods which they wanted to dispose of. These goods included mild steel special wheels. The plaintiff sent a tender for the goods, which was accepted. One of the conditions of tender and sale was to the effect that "the quantities and descriptions of the material to be purchased are believed to be correct and appropriate." It was also stipulated that "the tender and sale shall not be invalidated and no compensation for misdescription of the whole or any portion of the lots or item shall be admissible because of any divergence from the particulars entered in the schedule."

1. See also *Champanhac & Co. Ltd. v. Waller & Co. Ltd.* (1948) 2 All E.R. 724; *Ruben (E. & S.) Ltd. v. Faire Bros. & Co. Ltd.* (1949) 1 All E.R. 215 cited under S. 17 post (sale by sample).

2. See *Chalmers*, 16th Edn. p. 89.

3. *Josling v. Kingsford*, (1866) 13 C.B.

(N.S.) 447; *Tye v. Fynmore*, (1818) 3 Camp. 472.

4. *Prosser v. Hooper*, (1817) 1 Moore (C.P.) 106; *Parsons v. Sexton*, (1847), 4 C.B. 899.

5. Cited at p. 616 of *Benjamin on Sale*, 8th Edn.



The plaintiff had the option of inspecting the goods before taking delivery but he did not do so. On delivery the plaintiff discovered that the goods were of wrought iron and not of steel. *Held*, that although the company believed the goods to be of mild steel they did not give any guarantee and that the conditions of sale made it clear that if it turned out to be a case of misdescription they would not be liable for any damages and that in the circumstances the plaintiff took delivery of the goods at his own risk.<sup>1</sup>

Where the parties are really agreed on the things sold, a misdescription of it in the contract may be immaterial.<sup>2</sup> The fact that a sale is a sale by sample does not prevent it from being a sale by description also.<sup>3</sup>

Once there is a misdescription, however small, then subject to the *de minimis* rule the buyer is entitled to reject the goods if he acts in time.<sup>4</sup>

### (5) Goods sold under a trade name.

Where goods are sold *as being* of a particular *brand* the brand is part of their description, and if goods sold as being of a particular brand do not bear that brand the buyer can reject them, though the goods were in fact made by the manufacturer of the particular brand.<sup>5</sup> A buyer ordering an article by its trade name must be taken to have ordered it, as manufactured at the date of order, whatever its previous composition.<sup>6</sup> The common law is illustrated by the cases given below :

The course of dealing between the parties may show the meaning of the terms used, and so establish a sale by description. In *Bostock & Co. Ltd. v. Nicholson & Sons Ltd.*<sup>7</sup>, the defendants contracted to sell to the plaintiff sulphuric acid. The plaintiffs were sugar refiners and manufacturers of brewing sugars in the shape of invert and glucose ; but the purpose for which the sulphuric acid was required was never communicated to the defendants. The order given to the defendants was for 'B.O.V.' or brown oil of vitriol. It was *held* that 'B.O.V.' meant sulphuric acid commercially free from arsenic, and that there had been a sale by that description under section 13 of the English Act. And a particular description may attach to the goods by estoppel. Thus, on a sale of "oats," the seller may be aware that the buyer thinks he is being promised old oats.<sup>8</sup>

In *Allan v. Lake*<sup>9</sup>, it was held that a sale of turnip-seed as "Skirving's swedes" was not a sale with a mere representation, not part of the contract, but by description of the article, and that the contract was not satisfied by the tender of any other seed than "Skirving's swedes."

1. *B.B. & C.I. Railway v. Firm Nihal Chand Jagan Nath*, 192 I.C. 175 ; 1 R.L. 363.

2. See Chalmers, 15th Edn., p. 57. For false description under English law, see now Trade Descriptions Act, 1968 and *Beckett v. Kingston Bros. (Butchers) Ltd.*, (1970) 1 All E.R. 715 thereunder.

3. *Nichol v. Godts*, (1854) 10 Exch. 191.

4. *Rapalli v. Take*, (1958) 2 L.R., 469

C.A.  
5. *Scaliaris v. Ofveberg*, (1920) 37 T.L.R. 307 (C.A.). See also *Taylor v. Bullen*, (1850) 5 Ex. 779.

6. *Harris & Sons v. Plymouth Varnish & Colour Co.*, (1933) 49 T.L.R. 521.

7. (1904) 1 K.B. 725.

8. *Smith v. Hughes*, (1871) L.R. 6 Q.B. 597.

9. 18 Q.B. 560.



In *Wieler v. Schilizzi*<sup>1</sup> the sale was of "Calcutta linseed, *tale quale*." There was evidence that all linseed imported contained an admixture of from two to three percent of other seeds, but the article delivered contained an admixture of fifteen per cent. of mustard. It came, however, from Calcutta, and the plaintiff had sold it and it had been used as linseed. It was found that the article had lost "its distinctive character" so as not to be saleable as Calcutta linseed. Action of the purchaser for breach of warranty was upheld, though it is plain that the purchaser might before resale have rejected the contract *in toto*.

In *Steels and Busks v. Bleecker Bik & Co.*<sup>2</sup>, it was held : Where there is a recognised trade description, the proper test is whether the goods comply with the description by the standard generally applied and accepted in the trade.

**(6) A statement of quality or ingredients whether part of a description—Other conditions regarding place of origin, size of bags, etc.**

According to section 2(12) of the Act, "quality of goods" includes their state or condition. Where statement of quality or ingredients is added to the ordinary commercial denomination of the goods sold, a question may arise whether the statement forms part of the description. In the older cases, stipulations, express or implied, as to the quality of the goods were treated as part of their description ; the Act, however, deals with them as separate conditions in section 16(2) and section 17.

Goods are sold by description where the buyer enters into the contract of sale in reliance on the description of the goods by or on behalf of the seller (*Varley v. Whipp*, 1900, 1 Q.B. 513). The expression "description" usually means a particular class or kind of goods ; but it also includes any statement which may be essential to the identity of the goods as contracted for, *e.g.* as to their place of origin or of shipment, time of despatch or delivery, mode of packing, etc. The question is whether the untruth of the statement makes the goods delivered or tendered different things from what were contracted for.<sup>3</sup> The place of origin, the size of the bags containing the goods, the average weight of the parcels, and the mode of packing of the goods may also constitute part of the description of the goods." 'Ex store' has been held to be part of the contractual description of goods not satisfied by the tender of goods in lighters.<sup>4</sup> In another case whether the sale was of beans in bags *per S. S. Luzo* 'afloat', it was held that 'afloat' was used in reference to the goods and was a condition of the contract. So also the description of goods as "under deck" has been held to be a condition of the contract. On the other hand, a term of a contract that timber sold should be properly seasoned for shipment has been held to be a warranty only and not a condition."<sup>5</sup>

1. 17 C. B. 619 ; 25 L.J.C.P. 89 ; 104 R.R. 815 ; see also *Hopkins v. Hitchcock*, 14 C.B. (N.S.) 65 ; 32 L.J.C.P. 154 ; 135 R.R. 605.

2. (1956) 1 Lloyd's Rep. 228. See *Chalmers*, 16th Edn., p. 92.

3. See *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 48 (f.n.c.).

4. *Fisher Reeves, etc. v. Armour & Co.*, (1920) 3 K.B. 614.

5. *Benjamin on Sale*, 8th Edn., pp. 623, 624 and the authorities cited therein ; *Benabu v. Produce Brokers Ltd.*, (1921) 37 T.L.R. 851, C.A. (goods bought afloat but in fact discharged ; *Ballantine & Co. v. Cramp and Bosman*, (1923) 129 L.T. 502 (weight) ; *Barker (Junior) & Co. v. Aguish Ltd.*, (1927) 33 Com. Cas. 120, 53 T.L.R. 751 (briquettes of a certain size) ;



Where bales of yarn Hanuman quality (a quality bearing the trade mark of Hanuman) were sold and the inspection of bales was confined to their exterior and after delivery the yarn was found to have been eaten by white ants and as such unfit for ordinary use, it was *held* that the buyer was entitled to claim damages as on a breach of warranty as the goods did not correspond to the description.<sup>1</sup> Where, however, there was sale of goods bearing a particular number and the article tendered bore a different number but it was found that the goods tendered were in fact the contract goods and that the figures inserted in the contract were so inserted by reason of a clerical error, it was *held* that the numbers on the bales gave no warranty or indication of quality or description and were as such immaterial.<sup>2</sup> In *Ishar Das v. Khaunu Mal*<sup>3</sup>, numbers on bales did not correspond to the numbers given in the invoice. It was *held* that the buyer could not reject unless it was a condition that the bales should bear particular numbers.

### (7) Sale by sample as well as description.

This section also lays down that if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description; the goods supplied must be in accordance with both the description and sample.<sup>4</sup> Illustration (b) to repealed section 122 of the Indian Contract Act, 1872, was as follows;

"A buys, by sample, and after having inspected the bulk, 100 bales of 'Fair Bengal' cotton. The cotton proves not to be such as is known in the market as 'Fair Bengal'; there is a breach of warranty."<sup>5</sup>

Thus the implied condition that goods bought under a specific commercial description should conform therewith is not excluded by the fact that the sale is also by sample. A sample is a mere expression of the quality of the article, and not of its essential character, and although the bulk may agree with the sample, if it does not reasonably answer to the description, the seller is liable.<sup>6</sup> In *Gardiner v. Gray*<sup>7</sup>, the contract was for sale of 12 bales of "waste silk" imported from the continent, and

Moore & Co. and Landauer & Co., Re (1921) 2 K.B. 519, C.A. (mode of packing); Dayton Price & Co., Ltd. v. Rahmotollah, A.I.R. 1925 Cal. 609; 86 I.C. 571 (place of shipment); Parthasarathy Chetty & Co. v. T.M. Gajapathy Naidu & Co., A.I.R. 1925 Mad. 1258; 48 Mad. 787; 91 I.C. 568 (design); Re. Andrew Yule & Co., A.I.R. 1932 Cal. 879; 140 I.C. 877; 59 Cal. 928. "Standard Mills Make"; contrast Sazuki & Co. v. Uttamchand Maneklal, A.I.R. 1926 Bom. 431 (imported goods need not be imported by seller direct); Macpherson Train & Co. Ltd. v. Ross & Co., Ltd., (1955) 2 All E.R. 445 "Shipment and destination: Afloat per S.S. Martin Bay due London approximately June 8." Ship at that time already known not to be due until June 19th; ship

actually arrives on June 21st; clause is part of description and buyers are entitled to reject.

1. Peer Mohammed v. Dalooram, (1918) M.W.N. 658; 47 I.C. 555.

2. Ramjiwan v. H. Bhikaji & Co., (1924) 48 Bom. 519 P.C.

3. (1927) 8 Lah. 276.

4. Khirendra Nath v. Secty. of State, 44 C.W.N. 1069.

5. It may be pointed out that the use of the word "warranty" in the illustration is inaccurate.

6. Mody v. Gregson, (1868) L.R. 4 Ex. 49, at pp. 55, 56.

7. (1815) 171 E.R. 46; 16 R.R. 764; see also Tye v. Fynmore, (1813) 170 E.R. 1446; 14 R.R. 809 (contract for merchantable Sassafras wood—sample shown—finding that it did not answer to description.



samples were shown, though the bargain was made without reference to the sample. It turned out that the goods were not saleable as 'waste silk.' It was held that there had been a breach of condition. And this is whether the purchaser has an opportunity of inspecting the goods and judging for himself or not. In *Josling v. Kingsford*<sup>1</sup>, the sale was of oxalic acid and the bulk had been examined and approved, and a great part of it used by the purchaser, and the seller declined to warrant quality. On analysis, it was afterwards found to be chemically impure from adulteration with sulphate of magnesia, a defect not visible to the naked eye, nor likely to be discovered even by experienced persons. There were two counts in the declaration, one for breach of contract to deliver "oxalic acid" and the other for breach of warranty that the goods delivered were "oxalic acid." *Held*, although there was no evidence of warranty, the article did not come under the denomination of "oxalic acid" in commercial language.

Just as in cases where the goods are not sold by sample, a special term in the contract in favour of the seller (such as a clause providing that inferiority in quality of bulk to sample shall be a matter for allowance) does not deprive the buyer of his right to reject the goods if they do not answer the description in the contract, for he did not undertake to accept goods differing in kind from those for which he had bargained.<sup>2</sup> Still less will any such provision avail the seller if the bulk does not correspond with the sample at all. Thus in a case of a contract for the sale of cotton guaranteed equal to a sample which was of Longstaple Salem Cotton, it was stipulated that "should the quality prove inferior to the guarantee a fair allowance to be made" and the bulk turned out to be not Longstaple Salem, but exceptionally good Western Madras, which however is inferior to Longstaple Salem and cannot be manufactured with the same machinery, it was *held* that the buyer was not bound to accept.<sup>3</sup>

Where, however, a sample is given not as an expression of the *quality* of the goods, but as the only *description*, so as to continue the sole touchstone of the contract, the vendor is bound only to deliver stuff the same as the sample.<sup>4</sup> Thus in *Carter v. Crick*<sup>5</sup>, the sale was by sample of an article which the seller called seed barley, but said he did not know what it really was, and the bulk corresponded with the sample. *Held*, that the seller's warranty was contained only to a correspondence between the bulk and the sample.

#### (8) Sale of specific goods by description.

As has already been observed, a specific chattel could also be sold by description at common law and the same principle applies under the Sale of Goods Act. This may well occur in a case where the buyer has never seen the goods<sup>6</sup> and may also occur where he has seen them.<sup>7</sup> In

1. 13 C.B. (N.S.) 447; 134 R.R. 596.

2. See *Mody v. Gregson* cited above.

3. *Azemar v. Casella*, (1867) L.R. 2 C.P. 431; affirmed, *ib.* 677.

4. *Mody v. Gregson*, *supra*.

5. 28 L. J. Ex. 238.

6. See *Varley v. Whipp*, (1900) 1 Q.B. 513, cited at page 306 ante. Channell J. observed, "I think it (section 3 of the English Sale of Goods Act, 1893) applies to all cases where the purchaser has not seen the article sold

and relies on the description given to him by the vendor. I think it would most frequently apply to unascertained goods, but it does not follow that it may not, in some cases, apply to specific goods."

7. *Thornett & Fehr v. Beers & Son*, (1919) 1 K.B. 486; cf. *Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation*, (1928) 33 Com. Cas. 195 H.L.



the latter case, however, it is more difficult for the buyer to show that the sale was a sale by description, for usually the contract for the sale of a specific article is a contract for the article as it is ; and descriptions of it at the most amount to a warranty for the breach of which the buyer can only recover damages. Thus, in *Parsons v. Sexton*,<sup>1</sup> a contract for a specific engine described as a "fourteen horse power engine," and which had been inspected by the buyer's agent, was held to be a contract for the particular engine without any condition (though there might be a warranty) that it would do work equal to that of fourteen horses. Where the specific goods were before the parties at the time of the negotiation, it was held that the sale was not by description or denomination.<sup>2</sup>

The statement made about the article must be essential to its identity, and if it does correspond with the description, the buyer must take it. In *Barr v. Gibson*<sup>3</sup>, the defendant sold to the plaintiff "all that ship or vessel called *The Sarah* ; of new Castle etc.," covenanting that he "had good right, full power, and lawful authority" to sell. It turned out that the ship had gone ashore eight days before the sale. It was held that the subject of the transfer had the form and structure of a ship although on shore, with the possibility though not the probability, of being got off and that she was still a *ship*.

If the purchaser, instead of going in person to a shop, and selecting the goods himself sends an order describing what he wants, the vendor, if he accepts the order, must select and send an article which fairly corresponds with the description. And this is so whether the purchaser has an opportunity of inspecting the goods and judging himself or not.<sup>4</sup> Occasionally where goods are sold over the counter to a customer who asks for the goods, the sale may be a sale by description,<sup>5</sup> though usually a customer who buys goods in a shop across the counter is buying specific goods.

### (9) Sale of stocks and shares.

"Goods" under the Indian Act include stocks and shares. The English Act does not apply to sale of stocks and shares and like things, but the general principles relating to the sale of goods govern such transactions. The broad rule in England appears to be that where the thing forming the subject of transaction is something essentially different from what is supposed to be, for instance, a forgery<sup>6</sup> or something unmarketable because it is not properly stamped,<sup>7</sup> the sale can be rescinded by buyer and he can recover the purchase price. In *Young v. Cole*<sup>8</sup>, the plaintiff, a stock-broker, was employed by the defendant to sell for him four Guatemala bonds in April, 1836, and it was shown that in 1829 unstamped Guatemala bonds had been repudiated by the Government of

1.. (1847) 4 C.B. 899, 16 L.J.C.P. 181.

2. *Fateh Chand v. Lachmi Narain*, 57 I.C. 481.

3. 3 M. & W. 390 ; 7 L.J. Ex. 124, 49 R.R. 650.

4. *Tye v. Fynmore*, 3 Camp. 462 ; *Josling v. Kingsford*, 3 C.B. (N.S.) 447, 32 L.J.C.P. 94.

5. *Wren v. Holt*, (1903) 1 K.B. 610, C.A. ; *Morelli v. Fitch & Gibbons*,

(1928) 2 K.B. 636.

6. *Jones v. Ryde*, (1814) 5 Taunt 428 ; 15 R.R. 561 (forged naval bill) ; *Gurney v. Womersley*, (1854) 4 E. & B. 133, 99 R.R. 390 (Bill or exchange bearing a forged endorsement).

7. *Gompertz v. Bartlett*, (1853) 2 E. & B. 849, 95 R.R. 851.

8. 3 Bing. N.C. 724.



that State and had ever since been not a marketable commodity on the Stock Exchange. The defendant received the price on the delivery of unstamped bonds, both parties being ignorant that a stamp was necessary. The unstamped bonds were valueless. *Held*, that the defendant was bound to restore the price received. In *Westropp v. Solomon*<sup>1</sup>, the same rule was recognised and it was *also held* that in such cases nothing further was recoverable from the seller than the purchase money he had received, and that he was not responsible for the value of genuine shares.<sup>2</sup>

But there must be a complete difference in substance between the thing bargained for and the thing obtained ; the mere fact it is something less valuable than it was supposed to be will not make it something different so that it can be said not to answer the description. In such a case the buyer must go further, if he desires to rescind the contract and recover the price, and prove misrepresentation<sup>3</sup> though perhaps it is not now necessary for him to prove that the misrepresentation was fraudulent.<sup>4</sup>

### (10) Evidence of trade usage.

Parol evidence may be given<sup>5</sup> of the trade meaning of the description contained in the contract although on ordinary principles, parol evidence is not admissible to vary or to negative the description contained in a written contract.<sup>6</sup>

In case of a contract in writing, evidence of trade usage not inconsistent with the terms may be admitted to explain or supplement those terms.<sup>7</sup> And it seems that the usage of a particular trade to treat a condition as to quality as a mere warranty may be supported. Where, however, the article tendered answers the description, the buyer must, apart from some warranty, express or implied, take the risk as to its quality and condition.<sup>8</sup>

### (11) Damages.

A buyer is entitled to refuse to take delivery of goods when they do not answer to the description in the contract and is not liable for damages which the vendor may have suffered on account of such refusal.<sup>9</sup>

To recover special damages for a breach of warranty in a resale it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he resells or deals with them.<sup>10</sup>

1. 8 C.B. 345 ; 19 L.J.C.P. 1 ; 79 R.R. 530.

2. Analogous to such cases are the sale of a life insurance policy or an annuity when unknown to the parties, the insured or annuitant is dead. *Scott v. Coulson*, (1903) 2 Ch. 249 C.A. ; *Strickland v. Turner*, (1852) Ex. 208. The cases cited above have been treated as falling under the head of common mistake, see *Bell v. Lever Brothers*, (1932) A.C. 161.

3. *Kennedy v. Panama Royal Mail Co.*, (1867) L.R. 2 Q.B. 580.

4. See per Scrutton L.J., *Lever Brothers Ltd. v. Bell*, (1918) 1 K.B. at p. 588.

5. *Powell v. Horton*, 2 Bing. N.C. 668 ; *Woodhouse v. Swift*, 7 C. & P. 310.

6. S. 92, Indian Evidence Act 1872 ; *Smith v. Jeffreys*, 15 M. & W. 561 ; *Harnor v. Groves*, 15 C.B. 667 ; *Gardiner v. Gray*, 4 Camp. 144.

7. *Produce Brokers v. Olympia Oil Cake Co.*, (1916) 1 A.C. 314.

8. *Chalmers*, 16th Edn., p. 92 citing *Barr v. Gibson*, (1831) 3 M. & W. 390.

9. *Firm Prabhu Dial—Kishan Chand v. Firm Hari Chand—Sobha Ram*, 55 I.C. 209.

10. *Firm Kotumal—Charan Dass v. Firm Bihari Lal—Jagga Mal*, 22 P.L.R. 1921 ; 59 I.C. 424 ; 16 P.W.R. 1921.



*As to remedies of buyers when there is sale of goods by description and goods delivered do not answer to those contracted for, see Sha Thilockchand Poosaji v. Crystal Co., A.I.R. 1955 Mad. 481 cited under S. 13 at p. 283 ante.*

### *Further Illustrations*

(1) Where goods, whether specific or uncertained, are sold under a known trade description, without misrepresentation, innocent or guilty, and without breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is completely irrelevant. The parties are bound by their contract, and there is no room for the doctrine that the contract can be treated as a nullity on the ground of mutual mistake even though the mistake from the point of view of the purchaser, may turn out to be of a fundamental character.

By a contract in writing the sellers, who were importers of kapok, agreed to sell, and the buyers, who were manufacturers of articles made of kapok, agreed to buy, three hundred bales of Calcutta kapok "sree" brand. The contract contained a guarantee of quality in the following words: "To be equal to standard sample marked "sree" brand in our [the sellers'] possession." The sellers sent to the buyer a sample of Calcutta kapok "sree" brand. When the buyers began to use the bales of kapok they found that the kapok contained an admixture of cotton, which made the goods unsuitable for the buyers' requirements and it was not commercially possible for them to have discovered that they were unsuitable before putting them through their machinery. On a claim by the buyers that they were entitled to reject the goods, or alternatively, for damages for breach of contract, the appeal committee of the Kapok Trade Association found that Calcutta Kapok "sree" brand was, known as a brand of kapok which was in the kapok trade to contain an admixture of bush cotton (a fact which was unknown to the sellers as well as to the buyers), that the goods corresponded with the standard sample; and that they answered the description of Calcutta kapok "sree" brand. The appeal committee stated a consultative case asking the court for their opinion. *Held*, (1) on the facts of the case, neither party was at fault; therefore, it would not be right to say that the contract was voidable on equitable grounds; (2) even on the assumption that there was, at the time the contract was made, a mutual mistake of fact by the buyers and sellers as to the composition of the commodity they were dealing in, the buyers, who mistakenly believed that goods of known trade description had a particular composition, had no right to relief in the absence of misrepresentation and breach of warranty by the sellers, and the fact that the sellers entertained the same unexpressed but erroneous belief had no relevance when the rights of the parties came to be considered.<sup>1</sup>

Where a sale is not a sale by sample but the seller sends a sample of the goods to the buyer, the sample will be taken into account as evidence of the description given by the seller.<sup>2</sup>

1. *Harrison & Jones v. Bunten & Lancaster*, (1953) 1 All E.R. 903; (1953) 1 Q.B. 646.

2. *Chalmers*, 16th Edn., p. 91 citing

*Boshali v. Allied Commercial Exporters, Ltd.*, (1961) Nigeria L.R. 917, P.C.



(2) Where a contract of sale of goods is reduced to writing, the entire contract must be looked into for ascertaining what was agreed to be sold. At the same time, when certain words which are contended to be part of the description do not occur where they might naturally be expected to, as where there is a heading expressly provided for it, it is not unreasonable to require that it should plainly and clearly appear that those words were intended to be words of description.

Meaning of  
"Despatch August,  
1943."

The parties entered into an agreement under which the seller agreed to sell and deliver ten bales of yarn to the buyer in August, 1943. The agreement recited that "the buyer agrees to purchase subject to conditions and terms noted below." Of the four conditions and terms two were: "Description—20½ × 10 Harvey Mills Yarn ; Despatch—August 1943—Cash before delivery. Subject to the terms and conditions above the Mills, Madura godown delivery." In a suit for damages for breach of this agreement the buyer contended that the operation of the despatch condition was not exhausted by being read as signifying delivery by the seller in August and that in addition it could also bear the meaning that the goods must have been despatched by the Mills in August. It was held (i) that the words "Despatch, August, 1943" in their setting in the agreement referred to despatch by the seller and not by the Mills ; (ii) that even if the words "Despatch August" meant despatch by the Mills in August, still they could not be regarded as forming part of the description of the goods but that they referred only to the time of the delivery by the seller.<sup>1</sup>

(3) Any statement in a contract for sale of goods as to the mode of packing also forms part of the description. Hence the tender by the seller of chests of tea each containing only 76 lbs. as against the provision in the contract of 80 lbs. per chest is not a sufficient performance of the contract and being a breach of a condition of the contract entitled the buyer to reject the goods.<sup>2</sup>

### Miscellaneous

The following observations at p. 92 of Chalmers' Sale of Goods, 16th Edn., are worth perusal : "It follows that the crucial question to decide in a particular case is often whether words used in the contract with reference to the goods sold form part of the description under which the goods are sold, or amount only to a condition or warranty against the breach of which the seller can protect himself. Thus if a seller contracts to sell, 'round mahogany logs', with an exemption clause which protects him against breaches of condition, and then tenders logs which are mahogany but square, the first question will be whether shape of the logs formed part of their contractual description, and this will be a question of construction of the particular contract. Once it is decided that the contractual words do form part of the description, it remains necessary to decide whether the defect complained of is sufficient to prevent the goods from answering that description, and this will be a question of fact in each case."

1. *Kumaraswami Chettiar v. Karuppuswami Moonpanar*, A.I.R. 1953 Mad. 380 : (1952) 2 Mad. L.J. 785.

2. *Jormal Kasturchand v. Hasanalli Khanbhai*, A.I.R. 1954 Sau. 79.



These observations, must be read in the light of the cases cited at pp. 309 to 315 *ante*.

16. Subject to the provisions of this Act, and of any other law for the time being in force, there is <sup>Implied conditions as to quality or fitness.</sup> no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose by which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality :

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

### Synopsis

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|--|--|
| (1) <i>Analogous law.</i>  | <i>lity.</i>   |
| (2) <i>Principle of caveat emptor—meaning and scope of section 16.</i>                 | (7) <i>Exception (2)—applies to specific goods.</i>                                |
| (3) <i>Exceptions to the rule of caveat emptor under the Act.</i>                      | (8) <i>Exception (3)—condition or warranty implied from usage.</i>                 |
| (4) <i>Exception (1)—relying on the seller's skill or judgment.</i>                    | (9) <i>Exception (4)—effect of express condition or warranty on those implied.</i> |
| (5) <i>Sale of an article under its patent or trade name—proviso to exception (1).</i> | (10) <i>Hire-purchase agreement—breach of warranty of fitness.</i>                 |
| (6) <i>Exception (2)—merchantable qua-</i>   |  |



**(1) Analogous law.**

This section corresponds to section 14 of the English Sale of Goods Act, 1893. Sub-section (1) is based upon the judgment of Cockburn C.J. in *Bigge v. Parkinson*<sup>1</sup> in which he said : "Where a buyer buys a specific article, the rule *caveat emptor* applies, but where the buyer orders goods to be supplied and trusts to the judgment of the seller to select the goods which shall be applicable for the purpose for which they are intended and which is known to both the parties, though there is no express stipulation that they shall be fit for the purpose, there is an implied warranty that they are fit for that purpose. There is no reason why such a warranty should not be implied in the case of a sale of provisions."

The principle underlying this sub-section formed the basis of section 114 of the Indian Contract Act. The proviso to sub-section (1) has re-enacted the provisions contained in section 115 of the said Act, and sub-section (3) those of section 110 of the same, with only certain verbal changes necessitated by the adoption of sub-section (3) of section 14 of the English Act. The trend of the recent decisions does not recognise a distinction between provisions and other goods.<sup>2</sup> The Legislature has therefore discarded the provisions of section 111 of the Indian Contract Act, which maintained such distinction.

The proposition stated in sub-section (2) has been well established in England<sup>3</sup> and has also been recognised in this country.<sup>4</sup> Sub-section (4) is new and has been adopted from sub-section (4) of section 14 of the English Act.

**(2) Principle of *caveat emptor*—meaning and scope of section 16.**

Section 16 deals with implied conditions as to quality or fitness of goods for a particular purpose. No distinction is drawn in the section between contracts for the sale of specific, as distinguished from those for the sale of, unascertained goods. The first paragraph of the section states that subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or conditions as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as provided in this section. The general rule as to quality or fitness is therefore the principle of *caveat emptor* of the common law.

The rule of *caveat emptor* (buyer be careful) probably owes its origin to the fact that in early times nearly all sales of goods took place in market overt, and the buyer therefore had every opportunity to satisfy himself as to the quality of the goods or their fitness for a particular purpose. The common law rules on the subject of implied condition or warranty of quality or fitness were discussed and clearly

Rule of caveat emptor under the English law.

1. 31 L.J. Exch. 301.

2. *Emmerton v. Mathews*, (1862) 31 L.J. Exch. 139 ; *Smith v. Baker*, (1878) 40 L.T. 261 ; *Wallis v. Russell*, (1902) 2 L.R. 585 (611).

3. *Jones v. Just*, L.R. 3 Q.B. 197.

4. *Peer Mohammad v. Dallooram*, (1918) M.W.N. 658 : 47 I.C. 555 ; *Malli & Co. v. R.V.A. Firm*, 43 Mad. L.J. 208.



stated in *Jones v. Just*<sup>1</sup> and may be stated as follows : *Firstly*—A condition or warranty as to fitness or quality is implied only so far as a buyer does not buy on his own judgment. The buyer buys on his own judgment if he selects or defines the specific chattel or class of goods he requires although he may state the purpose for which he is buying. Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and discoverable on examination, at least where the seller is neither the grower nor the manufacturer.<sup>2</sup> The buyer in such a case has the opportunity of exercising his judgment upon the matter ; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable.<sup>3</sup> *Secondly*—Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied ‘warranty’. *Thirdly*—Where a known, described and defined article is ordered of manufacturer although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.<sup>4</sup>

At common law, however, there were recognised exceptions to the rule of *caveat emptor*. *Firstly*—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces or in which he deals, to be applied to particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own.<sup>5</sup> *Secondly*—When a manufacturer undertakes to supply goods, manufactured by himself or in which he deals, but which the vendee has not had the opportunity of inspecting it is an implied term in the contract that he shall supply a merchantable article.<sup>6</sup>

A buyer buys on a seller’s judgment if the seller agrees to “supply” goods, and there is no opportunity, or no genuine opportunity, of inspecting them. If the buyer’s purpose be communicated to the seller, the seller’s obligation is to supply goods fit for that purpose ; if the goods are bought under a commercial description, his duty is to supply merchantable goods. Where the goods are bought by sample, the buyer trusts to his own judgment (having inspected or been able to inspect the sample) as regards any merchantable or other quality of the bulk which

1. (1868) L.R. 3 Q.B. 197 ; 37 L.J.Q.B. 86.

2. *Parkinson v. Lee*, (1802) 2 East 314 ; 6 R.R. 429.

3. *Barr v. Gibson*, (1838) 4 M. & W. 390 ; 7 L.J. Ex. 124, 49 R.R. 650.

4. *Chanter v. Hopkins*, (1838) 4 M. & W. 399, 251 R.R. 650 ; *Ollivant v. Bayley*, (1843) 5 Q.B. 288, 64 R.R. 501.

5. *Jones v. Just*, (1868) L.R. 3 Q.B. 197, pp. 202-3, citing *Brown v. Edgington*, (1841) 2 Man. & G. 279, 58 R.R. 403 ; *Jones v. Bright*, (1839) 4 Bing. 533, 30 R.R. 728.

6. *Jones v. Just*, *supra*, citing *Laing v. Fidgeon*, (1815) 4 Camp. 169, 16 R.R. 589 ; *Shepherd v. Pybus*, (1842) 3 Man. & G. 868.



the sample would reveal on a reasonable examination, but on the seller's judgment as regards the correspondence of the bulk with the sample.<sup>1</sup>

And at common law generally "in every contract to supply goods of a specified description which the buyer has not opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description."<sup>2</sup> In *Gardiner v. Gray*<sup>3</sup>, the defendant made a sale of twelve bags of 'waste silk'. The declaration contained counts charging the promise to be that the silk should be of good and merchantable quality. Lord Ellenborough said :

"Under such circumstances the purchaser has a right to expect a *saleable* article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on dunghill."

And when it is a term of the contract that the seller should supply an article reasonably fit for the purpose for which it is required or of merchantable quality, the fact that the article is rendered unfit or unmerchantable by reason of some latent defect is no excuse to the seller. His duty on this point is absolute. It does not depend on any question of negligence, nor it is limited to making good such defects as are discoverable by care and skill.<sup>4</sup>

The modern tendency is to narrow the scope of the rule.<sup>5</sup>

### (3) Exceptions to the rule of *caveat emptor* under the Act.

Rule of *caveat emptor* under the Indian law.

The Act lays down the following exceptions to the rule of *caveat emptor* :

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

1. See Benjamin on Sale, 8th Edn., p. 629 ; *Mody v. Gregson*, (1868) L.R. 4 Ex. 49, and *Drummond v. Van Ingen*, (1887) 12 A.C. 284 ; 56 L.J.Q.B. 563.
2. *Jones v. Just*, supra, p. 205, citing *Bigge v. Parkinson*, (1862) 7 H. & N. 955, 126 R.R. 783 ; *Gardiner v. Gray*, (1815), 4 Camp. 144, 16 R.R. 764.
3. (1815) 4 Camp. 144, 16 R.R. 764, supra. The English law has been followed by the Courts in India ; Peer

- Mohammad v. Dalooram*, (1918) 35 Mad. L.J. 180 (sale of black yarn, Hanuman marked. The goods when supplied by the seller had been damaged by white ants) See also *Malli & Co. v. R.V.A.A. Firm*, A.I.R. 1923 Mad. 262 : 69 I.C. 396.
4. *Randall v. Newson*, (1877) 2 Q.B.D. 102, C.A.
5. *Kennedy v. Panama Royal Mail Co.*, (1867) L.R. 2 Q.B. 587.



(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality :

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

**(4) Exception (1)—Relying on the seller's skill or judgment.**

Exception (1) applies where—

(1) The buyer requires the goods for a *particular purpose*.<sup>1</sup>

(2) The buyer expressly or by implication makes known to the seller that particular purpose.

(3) It is shown that the buyer relies on the seller's skill and judgment.

(4) The seller's usual *course of business is to sell* such goods whether he is the actual manufacturer or producer or not.

Where all these essential facts exist, there is an implied condition that the goods shall be reasonably fit for such purpose.<sup>2</sup> It applies alike to the sale of specific<sup>3</sup> and unascertained goods ; and makes no distinction between cases where the goods are *in esse* and where they are not, so that it is immaterial whether the buyer has, or has not, the opportunity of inspecting them or whether or not he avails himself of that opportunity if he has it.<sup>4</sup> In fact, it is a question of fact to be arrived at in each case whether the buyer did rely on the skill or judgment of the seller instead of a presumption that a buyer, who might have inspected the goods sought on his own judgment, and an opportunity of examination and even an actual examination will be immaterial.<sup>5</sup>

If the vendor is informed that an article of a certain quality or description, suited for some specified purpose is required, the law implies a promise from him that he will supply to the purchaser an article of the quality or description ordered and reasonably fit for the purpose for which it is required. If a person purchases goods from a dealer in such

1. Under the English law, Lord Wright has observed in *Cammell Laird & Co. v. Manganese Bronze & Brass Co.* (1934) A.C. 402, 422 that "the tendency of the decisions since the Act has been to give a liberal interpretation to these words."

2. See *R.S. Thakur v. H.G.E. Corporation*, A.I.R. 1971 Bom. 97 ; *Bengal Corporation Private Ltd. v. Commrs., for the Port of Calcutta*, A.I.R. 1971 Cal. 357.

3. See *Wallis v. Russell*, (1902) 2 I.R. 585, C.A. where this section is fully

discussed. *Priest v. Last*, (1903) 2 K.B. 148, C.A.

4. Per Palles C.B. & Andrews J. in *Wallis v. Russell*, *supra*.

5. In England the Law Commission in its report on Amendments to the Sale of Goods Act, 1893 (Law Com. No. 24) has recommended that the onus should be on the seller to show that the buyer did not rely, or that it was unreasonable for him to rely on his skill and judgment. [See *Chalmers, Sale of Goods Act, 1893, 16th Edn.*, p. 93 f.n. (m)].



goods, explaining the purpose for which they are to be used and leaving the selection of them to the seller the latter thereby impliedly warrants that they are fit for the purpose for which they are so used, even though he was not the manufacturer of the goods sold by him.<sup>1</sup>

The seller's liability to supply goods that are "reasonably fit" is an absolute one. Consequently, he is not discharged by reason that the defects in the goods are latent ones ;<sup>2</sup> as for instance, in the case of milk supplied by a dairy company for domestic use, where the buyer relied upon the company's skill or judgment.<sup>3</sup>

It is not necessary that the buyer should rely on the seller's skill or judgment to the exclusion of any reliance on anything else.<sup>4</sup>

A "particular purpose" is not some purpose necessarily distinct from a general purpose ; for example, the general purpose for which all food is bought is to be eaten and this would also be the particular purpose in any specific instance. A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods<sup>5</sup> and it may appear from the very description of the article. Where, for example, the plaintiff, who was a draper, and had no special skill or knowledge with regard to hot water bottles went to a chemist who sold such articles, and asked for a "hot water bottle". An article was shown to him as such. He inquired whether it would stand boiling water and the defendant told him that it was meant for hot water, but would not stand boiling water. He then purchased it some days afterwards ; the bottle, while in use by plaintiff's wife, burst and she was in consequence scalded. It was *held* : The plaintiff had, when purchasing the bottle, made known to the defendant the particular purpose for which it was required, so as to show that he relied on the skill and knowledge of the defendant. The jury had found at the trial that the bottle was not, when sold, fit for the purpose of a hot water bottle. The case therefore came under S. 14(1) of the (English) Sale of Goods Act, 1893 and there was an implied warranty that the bottle was fit for the purpose of holding hot water, of which there had been a breach. The plaintiff was therefore entitled to damages.<sup>6</sup>

But where an article is capable of being applied to a variety of purposes, the buyer must particularise the specific purpose he has in view and if this is not shown, the buyer will have no remedy merely because it was unfit for the particular purpose.<sup>7</sup> In *Steels & Busks v. Bleacher Bik & Co.*<sup>8</sup> it has been said that reliance will more readily be inferred where

1. *Brown v. Edgington*, 2 M. & Gr. 279, 10 L.J.C.P. 66 ; & See *Bigge v. Parkinson*, 7 H. & N. 955 : 31 L.J. Ex. 301.  
 2. See *Randall v. Newson*, (1877) 2 Q.B.D. 102 ; 46 L.J.Q.B. 259 (C.A.).  
 3. *Frost v. Aylesbury Dairy Co.*, (1905) 1 K.B. 608 ; 74 L.J.K.B. 386.  
 4. *Medway Oil & Storage Co., Ltd. v. Silica Gen. Corporation*, (1928) 33 Com. Cas. 195, H.L.  
 5. *Wallis v. Russell*, *supra* ; *Priest v. Last*, *supra*.

6. *Priest v. Last*, (1903) 2 K.B. 148 C.A.  
 7. *Drummond v. Van Ingen*, (1887), 12 A.C. at 293 ; 56 L.J.Q.B. 563 ; *Jones v. Padgett*, (1890) 24 Q.B.D. 650 ; 59 L.J.Q.B. 261 (C.A.) ; *Bombay Burmah Corporation v. Aga Mohammad*, (1911) 38 I.A. 169 ; 34 Mad. 453 ; 12 I.C. 443 ; *In re Andrew Yule & Co.*, A.I.R. 1932 Cal. 879 : 59 Cal. 928 : 140 I.C. 877.  
 8. (1956) 1 Lloyd's Rep. 228, at p. 235. *Chalmers*, 16th Edn, p. 101.



the article is to be used in an unchanged state, or where the seller specialises in the manufacture of such articles for a clear purpose, than where the material is a raw material or a material manufactured in bulk and capable of being used, and in fact used, for a large variety of purposes in the manufacture of other articles.

The purpose need not necessarily appear in the contract itself, but may be proved by evidence of matters *ab extra* the contract even when it is in writing, if such evidence does not contradict the contract. Where a contract for the sale of goods is silent as to the purpose for which they are required the antecedent course of conduct of the buyer and seller, and the fact that a document stating the purpose for which the goods are required was brought to the knowledge of the seller, are admissible in evidence in an action for breach of warranty brought upon the contract to show that the buyer relied on the seller's skill and judgment, and that there is an implied condition that the goods shall be reasonably fit for such purpose.<sup>1</sup>

In *Frost v. Aylesbury Dairy Co.*<sup>2</sup>, sellers supplied buyer with milk for consumption by himself, his wife and family; the milk contained typhoid germs and buyer's wife died. Buyer successfully claimed damages from sellers. The Court of Appeal held that the requirements of S. 14(1) of the English Act, 1893<sup>3</sup> were satisfied.

Referring to *Henry Kendall & Sons v. William Lillico & Sons Ltd.*<sup>4</sup>, it is observed in, *Chalmers' Sale of Goods Act, 1893*<sup>5</sup>: "There is no magic in the word 'particular.' A communicated purpose, if stated with reasonably sufficient precision, will be a particular purpose. A purpose may be in wide terms or it may be circumscribed or narrow. The less circumscribed the purpose, the less circumscribed as a rule, will be the range of goods which are reasonably fit for such purpose."

The second essential fact is that the buyer *expressly or by implication* makes known to the seller that particular purpose. The words "by implication" clearly indicate that the communication of the purpose to the seller need not be expressed in words. It may be inferred from the description of the goods given by the buyer to the seller, or from the circumstances of the case.

The particular purpose must be made known to the seller expressly or by implication. In *Bombay Burmah Trading Corporation v. Aga Mohammad*<sup>6</sup>, timber was purchased and the fact was made known to the seller that the timber was to be used for railway sleepers. It was *held* that the buyer could reject the timber as it was not fit for the purpose.

1. *Gillespie v. Cheney*, (1896) 2 Q.B. 59; 65 L.J.Q.B. 552.

2. (1905) 1 K.B. 608.

3. Corresponding to S. 16(1) of the Indian Sale of Goods Act, 1930.

4. (1968) 2 All F.R. at pp. 465, 475, 482-3, 490, and 483 (per Lord Pearce). See this case as cited at p. 336 *post*.

5. 16th Edn., pp. 99, 100.

6. (1911) 34 Mad. 453 (P.C.). See also *R.S. Thakur v. H.G.E. Corporation*, A.I.R. 1971 Bom. 97—The communication of the particular purpose may be inferred from the description of the goods given by the buyer to the seller or from the circumstances of the case.



In *re Andrew Yule & Co.*<sup>1</sup>, there was contract for a sale of 150 bales of hessian cloth. The goods were resold by the buyers to sub-buyers who rejected the major portion of the goods, because of an unusual smell that rendered them unfit for packing provisions (which was one of their principal purposes). Inasmuch as the goods could be used for other purposes than packing of foodstuff and as the buyers had not disclosed the particular purpose, it was *held* that there was no implied condition of fitness for that purpose and that the buyers could not reject the goods.

In *Griffiths v. Peter Conway*,<sup>2</sup> the plaintiff bought of the defendants a tweed coat. Soon after wearing it, she developed dermatitis and sued for damages. The court found that no normal skin would have been affected. On the finding, the Court of Appeal held that there was no breach of any implied condition as to fitness. (The seller had no reason to be aware of it).

Provided the purpose is expressly disclosed to the seller, the buyer's knowledge that it may be possible that his exact requirements may not be satisfied because of the seller's want of stock, etc. will not exclude the operation of the rule enunciated in the section.<sup>3</sup>

Where the seller knows of a general purpose but not of the special purpose contemplated by the buyer, the seller may fulfil his contract by supplying goods fit for the purpose.<sup>4</sup>

It is not enough that the buyer communicates the purpose for which he wants the goods but he must rely upon the seller's skill or judgment; such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation.<sup>5</sup> The particular purpose must be made known to the seller so as to show that the buyer relies on the seller's skill and judgment.<sup>6</sup> The reliance need not be total or exclusive, a reliance partial but substantial and effective will bring the implied condition into play.<sup>7</sup> Though the buyer is expected to exercise his own judgment or common sense, even examination of the goods by the buyer may afford evidence that he did rely altogether on the seller's skill and judgment. In *Wallis v. Russell*,<sup>8</sup> where 'two fresh crabs for tea' were required and the plaintiff saw the goods, it was yet held that the plaintiff relied on the defendant to select crabs which would be nice and fresh for tea and so the

The buyer must rely on the seller's skill or judgment.

1. A.I.R. 1932 Cal. 879 : 59 Cal. 928 : 140 I.C. 877.

2. (1939) 1 All E.R. 685. See also *Exporters Ltd. v. Allen & Sons*, (1938) 3 All E.R. 375 (operation of clause restricting right to rejection); *Wilensko v. Fenwick*, (1938) 3 All E.R. 429.

3. *Manchester Liners v. Rea*, (1922) 2 A.C. 74, (order for coal for particular steamer with natural draught furnaces—buyer's knowledge of limited supplies—coal actually supplied unsuited—buyer held entitled to damages).

4. *Jones v. Padgett*, (1890) 24 Q.B.D. 650 (order for "indigo blue cloth" by a wool merchant who was also a tailor—cloth wanted for liveries—goods unfit for that purpose, but otherwise merchantable).

5. Per Lord Wright in *Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, (1934) A.C. 402, 423.

6. *Teheran Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.*, (1968) 2 All E.R. 886 C.A., per Lord Denning M.R., p. 887. See p. 335 *post*.

7. (1934) A.C., p. 428.

8. (1902) 2 Ir. Rep. 585, C.A.



defendant was liable. The fact that the defects are latent is no excuse where the seller's judgment is relied on.<sup>1</sup>

The case is similar where the buyer actually selects the goods he requires.<sup>2</sup> If the seller's skill is in fact relied upon, it is immaterial whether the defect in the goods is such as could be discovered by the exercise of ordinary skill or judgment or not.<sup>3</sup> As already observed,<sup>4</sup> the question whether a buyer has bought relying on his own judgment or not is a question of fact in each case, and an opportunity of examination and even an actual examination are immaterial. It is also not necessary for the application of this rule that the buyer must have *exclusively* relied on the seller's judgment alone if he does so to a substantial extent.<sup>5</sup>

The above three points are illustrated in a Calcutta case reported as *Joseph Mayr v. Phani Bhushan*.<sup>6</sup> In this case the plaintiff who carried on a business of ink and sealing wax wished to start the manufacture of carbon paper. He consulted from time to time the defendant, a manufacturer's agent, who advised him to use a steam boiler. The parties for some years previous to that had business dealings with each other, and the defendant even purchased some formulae for the plaintiff for the preparation of the carbon paper. The idea originally was to warm the rollers with gas flames. Sometime in 1933 the plaintiff discussed the matter with the defendant and was advised by him that the better way would be to heat the rollers with steam.

Plaintiff placed the order for the same with the defendant and having made known the purpose for which it was required relied upon the skill and judgment of the defendant to supply him with a boiler which was reasonably fit for the purpose. The boiler was accordingly delivered to the plaintiff who installed it in his workshop in 1933. It was, however, discovered in 1934 by the boiler inspecting authorities that the boiler did not satisfy the requirements of the Indian Boilers Act and was therefore discarded. Plaintiff purchased another boiler in 1937.

*Held*, that the defendant was guilty of breach of contract as the boiler was not reasonably fit for the purpose for which it was ordered and supplied and the plaintiff was, therefore, entitled to claim damages from the defendants under the following heads: (1) Expense incurred in removing the boiler in question and in installing another suitable one; (2) the difference between the price of another boiler suitable for the purpose which could be bought when the boiler was discarded in 1934 and the price he could get by the sale of the unusable boiler at the same time in 1934; and (3) a sum of money estimated to be the overhead charges in respect of the carbon paper plant only, during the time necessarily taken up in removing the unusable boiler and installing a suitable one.

1. See *Frost v. Aylesbury Dairy Co.*, supra; *MacFarlane v. Taylor*, (1868) 1 Sc. Ap. 245; *Mackillop v. Noorbhoy*, A.I.R. 1929 Sind 161; 116 I.C. 588.

2. *Wilson v. Dunville*, (1879) 4 L.R. Ir. 249; *Robertson v. Amazon Tug Co.*, (1881) 7 Q.B.D. 598 C.A.

3. *Frost v. Aylesbury Dairy Co.*, supra,

4. See page supra.

5. *Medway Oil & Storage Co. v. Silica Gen. Corporation*, (1928) 33 Com. Cas. 195; *Cammell Laird & Co. Ltd. v. Manganese Bronze & Brass Co. Ltd.*, (1934) A.C. 402.

6. A.I.R. 1939 Cal. 210; I.L.R. (1938) 2 Cal. 88.



If the goods are to be manufactured according to the buyer's plan, the buyer relies upon his own judgment.<sup>1</sup> Where the special purpose is disclosed to the seller, such disclosure is normally sufficient to show that the buyer relies upon the seller's skill<sup>2</sup> but generally no condition or warranty of fitness is implied where the buyer, although he may state his purpose, selects the goods he requires.<sup>3</sup>

Reliance is not excluded because the seller may not himself have seen the goods he is selling.<sup>4</sup>

It is essential for the application of sub-section (1) that the seller supplies goods of the description sold in the ordinary course of his business. If the seller does not deal in the class of things sold, the buyer plainly buys on his own judgment. Thus in *Turner v. Mucklow*<sup>5</sup>, where the buyer, who had ordered "spent madder" which was merely the refuse produced of seller's manufacture, and was sold as such, intending out of it to produce garancine, which it failed to produce, was held bound to take the risk of the goods producing the desired result.

It is sufficient if the goods are of a kind which the seller supplies in the course of his business even though he has never sold goods of that exact description.<sup>6</sup> Chalmers observes:<sup>7</sup> It is not clear whether a person who sells goods in the course of his business of a kind which he has not previously supplied comes within S. 14(1) but the better view would seem to be that if by entering the contract he is making it part of his business to supply such goods, and a *fortiori* if he has already acquired the goods with a view to selling them, then the sub-section applies,<sup>8</sup> though in such a case it may be harder for the buyer to show that he relied on the seller's skill and judgment, and the court may more readily hold the implied condition to have been excluded by the course of dealing between the parties.

"Where the buyer relies on the seller's skill and judgment only in relation to certain components of the goods, it would seem to be sufficient if it is in the course of the seller's business to supply those components."<sup>9</sup>

It is immaterial whether the seller is a manufacturer or producer or not. In *Parkinson v. Lee*<sup>10</sup>, it was held that the seller, who was only a dealer and not the manufacturer, was not liable for a latent defect which could not be discovered on an examination of the sample. This decision was,

1. *Hall v. Burke*, (1886) 3 T.L.R. 165, C.A. per Lord Esher, M.R.

2. See *Manchester Liners Ltd. v. Rea Ltd.*, (1922) 2 A.C. 74.

3. *Wilson v. Dunville*, (1879) 4 L.R. Ir. 249; *Turner v. Mucklow*, (1862) 8 Jur. (N.S.) 870; *Fitzgerald v. Iveson*, (1858), 1 F. & F. 410; *Robertson v. Amazon Tug and Lighterage Co.*, (1881) 7 Q.B.D. 598 C.A.; Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 52, f.n. (e).

4. See *Henry Kendall & Sons v. William Lillico & Sons Ltd.*, (1968) 2 All E.R. 444, 484 (per Lord Pearce)

cited post.

5. (1862) 8 Jur. (N.S.) 870, 131 R.R. 800

6. *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, (1971) 1 All E.R. 847, H.L.; *Spencer Trading Co. Ltd. v. Devon*, (1947) 1 All E.R. 284 cited post.

7. 16th Edn., pp. 101, 102.

8. *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, supra, at p. 876. per Lord Wilberforce, and cf. at p. 885, per Lord Diplock.

9. *Ibid.* pp. 855, 868, See this case cited post.

10. (1802) 2 East, 314. 6 R.R. 429.



however, criticised in a later English case.<sup>1</sup> Section 16(1) draws no distinction between a manufacturer and a dealer who is not one. Under it the seller's liability is in his character of dealer, though he may be also the manufacturer or the producer.<sup>2</sup>

In *Cammell Lord & Co. v. Manganese Bronze & Brass Co.*,<sup>3</sup> where an order was placed for the manufacture of a propeller for a ship according to plans and dimensions supplied by purchaser, other details being left to the seller's judgment and the propeller when fitted in, made a great noise, it was *held* that the warranty of fitness was broken and that the buyer was entitled to reject the same. Lord Macmillan said that despite of the detailed specifications of the propellers by the shipbuilders, "there was an important margin within which the (manufacturer's) skill and judgment had scope for exercise" (page 419).

It was not necessary that the buyer should rely exclusively on the skill and judgment of the seller for every detail in the production of the goods, and it is enough if reliance is placed on his skill and judgment to some substantial extent and the unfitness of which complaint is made arises from matters in regard to which reliance was placed on the seller.<sup>4</sup>

The same principle applies in the case of a contract for work and labour. In *G. H. Myers & Co. v. Brent Cross Service Co.*,<sup>5</sup> the plaintiffs entrusted a motor car for repairs to the defendants, who were garage proprietors and repairers of motor cars. In the course of repairing the car, the defendants obtained from the makers of the car and fitted six new connecting rods. One of these rods had a latent defect, which the defendants could not by reasonable care of skill have discovered and it broke, causing extensive damage to the engine. In an action for damages from the defendants, *held*, that the warranty implied in a contract for work done and materials supplied as to the fitness of the materials was not less than that implied in a contract for sale of goods—namely, an absolute warranty of fitness. But the warranty might be excluded if it appeared that the person giving the order did so in such a form as to show that he did not rely on the contractor's skill and judgment. Where the seller was not a dealer in meat, and the thing bought turned out to be unfit for food, he was held not liable, as the buyer did not rely on the seller's judgment.<sup>6</sup>

The words "or producer," do not appear in S. 14 of the English Act. They have been added in the present section so as to include agricultural product specifically.<sup>7</sup>

The following further illustrations may be studied  
with advantage :

Illustrations.

(1) In *Teheran Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.* (1968) 2 All E.R. 886, C.A., A, an English Company, acting as agents for the plaintiffs, a Persian Company, negotiated the purchase of twelve air compressor units from the defendants, an English Company disclosing the

1. *Randall v. Newson*, (1877) 2 Q.B.D. 102, at p. 106, defect in a carriage pole which would not be disclosed on examination.

2. See *Wallis v. Russell* supra.

3. (1934) A.C. 402.

4. *Ibid*; *Ashington Piggeries Ltd. v.*

*Christopher Hill Ltd.*, (1971) 1 All E.R. 847 H.L. cited post. See *Chalmers*, p. 101.

5. (1934) 1 K.B. 46.

6. *Burnby v. Bollett*, (1847) 16 M. & W. 644, 73 R.R. 667 (Sale of pig).

7. See also notes at pages 57 to 62 ante.



fact that A were acting for clients but not identifying the clients. The sale was a sale by description, describing the machines as "new and unused". One such machine was in fact inspected by a representative of the plaintiffs in London. It was made known to A that the machines were required for re-sale in Persia. The goods were in due course invoiced to A. The plaintiffs sued the defendants for damages for alleged breach of contract on the ground that the machines did not accord with description and were not fit for the purpose for which they were supplied, *viz.*, re-sale in Persia. It was held : (i) There was no business usage rendering the contract in the present case unenforceable at the instance of the plaintiffs : accordingly, as there was nothing to confine the contract on its true construction to A, the plaintiffs had the ordinary right of undisclosed principals to sue on it. (ii) The particular purpose of re-sale of the goods in Persia as new and unused machines had not been made known to the defendants in such a way as to show that the buyers relied on the defendant's skill and judgment, and there was no presumption in the circumstances of the present case of such reliance, but the true inference was that the plaintiffs relied on their own skill and judgment in this respect ; accordingly no warranty of fitness for re-sale in Persia was implied in the contract by virtue of S. 14(1) of the (English) Sale of Goods Act, 1893 (corresponding to S. 16(1) of the (Indian) Sale of Goods Act, 1930).<sup>1</sup>

Lord Denning M.R. observed : So far as S. 14(1) is concerned, it is quite clear that the buyers made known to the sellers that they were required for re-sale in Persia.....The section of the Act of 1893, however, contains a further requirement before a condition is implied. The particular purpose might be made known to the seller so as to show that the buyer relies on the seller's skill and judgment. The judge held<sup>2</sup> that, once the purpose was made known, there was an inference that the buyer relied on the seller's skill and judgment.....The particular purchaser must be made known "so as to show that the buyer relies on the seller's skill or judgment." That means that the buyer makes the particular purpose known to the seller in such a way that the seller knows that he is being relied on. That cannot be said here.

Sachs L.J. observed at pp. 895-896 : "Nevertheless before a buyer can establish that he is entitled to rely on S. 14(1) one has to examine closely the 'particular purpose' on which his case is founded to see if the vendor's skill and judgment can reasonably be said to have been relied on. Thus the buyer who asks lawn seed saying it is for his own lawn cannot, if the seed is fit for normal lawns but not for his particular lawn, rely on S. 14(1) merely because his own lawn has some peculiar characteristic known only to him, unless he has made known that characteristic to the seller in circumstances which would bring into force the sub-section." Commenting on this, Chalmers observes<sup>3</sup> : "But it would appear to be sufficient if the seed was not suitable for at least one type of lawn upon which the seed could fairly and reasonably have been expected to have been used (even, perhaps, if the lawn upon which it was used was not of that type) or if the seller should reasonably have contemplated that it was not

1. Manchester Liners, Ltd. v. Rea Ltd., (1922) All E.R. Rep. 605 ; (1922) 2 A.C. 74 not followed on the basis of observations by the House of Lords in Henry Kendall etc. v. William Lillico

etc., (1968) 2 All E.R. 444 H.L.  
2. In (1968) 1 All E.R. 585, which was reversed on this point in appeal in the case under reference.  
3. 16th Edn., p. 102.



unlikely that the seed would be used upon a lawn having a characteristic such as that possessed by the buyer's lawn."<sup>1</sup>

(2) In *Henry Kendall, etc. v. William Lillico etc.*, (1968) 2 All E.R. 444 H.L.<sup>2</sup>, a company A, who were wholesale dealers and members of the London Cattle Food Trade Association, bought ground nuts early in 1960, their description being "Brazilian ground nut extractions", on c.i.f. contracts with shipment from Brazilian ports. At that time the purchase of these goods from Brazil was purchase from a new source. Some of the ground nut extractions were sold to another Company B (who were also members of the same trade association), sales being effected on contract form No. 6 of the association which provided that the goods were not warranted free from defects rendering them unmerchantable which would not be apparent on reasonable examination. The purpose for which B required the goods, viz., re-sale in smaller quantities for compounding as food for cattle and poultry was known to A. The goods imported were in fact affected by a toxic condition and were unfit for use as food for poultry, though a proportion of five per cent, or so could be compounded (as became well-known by the date of the trial) in cattle food without rendering the compound unfit for cattle. B sold some of the goods to the Company C, by oral bargain followed by sold notes which bore on the back the condition that the buyer took responsibility for latent defects. There had been a long course of dealing between B and C by such bargains followed by sold notes containing this condition. C made known to B that the goods were required for compounding into food for pigs and poultry. C compounded the ground nut extraction so bought into food for birds and sold it to H, proprietors of a game farm, who fed it to peasants, many of which died in consequence of the poison in the ground nut extraction. C admitted liability under S. 14 of the Act of H and settled the matter with them. C sued their suppliers B, who sued their suppliers A, the claim being *inter alia* for breach of implied condition of fitness under S. 14(1), or of merchantable quality on the sale of goods by description [S. 14(2)]. There was evidence at the trial that contamination of goods to the extent to which these goods were contaminated was not then usually regarded commercially as a ground for rejecting the goods though a claim for rebate in price might be based on it. It was **held** with reference to the provisions of the (English) Sale of Goods Act, 1893):<sup>3</sup>

(i) B was liable to C, whether or not B could recover from A for breach of condition of fitness implied by virtue of S. 14(1) of the Act, in the contracts for sale to C, because the purpose for which goods were required, viz., for use in compounding into pig and poultry food was a "particular purpose" and because it was to be inferred in the circumstances that C relied on B's skill or judgment.

(ii) The latent defect condition in the sold notes did not exempt B from liability.

1. Cf. *Christopher Hill Ltd. v. Ashington Piggeries Ltd.* (1969) 3 All E.R. at p. 1523, C.A.; reversed on the facts, (1971) 1 All E.R. 847, H.L. where the onus of proof is discussed.  
2. On appeal from *Hardwick Game Farm v. Suffolk Agricultural and*

*Poultry Producers Association Ltd.*, (1966) 1 All E.R. 309, affirming it in result.

3. As to statutory warranty under the *Fertilisers and Feeding Stuffs Act, 1926*, there is no legislation in India exactly corresponding to it.



(iii) A was liable to B for breach of condition of fitness implied by S. 14(1) of the Act, because the purpose for which the goods were required, viz., for compounding into food for cattle and poultry, of which purpose A knew, was a sufficient particular purpose, and in the circumstances B had relied on A's skill and judgment, notwithstanding that they were members of the same trade association, that some of the goods were bought when afloat, and that the defect was latent.

(3) In *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, (1971) 1 All E.R. 847, H.L.,<sup>1</sup> A, on behalf of the appellants, approached the respondents, who were well-known animal feeding stuff compounders, with a view to the respondents compounding for the appellants a mink food, to be called 'King Size', in accordance with a formula prepared by A who was a leading mink farmer and an expert in mink nutrition. One of the ingredients included in the formula was herring meal. It was expressly made known to the respondents that the food was required for mink. The respondents had no previous experience or knowledge of preparing food for mink although they were compounding 167 varieties of feeding stuffs principally for poultry, pheasants, calves and pigs. The contract was entered into in May 1960 and nothing happened until July, 1961, after the respondents had begun using Norwegian herring meal, when heavy losses began to occur among mink to which it had been fed. These losses were carried by the presence in the herring meal of a substance called dimethylnitrosamine ('DMNA') which, in certain quantities, was highly toxic to mink. The presence of DMNA in the meal was then unknown to any of the parties. It was produced by a chemical reaction caused by the use of sodium nitrite as a preservative. At that time this possibility was unthought of and, in the existing state of scientific and commercial knowledge, no deliberate exercise of human skill or judgment could have prevented the meal from having its toxic, and lethal, effect on mink. One of the conditions (No. 3) on which the respondents purchased the herring meal from the Norwegian firm read: "The goods to be taken with all faults and defects, damaged or inferior, if any at valuation to be arranged mutually or by arbitration." The contract in writing with the Norwegian firm also contained, against the marginal heading 'Quantity and description'—About .....Norwegian Herring Meal fair average quality of the season etc. The respondents brought an action against the appellants for the price of the goods sold, while the latter counterclaimed for damages in respect of the losses occasioned by the death and injury to the mink, alleging breaches of the conditions implied by Ss. 13, 14 (1) and (2) of the (English) Sale of Goods Act, 1893 [corresponding to Ss. 15, 16(1) and 16(2) of the Indian Act]. The respondents in turn sued the Norwegian firm for an indemnity, alleging breaches of the conditions implied by Ss. 13 and 14(1) of the Act. It was held: (i) The respondents were liable to the appellants for breach of the condition implied by S. 14(1) of the Act that the goods were reasonably fit for their purpose, for the following reasons: (a) The appellants relied on the skill and judgment of the respondents even though that reliance was only partial, for it was not necessary that the reliance should be total and exclusive; the appellants relied on their own skill and judgment to see that the formula for King Size was suitable for feeding to

1. On appeal from *Christopher Hill Ltd. v. Ashington Piggeries, Ltd.*, (1969) 3

All E.R. 1946, partly accepting the appeal.



mink but they relied on the skill and judgment of the respondents to see that the ingredients were of a quality suitable for compounding animal feeding stuffs.<sup>1</sup> (b) It having been proved that herring meal was lethal to mink, the onus lay on the respondents to show that it was otherwise of a quality suitable for use in compounding feeding stuffs for domestic animals and poultry generally which they had failed to discharge. (c) It was not open to the respondents to argue that S. 14(1) did not apply on the ground that King Size or other mink food were not goods of a description which it was in the course of their business to supply because their business was to make up compounds for animal feeding and, in producing King Size, they were only using raw materials, including herring meal, which it was in their course of business to supply.

(ii) The respondents were also in breach of the condition implied by S. 14 (2) that the goods were of merchantable quality because, under the terms of S. 14 (2), the scope of the dealer's business was not restricted to the contract description of the goods, for the words 'goods of that description' meant 'goods of that kind' and the respondents had previously dealt in goods of that kind *i.e.* animal feeding stuffs; and furthermore (per Lord Wilberforce) even if 'description' were to be understood in a technical sense, a person would be a dealer in goods 'of that description' if he accepted orders to supply them in the way of business, whether or not he has previously accepted orders for goods of that description.

(iii) The Norwegian firm was liable to the respondents because (a) they were in breach of the condition implied by S. 14(1) in that the respondents had made known, or, which amounted to the same thing, the firm was aware of the purpose for which the herring meal was required *i.e.* to compound animal feeding stuffs, a purpose, which was sufficiently definite, to constitute a 'particular purpose' within the meaning of S. 14(1), and the evidence showed that, at the relevant time, the firm knew that feeding to mink was a normal user of herring meal and therefore that it was possible that the relevant consignment, or part of it, would be fed to mink; (b) condition 3 of the contract of sale between the respondents and the Norwegian firm did not exclude the right of the respondents to recover damages for breach of contract, for it was to be read as purporting only to exclude the buyer's right to reject goods for default or defects. The respondents were not liable to the appellants for breach of the condition implied by S. 13; nor was the Norwegian firm liable to the respondents for breach of the condition implied by S. 13.<sup>2</sup>

(4) In *Vacwell Engineering Co., Ltd. v. B.D.H. Chemicals, Ltd.*, (1969) 3 All E.R. 1681, A were manufacturers of plant and equipment designed to produce transistor devices. The plant and equipment required the use of certain chemicals, which B, the manufacturers and distributors of chemicals, had been supplying to A over a period of time. In 1964, B, having previously decided to investigate the industrial use of a chemical boron tribromide, advertised the same as a new entry in their catalogue, and in 1965, in order technically to facilitate their manufacturing process, A devised a method by which they could use that chemical. It was known that this chemical reacted on contact with water, emitting a toxic vapour,

1. *Cammell Laird & Co. Ltd. v. Manganese Bronze and Brass Co. Ltd.*, (1934) All E.R. Rep. 1 followed.

2. See also this case as cited under S. 51 at p. 315 *ante* on this point.



but neither of the parties knew that it reacted violently and exploded on contact with water. The entry in B's catalogue appeared without an appropriate warning as to the explosion hazard. In November 1965, at a meeting at A's premises, the method of manufacture devised by them was described to representatives of B, and a prototype of the equipment used was shown. Early in 1966, A gave B an order for 400 glass ampoules of this chemical. These were supplied, and a label affixed to each ampoule bore the warning words "harmful vapour". In April 1966, while two physicists were engaged on washing the labels off some 40 to 100 ampoules, an explosion occurred, killing one of the two men and causing extensive damage to A's premises. The overwhelming probability was that the explosion occurred as the result of the deceased physicist's dropping into the sink one or more of the glass ampoules, which had shattered, so releasing the said chemical into the water which in turn shattered the remaining ampoules in the sink. A claimed damages against B alleging that the accident was caused by breaches of contract and of duty at common law. It was *held*: B were liable because, *inter alia*, they were in breach of an implied condition of fitness for the purpose of the contract under S. 14(1) of the (English) Sale of Goods Act, 1893, inasmuch as (a) the course dealing between the parties up to the date of the contract in 1966 showed that A relied on B's skill to warn them of any unusual hazard which might arise in the ordinary handling and industrial use of a chemical purchased from B, (b) the nature of the parties' respective businesses made it a reasonable inference that A would, and did, rely on B to give such a warning, and (c) without an express warning there was a reasonably forceable risk that the chemical would come into contact with water in the ordinary course of any ordinary industrial use to which it might be put by a manufacturer.

(5) Sale of pigs "with all faults" in a market. The pigs were suffering from typhoid fever and infected other pigs belonging to the buyer. In the absence of fraud on the part of the seller, the buyer was without remedy.<sup>1</sup>

(6) In *Jackson v. Watson & Sons*<sup>2</sup>, there was a sale by a grocer and provision merchant of tinned salmon. The buyer was made ill by the salmon, which was poisonous, and his wife also ate and died from the effect of the poison. The buyer recovered damages including a sum to compensate him for being compelled to hire some one to perform the service which had been rendered by his wife.

(7) *Manchester Liners Ltd v. Rea Ltd*<sup>3</sup> related to an order for 500 tons South Wales coal, for the steamship "Manchester Importer" at Partington. The buyer knew when he gave the order that the seller's sources of supply were limited and might be procurable from the cargo of one particular vessel only. The order was accepted but the coal supplied, which came from the cargo of that vessel, was unsuitable for burning in the "Manchester Importer" which had natural draught furnaces, with the result that she had to abandon her voyage and return to port. The buyer recovered damages.

1. *Ward v. Hobbs*, (1878) 4 App. Cas. 13.

2. (1909) 2 K.B. 193 C.A.  
3. (1922) 2 A.C. 74.



(8) In *Jones v. Bright*<sup>1</sup>, there was a sale of copper for the purpose, known to the seller, of sheathing a ship. Owing to a latent defect the copper perished in a few months and was in fact unfit for the purpose of sheathing a ship. The buyer was held entitled to recover damages.

(9) In *Gedding v. Marsh*,<sup>2</sup> where a manufacturer of mineral waters supplied the plaintiff with mineral water in bottles for sale in her shop the bottles being returnable when empty, and, while the plaintiff was replacing a bottle in its case, the bottle, being defective, burst, it was held that the bottles, though returnable, were "supplied under a contract of sale" within section 14 (of the English Act) and therefore there was an implied warranty that the bottles should be reasonably fit for the purpose for which they were supplied.

The principle underlying this decision is that goods that are essentially necessary to the delivery and use of the goods sold, though they may not be themselves sold, are "supplied under the contract of sale", and the conditions in section 14 of the English Act apply to them.

(10) There was a sale by sample by a woollen manufacturer of indigo cloth to a woollen merchant who was also a tailor. The buyer required it for the purpose of making it into liveries, but this was not made known to the seller in any way. Owing to a latent defect in the cloth (which was also in the sample) it was unfit for that purpose, but there was nothing to show that it was unfit for other purposes for which cloth of that kind might be used. The buyer was without remedy.<sup>3</sup>

(11) A tells B that he can supply him with bunkering coal to suit his steamers. B says he will give an order, but the order must come through L, the coal merchant with whom he deals. This conversation is repeated to L who gives the order. If coal unfit for bunkering is supplied and rejected, A cannot sue for the price.<sup>4</sup>

(12) B buys a bath bun at a baker and confectioner's shop. The bun contains a stone on which B breaks one of his teeth. The seller (it seems) is liable for a breach of warranty under sub-section (1), and also to an action for negligence.<sup>5</sup>

(13) This clause has been construed to mean *intrinsic* fitness for the particular object to which the goods are to be applied and not fitness having regard to some particular legislation or rules framed by the States. Consequently, on a sale of machinery or plant the mere fact that the licensing authority declines to issue a licence in respect of it may not *ipso facto* be a breach of the warranty of fitness, though it may raise a presumption that the goods are not fit.<sup>6</sup>

(14) When goods are ordered of a manufacturer to be made for a particular purpose, the buyer does nonetheless rely upon the seller's skill or judgment by reason only that the buyer supports alterations in

1. (1829) 5 Bing. 533.

2. (1920) 1 K.B. 668 ; 89 L.J.K.B. 526.

3. *Jones v. Padgett*, (1890) 24 Q.B.D. 650.

4. *Crichton v. Love*, (1908) S.C. 818, Court of Session.

5. *Chaproniere v. Mason*, (1905) 21 Time L.R. 633, C.A. (verdict for defendant set aside and new trial ordered).

6. *Joseph Mayr v. Phani Bhushan*, A.I.R. 1939 Cal. 210 ; (1938) Cal. 38.



the mode of manufacture, or the use of particular materials, if such alterations or materials, even where they are the cause of the unfitness, are adopted without objection by the manufacturer.<sup>1</sup> But where it is part of the contract that the goods shall be made according to a certain style, shade, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plain, style, etc., or of the materials for effecting the purpose contemplated.

(15) In *Raghava Menon v. Kuttappan Nair* (A.I.R. 1962 Ker. 318) it was held :

Where a layman purchases a watch of a particular make from a reputed firm which exclusively deals in such watches the sale is governed by exception (1) to S. 16 of the Sale of Goods Act, because in such a case the purpose is only the common purpose and not any special purpose ; the seller knows it, and the purchaser being only a layman, he relies on the seller's skill or judgment. Further, such transaction being a sale by description from a dealer who deals in goods of that description, exception (2) to S. 16 also applies.

On the facts of this case, on construction of the guarantee clause it included the replacement also and the sale was governed by exceptions (1) and (2) to S. 16. The defendant was liable for breach of warranty under the Sale of Goods Act, 1930, and was bound to replace the watch or refund its price.

(16) In *R. S. Thakur v. H.G.E. Corporation*, A.I.R. 1971 Bom. 97, the plaintiff purchased a radio-set of a particular model from defendant No. 2 on 20-2-1962 on a hire-purchase basis. He had paid in advance Rs. 270 on that date and agreed to pay the rest of the sum in six instalments at the rate of Rs. 60 per mensem. Defendant No. 1 was the manufacturer of the radio-sets. Along with the first payment, the plaintiff got a guarantee under which the defendants undertook to repair or exchange free of cost any components except valves which may become defective due to faulty workmanship or material within 1 year from the date of purchase. The history of the radio-set showed that it was defective from the beginning and had to be repaired by defendant No. 2 and had also to be sent for thorough repairs to defendant No. 1. Even after it was received back on 16-7-1963, the set was not in working order and the plaintiff declined to accept it and brought a suit claiming refund of its price, which had been paid in full by that time. It was held that the plaintiff's case fell within Exceptions (1) and (2) of section 16 of the Sale of Goods Act, 1930, and he was entitled to refund.

Nonetheless the buyer may still rely in some respects on the seller's skill or judgment and then the case will be within section 16 (1) of the Act. "Although a person may order an article under a patent or trade name within the meaning of the proviso yet if at the same time that the order is given he makes it clear to the vendor that he is relying on his skill or judgment to ensure that the article shall be fit for a particular purpose, the proviso has no application, and the buyer is entitled to the benefit of the provisions of sub-section (1)."<sup>2</sup> In *Cammell Laird & Co. v. Mangnese*

1. *Hall v. Burke*, (1886) 3 T.L.R. 165 (C.A.).  
2. Per Sargant L.J. in *Baldry v. Marshall*, (1925) 1 K.B. 260, 270. The condition implied is that the goods are reason-

ably fit for the purpose made known to the seller to the extent to which the buyer relied upon the buyer's skill or judgment.



*Bronze and Brass Co. Ltd.*,<sup>1</sup> Lord Bright said : "The condition of fitness may in proper cases be implied where it was only in some respect that the buyer relied on the seller's skill and judgment." The dictum to the contract of Lord Esher in *Hall v. Burke*<sup>2</sup> was disapproved. In *Medway Oil and Storage Co. Ltd. v. Silica Gen. Corporation*,<sup>3</sup> Lord Sumner in the House of Lords laid down the proposition that (a) the buyer's reliance is a question of fact and (b) the reliance on the seller's skill and judgment is not to be exclusive judgment which leads the buyer to agree to the purchase." "The buyer may still call to his aid section 14 (1) (of the English Act) where he relies partly on his own knowledge and common-sense or the advice of his own experts and partly, but substantially, on the skill and judgment of the seller."<sup>4</sup>

Where goods bought from a retailer are prepared and distributed by a manufacturer with the intention that they should be used or consumed by the buyer in the condition in which they leave the factory and these goods have a hidden defect owing to lack of reasonable care in the manufacture and cause buyer damages, he has two claims : "The retailers.....are liable in contract ; so far as they are concerned, no question of negligence is relevant to the liability in contract. But when the position of the manufacturers is considered.....there is no privity of contract.....the liability, if any, must be in tort, and the gist of the cause of action is negligence."<sup>5</sup> But the manufacturer is only liable for *reasonable* care ; where he has taken precautions which can be described as a foolproof process of manufacture, he is not liable in negligence.<sup>6</sup>

Lord Wright observed in *Grant v. Australian Knitting Mills* (1936) A.C. 85 :

"A thing is sold by description though it is specific, so long as it is sold not merely as specific thing but as a thing corresponding to a description, e.g. woollen under-garments, a hot water bottle, a second-hand reaping machine, to select a few obvious illustrations."

"It is not merchantable.....if it has defects unfitting it for its only proper use but not apparent on ordinary examination."

In *Donoghue v. Stevenson*,<sup>7</sup> plaintiff visited a cafe with a friend who ordered a bottle of ginger-beer for her. The plaintiff drank part of its contents, and when the remainder was poured out of the bottle which was of dark opaque glass, a snail in a state of decomposition floated out of the bottle. Plaintiffs, who suffered from shock and gastro-enteritis, claimed damages from the manufacturers of the ginger-beer. The House of Lords held that the manufacturer was liable for negligence.

In *Daniels v. White & Sons*,<sup>8</sup> a husband bought a bottle of 'White's Lemonade'. When consuming the lemonade he and his wife suffered

1. (1934) A.C. 402, p. 429.

2. (1886) 3 T.L.R. 165.

3. (1928) 33 C.C. 195.

4. Benjamin on Sale, 8th Edn., p. 639.

5. Per Lord Wright in *Grant v. Australian Knitting Mills Ltd.*, (1936) A.C. 85, 100-101. See Schmitth on "The Sale of Goods," p. 61.

6. *Daniels v. White & Sons*, (1938) 4 All E.R. 258 ; *Evans v. Triplex Safety Glass Co. Ltd.*, (1936) 1 All E.R. 213 ; *Grant v. Australian Knitting Mills Ltd.*, (1936) A.C. 85.

7. (1932) A.C. 562.

8. (1938) 4 All E.R. 258.



injury because it contained carbolic acid. In an action by both against the retailer and the manufacturers, Lewis J. *held* that (1) the retailer was liable in contract under S. 14(2) of the English Act because the sale was by description and the implied condition of merchantable quality was broken; (2) but the manufacturers were not liable in tort because they used a foolproof method of cleansing and filling the bottles and there was sufficient supervision in their factory. "The duty owed to the consumer or the ultimate purchaser by the manufacturer is not to ensure that his goods are perfect.....his duty is to take reasonable care." The husband in the circumstances, did not rely upon the skill or judgment of the retailer, and could not recover under S. 14(1) of the Act.

In *Holmes v. Ashford*,<sup>1</sup> a hairdresser treated the plaintiff's hair with a dye, and as a result the plaintiff contracted dermatitis. The dye had been delivered to the hairdresser in labelled bottles together with a small brochure of instructions. Both the labels and brochure contained a warning that the dye might be dangerous to certain skin, and a recommendation that a test should be made before it was used. The hairdresser had read the labels and the brochure and was aware of the danger, but he made no test and did not warn the plaintiff. The plaintiff claimed damages against the hairdresser and the manufacturers, and was awarded judgment against both. It was *held* on appeal by the manufacturers: A manufacturer who puts a dangerous article on the market must take reasonable steps to prevent any person coming into contact with it from being injured, but it is not necessary in every case that precautions should be taken to ensure that the ultimate recipient of the article is warned of danger; in the present case, the manufacturers had given the hairdresser a warning which was sufficient to intimate to him the potential danger of the dye, and it was not necessary that they should have warned the plaintiff; and, therefore, they had discharged the duty which was on them.

In *Herschthal v. Stewart & Ardern*,<sup>2</sup> the defendants supplied for the plaintiff's use a reconditioned motor-car, which was delivered at the plaintiff's flat on the afternoon or evening. Early on the following morning the plaintiff drove the car out on business. In turning a corner the near rearwheel came off, owing to the negligence of defendant's servants before delivery and the plaintiff suffered injury. It was *held*: The defendants owed a duty to the plaintiff to take reasonable care that the car, which was intended, as they knew, for his immediate use, should be in a safe condition, and that they were liable for negligence. Where an article supplied is known to be required for immediate use, the test of liability in an action for negligence causing a defect in the article is not whether the injured party had an opportunity for immediate examination of the article; but whether such an examination could reasonably be anticipated by the persons supplying it, who will be liable if no such reasonable anticipation existed.

In *Burfitt v. A. & E. Kille*,<sup>3</sup> the defendants, proprietors of toy and fancy goods shop, sold a "safe-pistol" and fifty blank cartridges to A, a boy twelve years of age. In playing with the pistol A fired it and injured his playmate, the plaintiff B, a boy about ten years of age. The cause of

1. (1950) 2 All E.R. 76.

2. (1939) 4 All E.R. 123; (1940) 1 K.B. 155.

3. (1939) 2 All E.R. 372; (1939) 2 K.B. 739.



the accident was that the pistol became fouled. It was *held*: The pistol and cartridges formed a dangerous combination in the hands of A and the defendants having chosen to sell these pistol and cartridges, could not be heard to say that they did not know, that they might become dangerous in A's hands, and that, therefore, they were liable to B in damages.

In *Parker v. Oloxo Ltd. and Senior*,<sup>1</sup> the plaintiff had been in the habit of having her hair dyed with henna at the second defendant's shop. The second defendant suggested that the plaintiff's hair should be dyed with the Oloxo, a dye which he described as harmless, and which was prepared by and bought by the second defendant from the first defendant. The plaintiff raised objection to the use of such a dye but was assured it was safe to use. The plaintiff as the result of the use of the dye had an acute attack of dermatitis and nervous trouble. The first defendant by its agent had warranted the dye as safe, but for trade reasons it had supplied the second defendant through a wholesale hairdresser's sundriesman. A booklet was issued with the dye which stated that it was dangerous if used without a skin test, but no warning was given to the second defendant as to the danger. A certain quantity of the dye was purchased by the second defendant. She even attended certain lectures and demonstrations given on behalf of the first defendant and the lecture on behalf of the company stated that the company would indemnify hairdresser using the dye against claims arising out of its use. It was *held*: (i) The plaintiff was entitled to recover against the second defendant in contract; (ii) the plaintiff was entitled to recover against the first defendant in tort; (iii) the second defendant was entitled to recover from the first defendant damages for breach of contract and those damages were the damages the second defendant had to pay to the plaintiff in this action and her costs of the action; (iv) the indemnity given at the lectures was not made at such a time that it could be considered a part of the contract with the second defendant.

In *Bajrangi Parshad v. Provincial Government of C.P. & Berar*,<sup>2</sup> it was held: A manufacturer cannot escape liability in respect of a defect which arose not because he carried out the work according to the specification in the contract nor because he was compelled to do something by the buyer or his agent in the course of his manufacture but because of something else such as negligence or want of skill.

Goods are 'of a description which it is in course of the seller's business to supply' when they fall within the term

Goods of a description which it is in the course of the seller's business to supply.

of goods supplied by the seller although in a particular instance they are sold in a special and unusual form. In *Spencer Trading Co. Ltd. v. Devon (Fixol and Stickphast Ltd., Third Parties)*<sup>3</sup>, in 1944

manufacturers and suppliers of adhesive substances and gums supplied to defendant, on a special order an adhesive substance, of which the basis was a gum resin and which was invoiced as a fly gum, for making fly papers for catching flies. They had not previously (or only once a long time before) supplied a similar commodity. In 1945 the defendant ordered a further supply for the same purpose from the manufacturers, who this time used synthetic raw materials in place of the

1. (1937) 3 All E.R. 524.

2. S.A. No. 531 of 1946 D 23-1-49

(Nag.) Indian Digest (1950), p. 708.

3. (1947) 1 All E.R. 284.



natural materials previously employed as a consequence of which the fly gum was unsatisfactory for its purpose. The manufacturers were joined as third parties to an action by the plaintiffs against the defendant in which damages were claimed for supplying goods not reasonably fit for the purpose for which they were ordered under the Sale of Goods Act, 1893, S. 14 (1). It was held that goods are "of a description which it is in the course of seller's business to supply" if they fall within the general description of the goods supplied by the seller, although in a particular instance they take a special form or are designed for a special use, and, therefore, the manufacturers were liable to the defendant under S. 14 (1) of the Sale of Goods Act, 1893, for the breach of an implied condition that the goods were fit for the purpose for which they were required. Helbey J. said: "Although it is true that (sellers) were not making up gum for this particular purpose every day in the course of their business, it was nonetheless an article of a description which it was in their course of business to supply."

According to S. 16 (1) there is an implied condition that the goods should be reasonably fit for the particular purpose for which they are required and a purchaser, if he does not find the goods to be reasonably fit for the purpose for which they are required, is legally entitled to reject them.<sup>1</sup>

**(5) Sale of an article under its patent or trade name—proviso to exception (1).**

This corresponds to the repealed section 115 of the Indian Contract Act. The principle of it was expressed thus in *Bristol Tramways v. Fiat Motors Ltd.*,<sup>2</sup> by Farwell L.J. :

"If a man orders in express terms an article known by a patent or trade name under that name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it even although he told the vendor before he ordered it the purpose for which he required it."

The corresponding proviso in section 14 of the English Act was based on the decision in *Chanter v. Hopkins*.<sup>3</sup> In that case the plaintiff was the patentee of a furnace and stove having an apparatus constructed to consume its own smoke. The defendant, a brewer, wrote to him: "Send me your patent hopper and apparatus to fit up my brewing copper with your smoke-consuming furnace." The furnace and apparatus were sent and proved a failure in defendant's brewery. From the very terms of the order and from conversations with the defendant the plaintiff knew that the apparatus was to be used in a brewery. *Held*, that though the machine had failed in its object, the plaintiff could recover the price of it having supplied what was ordered. Parke B. said: "The purchase is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine."

1. *Baretto v. Puce*, A.I.R. 1939 Nag. 19.

2. (1910) 2 K.B. 831 (cf.) *Gillespie v. Cheney*, (1896) 2 Q.B. 59 (sale of coals

under a particular known description —not a case of a sale of article under its patent or trade name).  
3. (1838) 100 E.R. 1484 ; 51 R.R. 650.



As already observed,<sup>1</sup> where a buyer defines the specific article or the class of goods he required to fulfil his purpose he buys on his own judgment, although he communicates to the seller the particular purpose for which he wants the goods, and he must take the risk of their adaptability. In such a case the buyer's purpose is not an essential element of the sale, but is merely his motive in purchasing. This principle has been specially adopted by the Act with regard to a limited class of goods [though it underlies the general provisions of section 16 (1)], in the proviso to section 16(1).<sup>2</sup>

The proviso does not cover the case of an executory contract for the supply in bulk of manufactured goods, such as coal, though the terms of the contract may require them to be of a description known in the trade.<sup>3</sup> "It is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam ploughs or any form of invention which has a known name, and if bought and sold under its known name, patented or otherwise."

Explaining the scope of the proviso; Farwell L.J. observed in *Bristol Tramways, etc., Co. v. Fiat Motors* :<sup>4</sup>

"This must, in my opinion, be confined to articles which have in fact a patent or trade name under which they can be ordered. By A's patent shaving machine I mean a known article dealt in under that name. It is one thing to order an article known as a Fiat omnibus, an order which is intelligible only if there be such an article known to the public or the trade, it is quite another thing to order an omnibus to be made by the Fiat Company, although in the latter case that company might adopt patterns and devices which were its own exclusive property: the former is within proviso, the latter is not. An omnibus made by the Fiat Company may well be described as a Fiat omnibus but such nomenclature does not necessarily constitute a trade name within the Act; if it did, a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name. A trade name has to be acquired by user, and whether it has or has not been so acquired is a question of fact in each case."

And it does not necessarily follow that because the contract is for the sale of specific articles under its patent or other trade name, even when the name has been acquired by user, there is no implied condition as to its fitness for any particular purpose. For although a person may order article under a patent or trade name within the meaning of the proviso, if at the same time that the order is given he makes it clear to the seller that he is relying on the seller's skill or judgment to insure that the article shall be fit for the particular purpose, the proviso has no application, and the buyer is entitled to the benefit of the provisions of sub-section (1).<sup>5</sup> In that case (*Baldry v. Marshall*) the plaintiff applied to the defendants for a motor car suitable for touring. The defendants

1. See page supra.

2. See Benjamin on Sale, 8th Edn., p. 639.

3. Gillespie Brothers & Co. v. Cheney Eggar & Co., (1896) 2 Q.B. 59.

4. (1910) 2 K.B. 831; 79 L.J.K.B. 1107 (C.A.).

5. Baldry v. Marshall, (1925) 1 K.B. 260; 94 L.J.K.B. 192 (C.A.).



said that the Bugalti car, their speciality, would suit, and showed the plaintiff a specimen. The plaintiff then ordered an "eight-cylinder Bugalti car." The car delivered proved to be unsuitable for touring purposes, and the plaintiff claimed to reject the car and recover back the purchase money. *Held*, that he could do so. The mere fact that the car was sold under its trade name did not necessarily bring the case within the proviso to section 14(1) so as to exclude the implication of the condition of fitness. The car was bought in reliance on the seller's assurance that it would answer the purpose specified by the buyer and 'the fact that it (was) described in the contract by its trade name (did) not have the effect of excluding the condition' implied by S. 14(1) (of the English, Act).<sup>1</sup> Banks L.J. stated the test thus: "Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be?" And he put three cases: (1) where the buyer asks for an article for his purpose and the seller supplies one having a trade name; (2) where the buyer says, "I have been recommended such a trade-name article. Will it suit?"—in these cases the proviso does not apply; (3) where the buyer says, "I have been recommended such an article as suitable.....Please send it"—in this case the proviso applies.

There may, of course, be an express engagement by the seller to supply a patent article to be fit for the buyer's purpose.<sup>2</sup>

The terms of the proviso show that it does not apply except to the patent or trade article *itself*. A condition of the fitness of articles supplied which are necessary to the use of the patent article, may sometimes be implied. Thus where the patentee of a particular gas installed a gas plant, but miscalculated the size of the plant, so that the lighting and heating was wholly insufficient in quantity, but there was no failure in the quality of the gas itself, it was held that a condition should be implied as to the fitness of the plant, and the proviso to section 14(1) of the English Act [corresponding to section 16(1) of the Indian Act] did not apply.<sup>3</sup>

The condition or warranty as to fitness is not, of course, implied in favour of a third person not a party to the contract of sale between whom and the seller there is no privity of contract. To render the seller responsible to a third person, the latter must show either fraud on the part of the seller, or duty to him to take care that the thing sold is fit.<sup>4</sup>

Whether a sale is of goods under patent or trade name or of goods by description is a question of fact. There may not be any warranty that goods sold under a trade name will be fit for any particular purpose, but there may still be a warranty as to general merchantability.<sup>5</sup>

#### (6) Exception (2)—merchantable quality.

Sub-section (2) embodies the second exception recognized at common law to the maxim *caveat emptor*. It lays down that where goods are

1. Per Lord Atkin L.J. at p. 268.

2. See Benjamin on Sale, 8th Edn., p. 642 and the cases cited therein.

3. Paterson v. Newman, (1908) 23 N.Z. L.R. 218.

4. See Benjamin on Sale, 8th Edn., p.

642 and the authorities cited therein.

5. Chhedilal v. But-Over Ltd., (1948) 52 C.W.N. 45. See also Bristol Tramways etc. Co. v. Fiat Motors, (1910) 2 K.B. 831, at pp. 839, 840.



bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. If, however, the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. Thus whereas at common law the implication of a condition that the goods were of merchantable quality did not arise if the buyer had an opportunity to examine the goods, under this section it will only be negated if the buyer has actually examined the goods. Again, under the Act the seller is liable for latent defects which rendered the goods unmerchantable, even if the goods are examined by the buyer, although at common law it was at least doubtful if the seller was so liable.

This rule laid down in this sub-section is thus reduced to this : In the case of goods sold by description by seller who deals in such goods, he is always, *in the absence of agreement to the contrary*, responsible for latent defects in the goods which render them unmerchantable, whether the buyer has examined them or not, *and for all such defects whether latent or discoverable on examination in cases where the buyer has not in fact examined the goods*. Where the buyer gets opportunity of inspection but examined the goods superficially, he cannot complain of defects which reasonable and more thorough examination ought to have revealed.<sup>1</sup> Generally, the implied condition will only be excluded in respect of defects which ought to have been revealed by the examination actually made.

It is to be remembered that the proviso to sub section (1) does not apply to this sub-section, and the implied condition as to merchantableness applies to all goods bought from a seller who deals in goods of that description whether they are sold under a patent or trade name or otherwise.<sup>2</sup> In *R.S. Thakur v. H.G.E. Corporation*, A.I.R. 1971 Bom. 97, it has been held : If the goods are sold under a patent or a trade name or otherwise, and they are of a particular description and if they are sold by a seller who deals in goods of that description, then there is an implied condition as to merchantableness of the goods.

As to when goods are said to be bought by description, see notes to section 15, *ante*. The "quality" of goods, includes their state of condition<sup>3</sup> which includes their packing.<sup>4</sup>

It is essentially a question of fact whether the seller is a dealer within the term of S. 16(2) of the Act in a particular case.<sup>5</sup>

"Goods of that description" means goods of the same kind as those bought. Thus in *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, (1971) 1 All E.R. 847, H.L. (cited at p. 337 *ante*), where an animal food supplier manufactured food to a special formula supplied by the buyer, being food which both parties intended to be fed to mink, even though the seller did not other-

1. *Thornett & Fehr v. Beer & Son*, (1919) 1 K.B. 486 ; 88 L.J. K.B. 684.

2. *Bristol Tramways Co. v. Fiat Motors Ltd.*, (1910) 2 K.B. 131 C.A.

3. See section 2 (12), *ante*.

4. *Niblett v. Confectioners' Materials*

*Co.*, (1921) 3 K.B. 387, C.A. (labels infringing another's trade mark)

5. *National Traders v. Hindustan Soap Works*, A.I.R. 1959 Mad. 112 (A soap manufacturer was held to be dealer in caustic soda).



wise make mink food to that formula or at all, he was held, as already seen, to deal in goods of that description.<sup>1</sup>

The term "merchantable" has not been defined in the Act. Goods are of merchantable quality if they are of such quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept them under the circumstances of the case in performance of the offer to buy them, whether he buys for his own use or to sell again.<sup>2</sup>

"Merchantable quality" does not cover legal title to goods or the legal right to sell. In *Sumner, Permain & Co. v. Webb*,<sup>3</sup> the defendants sold tonic water to be shipped, as they knew, to Argentine. The water contained salicylic acid. Argentine law prohibited the sale of food or drink containing that acid, and the tonic water was condemned on arrival. *Held*, that the fact that by the local law the goods were unsaleable in the country in which the defendants knew that they were to be sold was not a breach of the implied condition that they should be of "merchantable quality." "Merchantable quality," means that the goods comply with the description in the contract, so that to a purchaser buying goods of that description the goods would be good tender. It does not mean that there shall in fact be persons ready to buy the goods...I do not think "merchantable quality" means that there can legally be buyers of that article. If the goods are of the contract description the possibility of legally making a sale of them does not in my view come within the expression "merchantable quality."

In *Henry Kendall & Sons v. William Lillico & Sons Ltd.*, (1968) 2 All E.R. 444 H.L. (cited at p. 336 *ante*), Lords Guest, Pearce and Wilberforce (at pp. 477, 485-6, 493), adopted the definition of Dixon J. in *Australian Knitting Mills v. Grant*,<sup>4</sup> where he said :

"The condition that the goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms."

Lord Reid also accepted this definition, subject to the substitution of "some buyers" for "a buyer."<sup>5</sup>

But this definition was disapproved by the House of Lords in *B.S. Brown & Son Ltd. v. Craiks Ltd.*, (1970) 1 All E.R. 823 (cited at p. 353 *post*), as being too wide. Their Lordships adopted the definition given by Lord Wright in *Cammell Laird & Co. v. Manganese Bronze and Brass Co. Ltd.*, (1934) A.C. 402 H.L., at p. 430, as amended by Lord Reid in *Henry Kendall & Sons v. William Lillico & Sons Ltd.*, (1968) 2 All E.R., 444, at p. 451, but modified it in two respects: by allowing that

1. See Chalmers, 16th Edn., p. 103.

2. Per Farwell L.J. in *Bristol Tramways, etc. Co. v. Fiat Motors*, (1910) 2 K.B. 831, at p. 841; 79 L.J.K.B. 1107 (C.A.); *Morelli v. Fitch & Gibbons*, (1928) 2 K.B. 636; 97 L.J.K.B. 812, (defective bottle of ginger beer).

3. (1922) 1 K.B. 55; 91 L.J.K.B. 228 (C.A.). See also *Phoenix Distributors v. Clarke*, (1966) 2 Lloyd's Rep. 285.

4. (1933) 50 C.L.R. 387 (H.C. of Aus.), at p. 418.

5. (1968) 2 All E.R. 444 H.L., p. 453.



the price element may be material and by holding that it was not necessary that goods should be usable for some purpose for which they—the contract goods—were normally used, provided they were usable for some purpose for which goods of the same general character and designation would normally be used.<sup>1</sup>

Chalmers observes :<sup>2</sup> “If there is a condition of merchantable quality and the seller knows that the goods will undergo transit of a substantial duration, the condition requires that the goods be in such a state at the start of the transit that they will remain merchantable throughout normal transit to their destination and for a reasonable time thereafter to allow for their disposal.”

Under section 16(2) and the proviso thereto, in the case of a sale by description, the implied condition extends to merchantability less patent defects. The defects contemplated by section 16(2) are those “apparent on reasonable examination” within the meaning of section 17 of the Act. The implied warranty will be excluded only as regards any defects which a buyer of ordinary diligence and experience would have detected by due diligence, in the use of all ordinary and usual means. If merchant possessed of ordinary skill, using due care and diligence, would not have thought of the existence of the particular defect which gives rise to the action, such a defect would be a latent or hidden defect as distinguished from a patent defect and for such a latent defect, the seller is liable under the section.

**Latent defects and patent defects — distinction.**

A contract for the sale of certain skins provided *inter alia* that the skins were “to be of fair average quality” of description and to be passed by Messrs. Gordon Woodroffe & Co. Ltd., Madras (buyers) as such.<sup>3</sup> The goods were inspected, approved and accepted. The goods were then sent to England ; but when they were put to work, it was found that there were defects in the skins which were not revealed on examination of the skins in the dry salted state. In a suit by the sellers for the price of the skins the buyers counter-claimed for damages on the ground that the goods supplied did not fulfil the description in the contract. It was held : (1) that the sale being one by description governed by section 16 of the Act, there was an implied condition as to the quality of the goods ; that the fact that the goods had been passed by the buyers did not end the matter and that the superadding of the provision as to inspection did not reduce the importance of the independent undertaking as to quality ; (2) that the defects discovered being latent and not patent defects, the sellers were liable for the same ; (3) that the express condition in the contract that the skins “are to be of fair average quality,” gave the buyers a higher right, apart from the implied condition under section 16(2), that the buyers might treat the condition as a warranty, a breach of which would give rise to a claim for damages, although they would be precluded from rejecting the goods ; and (4) the buyers having accepted the goods

1. Chalmers, 16th Edn., pp. 103, 104.

2. Ibid, p. 105 and the authorities cited therein.

3. A.M.N. Khoyee & Co, v. Gordon

Woodroffe & Co., A.I.R. 1937 Mad. 40 : I.L.R. (1937) Mad. 479 ; 166 I.C. 313.



were entitled in the suit by the sellers for price of the skins, to counterclaim for damages.<sup>1</sup>

In *Hasenbroy Jetha v. New India Corporation Ltd.*,<sup>2</sup> A was a well-reputed firm dealing in second-hand crushing machines. The respondents agreed to purchase a crushing machine from firm A of the description mentioned in contract without a screen. It was found that the machine was not of a merchantable quality. It was *held* that the inspection made by the respondents' representative was of no use inasmuch as the defect was a latent defect which could not be revealed except by a demonstration with electric power and which was in fact not done or avoided on the assurance given by the firm A.

The buyer is not entitled to treat the goods as unmerchantable merely because they are not fit for some particular purpose ; for if goods are sold under a description which they fulfil and if goods under that description are reasonably capable in ordinary use of several purposes, they are of merchantable quality within the meaning of the sub-section if they are reasonably capable of being used for any one or more of such purposes, even if unfit for that one of those purposes which the particular buyer intended.<sup>3</sup>

Thus where barley, sold under the description of feeding barley, was found to be useless as food for pigs, owing to its having been attacked by a fungus, but was still capable of being used as feeding stuff for other animals, it was held that it was not unmerchantable.<sup>4</sup>

In the case of a sale of a motor car by description by a seller who deals in cars of that description, there is under the *Second Exception* of section 16 of the Sale of Goods Act an implied condition in the contract of sale that the car sold is of merchantable quality. When in such a case a latent defect which is not expected in a car of the description of average quality is discovered subsequently there is not only a breach of the implied condition of merchantability under the *Second Exception* of section 16, but also of the implied condition of conformity with description under section 15, and in either case the buyer can under section 13 of the Act treat such a breach of warranty and claim damages, without repudiating the contract of sale. Section 13 of the Act is not limited to a breach of an express condition but extends also to a breach of an implied condition.<sup>5</sup>

Sections 16, 17 and 41 of the Act show that even after the buyer had a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and even when such an examination has taken place, it might still be open to the buyer to reject the goods whether they are not in conformity with the contract because of some defect, which was not apparent on such examination. In other words, S. 41 gives the buyer a right of inspection and

1. *A.M.N. Khoyce & Co. v. Gordon Woodroffe & Co.*, A.I.R. 1937 Mad. 40 : I.L.R. 1937 Mad. 479 : 166 I.C. 313. See also *Hasenbroy Jetha v. New India Corpn. Ltd.*, A.I.R. 1955 Mad. 435 ; *Muthukrishna v. Madhavji Devichand & Co.*, A.I.R. 1953 Mad. 817.  
2. A.I.R. 1955 Mad. 435.

3. *Canada Atlantic Grain Export Co. v. Eilers*, (1929) 35 Com. Cas. 90, at p. 102 ; In re *Andrew Yule & Co.*, A.I.R. 1932 Cal. 879.  
4. *Ibid* ; see also *Jones v. Padgett*, supra.  
5. *Mackenzie & Co. v. Nagendra Nath*, 50 C.W.N. 213 (2) : (1946) 1 Cal. 225.



unless he has had an opportunity of exercising that right, he is not deemed to have accepted the goods and has a right to reject them and therefore till the goods are inspected and accepted, it cannot be stated that the relationship of buyer and seller has become extinguished and the relationship of debtor and creditor or of principal and agent alone remained to be considered. In other words, contract to buy does not immediately transfer ownership but only when goods are found by buyer to be in good condition or when he has accepted them. On rejection of goods as not answering to description the buyer, if he has paid for them, he is entitled to recover from the seller the price as money had and received for his use. Ordinarily when there is a dispute between a buyer and a seller with reference to quality, it would be the duty of the seller to prove that the goods were of the quality contracted for. The suit for return of the advance amount can be filed in the court where the goods were deliverable.<sup>1</sup>

Goods are not merchantable merely because they can be made merchantable at small expense. They must, as a whole (subject to the rule of *minimis non curat lex*), be merchantable at the time of the seller's tender. Thus in the case of a *Jackson v. Rotax Motor & Cycle Co.*,<sup>2</sup> there was a sale of quality of motor horns by instalments. The first instalment was accepted but the second contained a substantial portion of horns which owing to bad packing were dented, while others were owing to careless workmanship badly polished, and by reason of these defects they were not saleable. The buyer was held entitled to reject the whole lot, although it would have cost but little to repair the dents, and to polish the horns properly.

In *Shivalingappa Shankarappa Mendse v. Balakrishna Chettiar & Son*,<sup>3</sup> in a contract for a sale by description, the defendant agreed to sell to the plaintiff Damangan Toor Dhal which was recognised as of best quality. The plaintiff did not examine the goods agreed to be sold. The defendant loaded the goods in rain with the result that when it arrived at the destination it no longer answered the description and could not be sold as toor dhal of best quality. The plaintiff sued for damages. *Held*: As the goods on delivery could not be sold as toor dhal of best quality, but only as toor dhal which has been damaged by moisture, it was no longer of a merchantable quality. There was therefore an implied breach of warranty as to the merchantable quality. Merchantability does not mean that the goods should fetch any price or even some price. The goods must fetch the price which they would fetch if they had been sold as per description.

Under S. 59 of the Act, the right of rejection of a buyer and his right to sue for damages are alternative remedies and can never be cumulative, for they proceed upon contrary state of facts.

On the facts, there was an implied breach of warranty of merchantable quality by reason of the defendant having allowed the goods to

1. Beharilal Baldeo Prasad, In re, A.I.R. 1955 Mad. 271.

2. (1910) 2 K.B. 937 C.A.

3. A.I.R. 1962 Mad. 426 : (1963) 2 Mad. L.J. 140.



become wet while it was loaded in the train. In deciding the quantum of damages the price contracted for is wholly irrelevant and immaterial. The basis for deciding the quantum could either be the difference between the price of the goods of the contracted quality or description on the date of delivery and the price which the damaged goods would have fetched if sold on that date ; or the difference between the price of the goods of the contracted quality or description on the date of sale and the price fetched by the damaged goods on the date of the sale.

#### *Further Illustrations*

The following further examples by way of illustrations may be studied with advantage :

(1) In *B.S. Brown & Son Ltd. v. Craiks Ltd.*, (1970) 1 All E.R. 823, H.L., A ordered a quantity of cloth from B. The orders were for cloth manufactured to a detailed specification intended by A for making dresses. A did not inform B of the purpose for which the cloth was required and B *bona fide* believed that it was required for industrial purposes. The price agreed was higher than would normally have been paid for an industrial fabric but not unreasonably high. The cloth was not suitable for making dresses and A cancelled the contract and claimed damages. Both the parties were left with substantial quantities of cloth. B managed to sell some of this for industrial purposes at 30d. per yard while the price agreed upon was 36.25d. per yard. Cloth of similar description was suitable for a number of industrial purposes but there was no evidence of use of cloth of the precise contract description for industrial purposes. The question was whether for the purposes of S. 14(2) of the (English) Sale of Goods Act, 1893, the cloth was of merchantable quality. It was *held* : The cloth was of merchantable quality, because—(i) the cloth was reasonably capable of being used and was saleable for a number of industrial purposes ; accordingly, there was market for cloth of that general character and description for industrial purposes ; (ii) it was not a necessary requirement of merchantability that there should be no abatement of price ; but if the difference in price was so substantial as to indicate that the goods would be sold only at a throw-away price then that might indicate that the goods were not of merchantable quality ; the present abatement of price, however, was not so material as to justify any such inference.

(2) In *Wilson v. Rickett, Cockerell & Co.*,<sup>1</sup> the plaintiff, a housewife, ordered from the defendants, coal merchants, “a ton of coalite”, and it was duly delivered to her by the defendants. The fuel was purchased by *description* from the defendants whose business it was to supply such goods. When part of the consignment was put on fire in an open grate in the plaintiff's house an explosion occurred which caused damage. The plaintiff claimed damages for breach of warranty under S. 14 of the Sale of Goods Act, 1893. The defendants were held liable under S. 14(2)<sup>2</sup>, as the consignment was not of merchantable quality, and the presence of the explosive piece made it unfit for burning.

(3) The sale of goods by description may have reference to the quality of the goods. To that extent the goods must satisfy the conditions

1. (1954) 1 All E.R. 868 ; *Duke v. Jackson*, (1921) S.C. 362 disapproved.

2. Corresponding to S. 16(2) of the Indian Sale of Goods Act, (1930).



as to quality. In the case of *foodstuffs* where they are purchased by description an implied condition as to their being sound and of merchantable quality may also arise. The condition of the article being reasonably fit for a purpose may be implied from the nature or description of the article itself as in the case of 'dal'<sup>1</sup>. It was *held* in the case : Only the goods corresponding to the quality stipulated for by the plaintiff's firm could sell as 'dhal'. Therefore, the seller was bound to supply goods in conformity with the contract and of merchantable quality and this was not found to be the case on examining the goods.

(4) Sale of certain "bales Manilla hemp," expected to arrive on ships named. The vessels arrived, and the hemp was delivered damaged so as to be unmerchantable, but being still properly described as Manilla hemp. *Held*, that the seller was liable and the buyer was entitled to recover the difference between what it fetched on being resold with all faults and what it would have been worth if it had been shipped in proper condition. In every contract to supply goods of a specified description, which the buyer has had no opportunity to inspect, the goods must not only answer the description, but must be saleable or *merchantable* under that description.<sup>2</sup>

(5) In *Thornett & Fehr v. Beers & Sons*<sup>3</sup> where the buyer's agents though offered every facility of inspecting the barrels of glue inspected the outside only. Bray J. *held* that the buyer having partly relied on the description had bought the glue "by description" and must be held to have examined it. They were satisfied by their inspection of the barrels, which, if opened, would have shown the condition of the glue. Moreover, under the Act, a full examination was not necessary. Accordingly, no condition of merchantable quality could be implied, and the seller was not liable for defects in glue, if any.

(6) In *Peer Mohammad v. Dalooram*<sup>4</sup> where black yarn was purchased and the same found damaged by white ants, it was *held* that the condition regarding merchantability was broken.

(7) In *Malli & Co. v. R.V.A. Firm*<sup>5</sup> where out of a bale of 1,000 pieces 9/10 was found to be damaged (moth eaten) it was *held* to be a breach of a condition. Similarly, where cement was damaged by sea water,<sup>6</sup> or beer contaminated with arsenic,<sup>7</sup> or dates contaminated with sewage<sup>8</sup> the condition as to merchantability was held to have been broken.

(8) In *Grenfell v. Meyrowitz Ltd.*<sup>9</sup>, the plaintiff purchased in 1932 flying goggles described as fitted with "safety glass lenses". In 1935 he was involved in an accident in which he suffered *inter alia* an injury due to a splinter from the goggles entering the eye. The evidence was that the glasses supplied was known in the market in 1932 as "safety glass lenses." It was *held* that there was no warranty of absolute safety and that the plaintiff got what he purported to buy and there was no evidence of unmerchantability.

1. Beharilal Baldeo Prasad, In re, A.I.R. 1955 Mad. 271.

2. Jones v. Just, L.R. 3 Q.B. 197 : 37 L.J.Q.B. 89.

3. (1919) 1 K.B. 486.

4. 47 I.C. 555 : (1918) 35 M.L.J. 180.

5. A.I.R. 1923 Mad. 252 : 69 I.C. 396.

6. Montreal Light, Heat and Power Co. v. Sedgwick, (1910) A.C. 598.

7. Wren v. Holt, (1903) 1 K.B. 610.

8. Asfar & Co. v. Blundell, (1896) 1 Q.B. 123.

9. (1936) 2 All E.R. 1313.



(9) In cases of sale of tyres by a person who is the distributor of Continental Solid tyres, and those tyres only, there is no implied condition as to the fitness of the tyres for any particular purpose, though the goods sold must be of merchantable quality.<sup>1</sup>

(10) Where purchase is made of *Kaithal* ghee and sold as *Kaithal* ghee and which is *Kaithal* ghee, S. 16(2) of the Act applies and there is only an implied condition that the goods sold shall be of merchantable quality and not that it should be pure ghee.<sup>2</sup>

(11) In *Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd.*, (1962) 1 All E.R. 77 [an appeal from (1961) 1 All E.R. 485], the plaintiffs carried on business as dealers in potatoes for human consumption in the U.K. ; the defendants were also dealers in, and importers of potatoes. A contract for the purchase and sale of Cyprus potatoes was made between the plaintiffs' Director and the defendants' agents, duly confirmed by a contract note. On arrival of the potatoes at the port of destination, the potatoes were found to be rotten, suffering from a disease called soft-rot and they were condemned by the Port Health Authority as unfit for human consumption. They were sold by the plaintiffs as pig food at £ 3 per ton. The plaintiffs sued the defendants for damages for breach of warranty under a C. & F. contract. Diplock J. gave judgment for the plaintiffs in the action, there being breach of contract falling within the purview of both Section 14 (1), (2) of the English Sale of Goods Act, 1893. The Court of Appeal held : The alleged warranty was implied in the contract, viz., a warranty that the potatoes, when put on board, were in such a state that, *after normal voyage* they would, on arrival, be in such a condition as to be suitable for the purpose for which the plaintiffs required them i.e. sale to retailers for human consumption. The Court held, however, that the proper inference on the facts proved and on the balance of probability was that *it was not a normal voyage* and there was no sufficient ground for inferring that the potatoes, when put on board at the port, were not to travel on a normal voyage, so as to constitute a breach of the assumed warranty.

(12) In *Godley v. Perry*, (1960) 1 All E.R. 36, the plaintiff, a boy aged six, saw the catapults in the window, came into the defendant's shop and purchased one of them for 6 d. While using it to fire a stone in the normal way the catapult broke and the plaintiff was struck in the left eye either by a piece of the catapult or by the stone and lost his left-eye as a result of the accident. The defendant had bought the catapults from a wholesaler B. The sale was by sample. In an action by the plaintiff alleging against the defendant breach of the condition implied by S. 14(1) and (2) of the English Act, the defendant brought in his supplier B, as third part, alleging against him breach of the condition implied by S. 15 (1) (c) of the Act of 1893, that the goods would be free from any defect rendering them unmerchantable which was not apparent on reasonable examination of the sample. B, in turn, brought in his supplier G, alleging breach of S. 15 (2) (c) against him. It was held :

(i) The defendant was in breach of S. 14(1) and (2) of the Sale of Goods Act, 1893, since—

1. *Globe Automobile Co. v. K.A.K. Master*, 157 I.C. 12 : 8 R.R. 81.

2. *Madhusudan Das v. Ram Kishun Das*, 1943 A.L.W. 325.



(a) [as regards S. 14(1)] the catapult was not reasonably fit for the purpose for which it was required, and the plaintiff had relied on the seller's skill and judgment such reliance being a matter of inference, and the inference being readily drawn where the customer was of very tender years, and

(b) [as regards S. 14(2)] the catapult was bought by description, although it was sold over the counter, and it was not of merchantable quality ;

(ii) the third and fourth parties were both in breach of S. 15 (2) (c) because the catapult had a defect which rendered it unmerchantable but such a defect would not have been apparent on reasonable examination of the sample, the test made by pulling back the elastic of the samples being all that could be reasonably expected of a potential purchaser ; moreover, on the sale between the fourth and third parties, who were wholesalers who had previously done business together, the third party was entitled to regard without suspicion the sample shown to him and to rely on the fourth party's skill in selecting his goods.

(13) In *Morelli v. Fitch & Gibbons*, (1928) All E.R. Rep. 610 : (1928) 2 K.B. 636, the plaintiff, asked for a bottle of Stone's ginger wine at the licensed premises of the defendants. While the plaintiff was endeavouring to draw the cork with a corkscrew the bottle broke at the neck and injured him. It was held : The sale was done by description, and the bottle was not of merchantable quality. Consequently, the condition that it was of such quality implied under S. 14 (2) of the (English) Sale of Goods Act, 1893 [corresponding to S. 16 (2) of the Indian Act] had been broken and the plaintiff was entitled to damages.<sup>1</sup>

(14) In *Bartlett v. Sidney Marcus Ltd.*, (1965) 2 All E.R. 753, there was sale of a secondhand motor car. The buyer was told of the defect in clutch by the defendant's salesman when the plaintiff took the car for trial along with him, but the defects were not considered serious matters. The car was driven for four weeks without trouble. The defect in the clutch was then found serious. It was held : The implied conditions, under S. 14 (1), (2) of the English Sale of Goods Act, 1893, that the car was reasonably fit to drive along the road and that it was of merchantable quality were applicable, but there was no evidence to support the finding of the county court judge that there were breaches of these implied conditions.

### (7) Exception (2) applies to specific goods.

It will be observed that there are no words in section 16 (2) to confine its operation to unascertained or future goods. Indeed, the fact that the sub-section contemplates the possibility of the goods having been actually examined shows that specific goods are not excluded.<sup>2</sup> In *Wren v. Holt*,<sup>3</sup> the plaintiff entered a public-house, licensed for the sale of

1. Here the sale of goods was over the counter.

2. Benjamin on Sale, 8th Edn., p. 646.

3. (1903) 1 K.B. 610 ; cf. *Morelli v. Fitch and Gibbons*, (1928) 2 K.B. 636 ; *Gedding v. Marsh*, (1920) 1 K.B. 898, which show that the conditions

under sub-sections (1) and (2) apply not only to the goods sold, but also to goods that are essentially necessary to the delivery and use of the goods sold as being "supplied under the contract of sale".



beer to be consumed on the premises, knowing that all the beer sold at the house was supplied from H's brewery and with the object of getting H's beer because he preferred it. He, however, only asked for beer generally. The beer supplied contained latent quantities of arsenic, which made plaintiff ill. The jury found that the plaintiff did not rely on the defendant's skill or judgment under section 14 (1) of the English Act. It was *held* by the Court of Appeal that the judgment had been rightly entered for the plaintiff, on the ground that he had bought goods from a seller who dealt in goods of that description, and that there was an implied condition that they should be of merchantable quality.

The sub-section applies only to specific goods sold by description and not otherwise.

Williston observes :<sup>1</sup> "It is obvious that the question whether a seller is bound by an implied obligation that goods shall be of merchantable quality or fit for a particular purpose is somewhat different in the case of a contract to sell goods by description and in the case of an executed sale of specified goods. If the seller contracts to sell goods by description it may well be argued that as a matter of interpretation the contract means not any goods of that description but goods of fair or merchantable quality of that description. That is probably the actual meaning of the parties.

"On the other hand, if the seller agrees to sell a specified article which the parties have before them without in terms warranting it, it is clear that if the obligation of a warrantor is imposed upon the seller, the obligation cannot be derived from the terms of the bargain but is super-added by the law. The obligation, though not merely restitutionary, is *quasi-contractual*, rather than contractual. Because of the difference just alluded to, some courts have been willing to infer an obligation to furnish merchantable goods if the bargain was executory, but not if it was executed. It is to be observed, however, that an executory contract to sell may relate to a specified defined article and on the other hand an executed sale may relate to goods identified only by description. The distinction which these courts have in mind, therefore, is not between executory contracts to sell and executed sales, but rather between bargains (whether sales or contracts to sell) relating to specified goods and bargains relating to goods of a certain description. It is almost always true, however, that an executory contract to sell relates to unspecified goods, and an actual sale still more generally relates to goods specified in some other way than by a description of their character. It is for this reason that courts have referred to the distinction as one between executory contracts and sales rather than between bargains in regard to unspecified goods known only by description and goods otherwise identified.

"In whatever way the distinction be worded it is an important one. If the contract is for the sale of goods specified only by description, and there are various grades and qualities of goods fulfilling that description, it is a reasonable construction of the bargain that goods of merchantable quality are intended. Accordingly, that construction is adopted unless something in the contract indicates a contrary intention. Nor is it material whether the seller is a manufacturer or a dealer or neither. The terms of

1. Williston on Sales, (Revised Edition),

Vol. I, 230, 231, pp. 586 to 592.



the contract may, however, be so specific that the contract itself marks out the extent of the seller's liability, leaving nothing to implication.

“As has been shown in the preceding section, it is more than a liberal rule of construction : it is an imposition of liability irrespective of (though not contradicting) the positive contract of the parties, to hold that there is a warranty of quality in case of a sale of contract to sell specific goods, where there is no promise or affirmation in regard to them.....

“The reason for imposing such a liability upon the seller is that the circumstances of the bargain justify the buyer in inferring that the seller by the very act of offering his goods for sale, asserts or represents that they are merchantable articles of their kind or are fit for some special purpose and that the buyer relies upon this implied assertion or representation. Such an implication and justifiable reliance thereon does not exist in every case. The circumstances which must be considered in deciding the question may be thus summarised : (1) Was the seller a manufacturer of the goods, and thus familiar with their construction ? (2) Or, if not a manufacturer, was he a dealer in goods of that kind, and so a competent judge of their quality ? (3) Did the buyer inspect or have an opportunity to inspect the goods, and was the defect latent so that it could not be discovered by such inspection ? (4) Apart from opportunity to inspect, were these circumstances showing that the buyer selected the goods relying on his own judgment or showing an intention to take the risk of their quality ?”

**(8) Exception (3)—Condition or warranty implied from usage.**

The sub-section contains the same rule as that embodied in old section 110 of the Indian Contract Act, and is based on the decision in *Jones v. Bowden*.<sup>1</sup> In that case there was an action for breach of a warranty. It was shown that in auction sales of certain drugs as pimento, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. Fair samples had been shown, but sea-damage could not be detected by examination. The court *held*, on this evidence, that freedom from sea-damage was an implied warranty in sale.

Section 62, *post*, provides for the converse case of an implied condition or warranty being excluded by usage, if the usage is binding on both the parties to contract.

It was held in *Bombay United Merchants Co. v. Dooluram*<sup>2</sup>, that an importing firm which accepts a commission to order out goods from Europe at a specified rate, and undertakes that the goods will be invoiced to the indenter at the rate, does not, in the absence of proof of usage to the contrary, fulfil its contract by offering to the indenter goods procured in Bombay from another firm in Bombay, though they answer the description of the goods in the order.

*See further notes under section 62.*

1. (1903) 1 K.B. 610, 615 ; see also *Syers v. Jonas*, 2 Ex. 111 ; 74 R.R. 515.      2. (1887) 12 Bom. 50.



**(9) Exception (4)—effect of express condition or warranty on those implied.**

This sub-section lays down that 'an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.' In *Bigge v. Parkinson*,<sup>1</sup> the defendant had made a written offer "to supply your ship, *The Queen Victoria*, to Bombay, with troop stores, viz., dietary, mess utensils, coals, etc. at £ 6 15s. 6d. per head, guaranteed to pass survey of the Honourable East India Company's offices and also guarantee the quantities (qualities) as per invoice." The plaintiff accepted this offer. It was held: This express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended.

In the case of sale of a horse, whether the buyer insisted upon a veterinary doctor's certificate and the seller furnished one, it was still liable for breach of warranty as to the soundness of the horse.<sup>2</sup>

Where there is an express sale by sample the implied condition of merchantable quality is not excluded with regard to latent defects.<sup>3</sup>

An express term, however, will not be extended by implication,<sup>4</sup> and if it be inconsistent with a term implied by law, it will prevail and the term usually implied will be negated.

*Cf.* Section 62 *post* which provides that an implied warranty or condition may be negated or varied by express agreement.

**(10) Hire-purchase agreement—breach of warranty of fitness.**

At the time of a supposed purchase the purchaser entered into a hire-purchase agreement of quite a common kind with a finance company. The document recorded the relationship of hire-purchase between the hirer and the owner in the form of an offer made by the hirer on a printed form signed by the hirer on May 11, 1938. On the same date, a document purporting to be an invoice was signed by the dealer purporting to invoice the apparatus to the hirer. In an action by the hirer against the dealer alleging a breach of warranty of fitness of the apparatus it was contended that the transaction was a sale and not of hire and that the defendant was liable as vendor for the breach of the warranty. *Held*, that the contract was one of hire-purchase and the issue of the invoice did not make it one of sale and the action must fail.<sup>5</sup>

Where, however, the customer is induced by a misrepresentation of the dealer to enter into the hire-purchase agreement with the finance company, the dealer is liable to the customer for damages *e.g.* where a dealer selling a motor car on hire-purchase terms gives the customer an

1. (1862) 7 H. and N. 955 ; 31 L.J. Ex. 301.

2. *O'Grady v. Herbert Winn*, (1912) 6 A.L.J. 285 ; 14 I.C. 135.

3. *Drummond v. Van Ingen*, (1887) 12 App. Cas. 284 ; see also *Mody v. Gregson*, (1858) L.R. 4 Exch. 49, at

p. 53 ; *Baldry v. Marshall*, *supra*. Compare *Wallis v. Pratt*, (1911) A.C. 394.

4. *Dickson v. Zizinia*, (1851) 10 C.B. 602, 84 R.R. 719.

5. *Drury v. Buckland Ltd.*, (1941) 1 All E.R. 269 (C.A.).



express warranty that the car is in perfect condition and the car is not satisfactory, the dealer is directly liable to the customer.<sup>1</sup>

### *Other illustrations*

(1) In *Horn v. Minister of Food*,<sup>2</sup> the seller was a farmer. In 1943, the buyer, the Minister of Food, entered into an agreement for purchase of 33 tons of Majestic ware potatoes in a clamp. Delivery instructions were to be given during May, June or July, 1943. An advance payment of £ 13 was made by the buyer to the seller under the contract. On June 21, the seller opened clamp 298 and found a seam of root. On June 22, he received delivery instructions from the area potato supervisor. At that time he had given no written notice of deterioration to the supervisor, the first notice of deterioration being given by letter dated June 23. On June 25, the supervisor inspected the clamp of potatoes and forthwith cancelled the delivery instructions.

It was found as a fact that the farmer had carried out his duty of exercising care in the storage of the potatoes and in protecting them against the weather. It was *held*: (i) Section 14(2) of the Sale of Goods Act, 1893, did not operate so that there was an implied term in the contract that the potatoes should be merchantable, since that section was subject (*inter alia*) to the provisions of S. 55 of the Act and the parties had expressly contemplated that there might be excessive deterioration of the potatoes; (ii) section 7 of the Act did not apply because the potatoes still answered to the description "potatoes", however grave the deterioration in their condition, and, therefore, they could not be said to have "perished before the risk passed to the buyer" within the section, nor did they "fail to correspond to the description of the potatoes sold" within Condition 4; (iii) the seller having complied with the obligations imposed on him by Condition 1, by the terms of that condition the risk of deterioration was with the buyer, the buyer had failed to give effective, subsisting delivery instructions, which he was obliged to do under the contract, and therefore, the buyer was liable to the seller either in damages or for the price of the goods.

(2) Williston<sup>3</sup> states the principle thus :

If the buyer requests exactly described goods when he enters into an executory contract to purchase them or when he makes an executed purchase of them, it does not preclude an obligation on the part of the seller to furnish merchantable goods of that description; unless description itself is inconsistent with merchantability, but, even though the seller is manufacturer of the goods, the description does preclude a warranty that they are fit for any more special purpose than that which merchantable goods of the agreed description necessarily fulfil. By exactly defining what he wants the buyer has exercised his own judgment instead of relying upon that of the seller. This definition may be given by means of a trade name or in any other way. The description must be the buyer's choice, however, or the goods must be not only described and definite but known, in order

1. *Brown v. Sheen & Richmond Car Sales Ltd.*, (1950) 1 All E.R. 1102 cited at p. 277 *ante*.

2. (1948) 2 All E.R. 1036.

3. Williston on Sales, (Revised Edition), Vol. I, 236, pp. 610 to 614.



to preclude a warranty of fitness. Where the buyer justifiably relies on the seller's skill and judgment to select goods, suitable for his purpose, a warranty of fitness will exist even if the goods which the seller selects are described and definite, unless the buyer knew or ought to have known the characteristic of such goods.

"A description by the buyer, furthermore, may be so general as to allow the seller some choice, and it is often difficult to determine when the seller's judgment is justifiably relied upon and when the description is so definite as to preclude that supposition. Extreme cases may be put on one side and the other which are easily decided, but the question finally resolved itself into one of degree. The line drawn by the courts can best be gauged by examination of the facts of some leading cases, with recognition, however, that there is a greater disposition in recent cases than in earlier ones to imply warranties. Express promises or representation to induce a sale, of course, will render the seller liable, however exactly the goods are defined."

### Miscellaneous

**Sections 19, 37, 59—Breach of warranty—Buyer cannot refuse delivery—He can only recover damages—Goods different from agreed sent to buyer—Buyer can refuse delivery.**

*See under "Section 59" post.<sup>1</sup>*

**\*17.** (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

*Sale by sample.*

(2) In the case of a contract for sale by sample there is an implied condition—

(a) that the bulk shall correspond with the sample in quality ;

(b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;

(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

### Synopsis

- (1) *Sale by sample.*
- (2) *When is sale by sample ?*
- (3) *Implied condition in a sale by sample.*
- (4) *Dangerous goods.*

- (5) *Sale of goods—approval of sample—condition precedent to payment—not operative where condition cannot be fulfilled owing to buyer's default.*

1. *Ramnarayan v. Subramaniam Chetty*, 1962 M.P.L.J. (Notes) 110.

**\*Analogous law**

Section 15 of the English Sale of

Goods Act, 1893 which is the same as section 17 of the Indian Act.

Old section 112 of the Indian Contract Act, 1872, (Appendix B).



**(1) Sale by sample.**

Before the passing of the English Sale of Goods Act, 1893, it was held that on a sale by sample the only warranty was that the sample was fairly taken from the bulk.<sup>1</sup> The purchaser suing for damages on the ground that the bulk did not correspond with the sample had then to establish either a warranty or a false and fraudulent representation that the bulk was equal to the sample. If he relied on an implied warranty, the implication had to be based on facts other than the mere exhibition of the sample. If he relied on a misrepresentation, he had to prove that it was false to the knowledge of the vendor.<sup>2</sup> It was formerly a question in each case whether the term that the goods should correspond with the sample was a condition entitling the purchaser in breach of it to rescind the contract or merely a warranty giving him a right of action for damages; and on the sale of specific chattels the latter construction prevailed.<sup>3</sup> Abbot C.J. observed in *Parker v. Palmer*:<sup>4</sup> "The words 'per sample' introduced into this contract, may be considered to have the same effect as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the rule," and that as a general rule "the purchaser may reject the commodity if it does not correspond with the sample," but as to other like cases, not after he has occupied the goods or dealt with them as his own.<sup>5</sup> Again, at common law it was held that the buyer is entitled to reasonable facilities for inspecting the bulk independently of any local or trade usage to that effect<sup>6</sup> and if there is any latent defect in the sample which, if present in the bulk, would render the goods unmerchantable, the sample is to be taken as free from it.<sup>7</sup> The same result is now arrived at through the combined operation of sections 15 (2) (a) and 11 (c) of the Act of 1893 [corresponding to sections 17 (2) (a) and 13 (2) of the Indian Act].

Williston observes :<sup>8</sup> "In truth, a sample is simply a way of describing the subject-matter of the bargain, and the principles which are applicable to contracts to sell and sales by description are applicable here. Verbal description may be used (1) as a means of identifying existing goods or (2) as a means of describing the quality of existing goods which are otherwise identified, or (3) as a means of describing non-existing goods. The same principles are applicable where the description is by means of a sample.

"In the first case where the description or sample is the only means provided for identifying the goods which are the subject of the bargains, if the goods are not like the description or sample, the means of identification fail and the property cannot pass, though the parties purported to make an executed sale. In the second case, however, if the parties purport

1. *Sayers v. London and Birmingham Flint Glass Co.*, 27 L.J. Ex. 294.

2. *Ormrod v. Huth*, 14 M. & W. 651 : 14 L.J. Ex. 306 ; *Freeman v. Baker*, 3 L.J.K.B. 17 ; *Moens v. Heyworth*, 10 L.J. Ex. 177.

3. *Heyworth v. Hutchinson*, 36 L.J.Q.B. 270.

4. (1821) 4 B. & A. 387 ; 23 R.R. 313.

5. (1821) 4 B. & A. 387 ; 23 R.R. 313.

6. *Lorymer v. Smith*, (1822) 1 B. & C. 1 ; *Polenghi v. Dried Milk Co.*, (1904) 10 Com. Cas. 42 ; *Clements Horst Co. v. Biddel Brothers*, (1912) A.C. 18.

7. *Heilbutt v. Hickson*, (1872) L.R. 7 C.P. 438.

8. *Williston on Sales* (Revised Edition), Vol. I, S. 250, pp. 665 to 667.



to make an executed sale and the goods are clearly identified as being those to which the bargain related, there seems no reason why the property should not pass though the goods are not equal to sample. In the third class, where the goods in regard to which parties are dealing are not specified, the bargain is necessarily executory. In the other two cases also, even though the goods are specified, the bargain may, nevertheless, be executory if the parties so intend. But these three classes of cases need not be distinguished, so far as the obligation of the seller is concerned. In each of them his obligation is the same. If he does not deliver goods equal to the sample, whether the bargain purported to be sale or a contract to sell, he will be liable. The buyer's remedies may, however, vary, and the acceptance of the goods may have an effect in destroying this liability...

"A contract to sell by sample may provide for delivery of the goods in instalments, and sample forming part of one bargain may by implied representation or contract operate as a warranty in subsequent transactions."

"Sale by sample" should be distinguished from "sale by sample as well as by description" in which case it is not sufficient that the bulk of goods corresponds with the sample if the goods do not correspond with the description.<sup>1</sup> The sample in such cases is looked upon as a mere expression of the quality of the article, not of its essential character. In *Nichol v. Godts*,<sup>2</sup> there was sale of foreign refined rape-oil warranted only equal to sample. The oil tendered was the same as the sample but it was not "foreign refined rape-oil" being a mixture of it and another oil. It was held that the seller was liable.

If a sample is exhibited at the time of the contract, a question may arise whether the description or the sample was intended to be essential. The latter case is not strictly speaking a sale by sample within the Act, and it is sufficient if the goods correspond with the sample; in the former case they must answer the description as well.<sup>3</sup> The question which of the two was to be "the touchstone of the contract" depends on the intention and object of the parties issuing the sample.<sup>3</sup> Generally the description is the more important, as it goes to the nature of the goods, whilst the sample deals more with the quality.<sup>4</sup> Evidence is admissible to prove that the sale was by sample though the contract is written and is silent about it.<sup>5</sup> The exhibition of a sample during the negotiations does not necessarily mean that the sale is by sample; it must be a *term* of the contract that the sale shall be by sample.

Section 17(2) now provides that in the case of a contract for sale by sample there is an implied condition—

(a) that the bulk shall correspond with the sample in quality ;

1. Section 15 of the Act. See also *Josling v. Kingsford*, (1863) 13 C.B. [N. S.] 447; *Jones v. Just*, (1868) L.R. 3 Q.B. 197.  
2. (1854) 10 Exch. 191.  
3. *Mody v. Gregson*, L.R. 4 Ex. 49; *Hill v. Smith*, 4 Taunt. 520; *Meyer v. Everth*, 4 Camp., p. 22; *Gardiner v.*

*Gray*, 4 Camp. 144; all cases of written contract which were silent as to the sale being a sale by sample.  
4. *Nichol v. Godts*, supra.  
5. *Syers v. Jonas*, (1848) 2 Exch. 111; sale of tobacco; *Borrowman v. Rossell*, (1864) 16 C.B.N.S. 58.



(b) that buyer shall have a reasonable opportunity of comparing the bulk with the sample ;

(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The word "quality" has been defined in the Act as including the state or condition of the goods [*Vide* Sec. 2(12)], and this has been held to including their packing.<sup>1</sup>

Chalmers observes<sup>2</sup> : "Quality" here is confined to such qualities as are apparent on an ordinary examination of the sample as usually carried out in the trade.

## (2) When is sale by sample ?

According to sub-section (1), in order that a contract of sale should be a contract for sale by sample, it is necessary that there must be an express or implied term to that effect. When the contract expressly provides that the sale is by sample, there can be no difficulty.<sup>3</sup> Where the contract is silent on the point, the term may be implied by the usage of the trade.<sup>4</sup>

The word "sample" has not been defined in the Act. "The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which buyer belongs, using due care and diligence, and appealing to it in the ordinary way, and with the knowledge possessed by merchant of that class at the time."<sup>5</sup>

As has already been referred to above, it must not be assumed that in all cases where a sample is exhibited the sale is a sale "by sample". The seller may show a sample, but decline to sell by it, and require the buyer to trust to the sample and the implied condition, and require an express condition or warranty, in which case there is none implied ; or the contract may be in writing, making no mention of any sample.<sup>6</sup>

In *Mahadev Ganga Parsad v. Gaurishankar*,<sup>7</sup> the only warranty provided for in the written contract was that the goods contracted for would be of the standard quality manufactured by the seller and that a slight difference or variation in the quality will not entitle the purchaser to put an end to the contract and none of the clauses in the agreement gave a

1. *Niblett v. Confectioner's Materials Co.*, (1921) 3 K.B. 387, C.A.

2. 16th Edn., p. 108 citing *Hookway v. Alfred Isaacs & Sons*, (1954) 1 Lloyd's Rep. 223 ; *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, (1971) 1 All E.R. 847, at pp. 856, 872, H.L.

3. *Russell v. Nicolopulo*, (1860) 8 C.B. (N.S.) 362 ; 125 R.R. 683 (sale of wheat).

4. *Syers v. Jonas*, (1848) 2 Exch. 111 ; 76 R.R. 515,

5. Per Lord Macnaghten in *Drummond v. Van Ingen*. (1887) 12 App. Cas. 284 at p. 297 ; sale of worsted coatings by sample containing latent defects which could not be discovered on examination of the sample.

6. See *Benjamin on Sale*, 8th Edn. p. 653.

7. A.I.R. 1950 Orissa 42.



right to the purchaser to cancel the contract on the ground that the contents of the bales, when opened, would not tally with the quality of the sample shown and no sample was retained by the purchaser. It was *held* that the contract was by description and not by sample, as there was no express provision in the contract that the sale was by sample nor any implied condition to that effect would be inferred.

It was further held in the above case : Where a contract of sale is alleged to be by sample and the express contract reduced to writing between the parties is silent about a sample being exhibited or about the quality conforming to a sample shown at the time of the contract, no evidence can be given to determine whether the contract was by sample.

In *Meyer v. Everth*,<sup>1</sup> the seller produced a sample, and represented that the bulk would be of equal quality. There was a sale notice which did not refer to the sample and it was held to be not a sale by sample. Lord Ellenborough observed :

“When the sale notice is silent as to sample, I cannot permit it to be incorporated into a contract as it would amount to the admission of parole evidence to contradict a written document. In truth the present was not a sale by sample and the sample can only be used as evidence of deceitful representation.”

In *Gardiner v. Gray*,<sup>2</sup> the seller showed buyer some samples of waste silk which he had received by letter, the bulk being shipped from the continent to London. Buyer bought the goods, and a sales note for 12 bags of waste silk was written which did not refer to the samples. On arrival the silk was found to be of inferior quality to the samples. It was *held* that the sale was not by sample but by description and that buyer was entitled to recover the price because the goods were not of merchantable quality. “The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity.”

Where sale by sample contains the clause that the goods are sold ‘with all faults and imperfections’, seller is not relieved from his duty to deliver goods corresponding with sample, but may be relieved of his liability for any defects not apparent to buyer on reasonable examination of the sample.<sup>3</sup> In this case, there was sale by sample of Government surplus balloons. On delivery of the balloons it was discovered that the material was perished and unmerchantable. The fabric of the balloons thus did not correspond with the sample. The seller was held liable. Slade J. said, that the clause “with all faults and imperfections” meant that the buyer in effect said : I will accept any goods which correspond with the sample, *i.e.* which are of the same nature and type of goods as those which I have been shown and on the faith of which I decided to buy, and so long as I get goods of that type and quality I will take them with any other faults and imperfections they may transpire to have.”

In *Tye v. Fynmore*,<sup>4</sup> where the seller exhibited a sample of “sassafras wood,” and the buyer inspected it, and had skill in the article, and the

1. (1814) 4 Camp. p. 22.

2. (1815) 4 Camp. p. 144.

3. *Champanhac Ltd. v. Waller Ltd.*,

(1948) 2 All E.R. 724, 726.

4. 3 Camp., 462 ; 14 R.R. 809.



seller then in the sale deed described the goods to be "fair merchantable sassafras wood," it was *held* not to be a sale by sample, but sale by description, with express condition that the woods should be what was understood by "sassafras wood".

Again, provided a specimen of the goods sold has been in existence on the basis of which an offer was accepted, the sale remains a sale by sample, notwithstanding the disappearance or destruction of the specimen. Though the specimen has turned into formula, the offer and acceptance must be regarded as having been made on the basis of the accepted specimen.<sup>1</sup>

The buyer may reject the whole bulk sold by sample, or he may retain the whole, claiming damages for the portion inferior to sample, but he cannot keep the part equal to the sample and reject the other part.

### (3) Implied conditions in a sale by sample.

(a) In the case of a contract for sale by sample the first implied condition is that the bulk corresponds with the sample in quality. As has already been observed<sup>3</sup> the older cases held the term that bulk shall agree with the sample was a warranty, collateral to the contract.<sup>4</sup> But Blackburn J. in a case where goods were guaranteed "about equal to sample" said: "Generally speaking, when the contract is as to any goods such a clause is a *condition* going to the essence of the contract but when the contract is as to specific goods the clause is only collateral to the contract and is the subject of a cross action, or matter in reduction of damages."<sup>5</sup> Mr. Benjamin, after reviewing the cases, argued that the buyer might always reject the goods if the bulk did not correspond with the sample, unless (1) he had finally accepted them, or (2) the contract related to specific goods property in which had passed to him.<sup>6</sup> The Act adopts this view describing the term as a condition and not a warranty, though the parties may agree that the term shall be treated as a warranty and not as a condition.<sup>7</sup>

This condition is not fulfilled where the goods supplied are not in accordance with sample though by a simple process they can be turned into goods which correspond with sample.<sup>8</sup> In this case, the plaintiffs sold to the defendants a quality of rubber material samples of which had been submitted to the buyers. It was to be in rolls of specified length and width. When the buyers placed their order with the sellers they had contracted with a company of footwear manufacturers to sell the rubber to them. Accordingly in placing their order the buyers asked the sellers,

1. Lal Chand Deep Chand v. Baij Nath Jugal Kishore, A.I.R. 1937 Cal. 140.

2. Aitken v. Boullen, (1908) S.C. 490 (Scot.). See Jackson v. Rotax Motor and Cycle Co., if the contract be severable.

3. See pages 362 and 363.

4. E. g. Parker v. Palmer, (1821) 4 B. and Ald. 387, at p. 391, per Lord Tenterden (East India rice).

5. Heyworth v. Hutchinson, (1867) L.R.

2 Q.B. 447, p. 451; cf. Syers v. Jonas (1848) 2 Exch. 111, at p. 117, per Parke B.

6. Benjamin on Sale, 4th Edn., p. 936.

7. Heyworth v. Hutchinson. (1867) L.R. 2 Q.B. 447; Walker v. Shaw (1904) 2 K.B. 152.

8. Ruben (E. & S.) Ltd. v. Faire Bros. & Co. Ltd., (1949) K.B. 254, 260: (1949) 1 All E.R. 215.



and the latter consented to deliver the rubber direct to the footwear company at an agreed delivery charge. The footwear company rejected the rubber because it was crinkly, unsuitable for use in their machines and not upto sample. The buyers then purported to reject the goods by telephone and by letter. The sellers brought an action for the price of the goods and delivery charges, and the buyers counter-claimed for damages for breach of warranty. It was *held* that the buyers, in asking the sellers to deliver on behalf of the buyers the goods ordered to the footwear company, were constructively taking delivery of them at the sellers's premises, were doing an act in relation to them which was "inconsistent with the ownership of the sellers" within the meaning of S. 35 of the Sale of Goods Act, 1893, and thereby lost their right to reject the goods, that they were thus thrown back on their remedy for breach of warranty; that the measurements specified in the contract made the sale one by description as well as by sample; that the fact that the rolls were not of the specified measurements was thus also a breach of the contract; and that the goods were nonetheless out of accord with the sample because only a simple process was required to make them accord with it.

"Ordinarily, the warranty is not to be extended further than that the bulk shall conform to the sample, and a further warranty that the commodity is fit for the particular purpose intended is not, it has been held, ordinarily implied. Thus, such a warranty is not implied in the absence of knowledge by the seller of the buyer's particular purpose and reliance by the buyer upon the seller's skill or judgment as to the fitness of the goods for such purpose. It has been held that the warranty does not necessarily imply that the bulk will answer every purpose which the sample would. Thus, where it was a fact well known to the trade that a cargo of southern wheat would heat and that this might render it unfit for malting although it would not be thereby injured for flour, and a sample was taken in the usual way by thrusting the arm into the bulk, and such sample when tested by the buyer was found fit for malting, it has been held that a warranty that the bulk will also be fit for such purpose will not be implied."<sup>1</sup>

Where an average sample was taken of a large quantity of goods (beans) contained in a number of packages by drawing samples from all the packages and then mixing them together, it was *held* that the purchaser could not reject any of the packages on the ground that *they* were inferior to the average nor recover for the difference in value on that ground; that the true test was whether, if the contents of all the packages delivered were mixed together, the quality of the bulk so formed was equal to that of the average sample drawn.<sup>2</sup> And on a contract for twenty-six bags of Persian berries by a sample, drawn from three to five of the bags, where the buyer had claimed to reject some of the goods on the ground that they were inferior to the sample evidence was held admissible to prove a custom that, upon a sale of berries in bags by sample, the sample represented the average quality of the entire lot, and not the quality of the amount contained in each bag taken separately.<sup>3</sup>

1. American Jurisprudence, Vol. 46, S. 364, pp. 548, 549.

2. Leonard v. Fowler, (1871) 44 N.Y.

289.

3. Schonitzer v. Oriental Print Works, (1873) 144 Mass. 123.



(b) The second implied condition is that the buyer shall have a reasonable opportunity of comparing the bulk with the sample. An improper refusal by the seller to allow this is a breach which justifies the buyer in rejecting the contract.<sup>1</sup> The clause seems to cover wider ground than section 41(1). The latter specifies the buyer's right to examine the goods on delivery for the purpose of ascertaining whether they are in conformity with the contract, while *Lorymer v. Smith* [on which section 15(2) (b) of the English Act is based] shows that the buyer may repudiate the contract if inspection be refused before delivery.

*Prima facie* the place of delivery is the place for comparing the bulk with sample.<sup>2</sup> But this presumption may be rebutted. As observed in *Heilbutt v. Hickson*<sup>3</sup> by Brett J., "such a contract always contains an implied term that the goods may under certain circumstances be returned, that such term necessarily contains certain varying or alternative applications, and amongst others, the following, that if the time of inspection, as agreed upon, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to sample, return them then and there on the hands of the seller."

In *Nagardas v. Vel Mahomed*,<sup>4</sup> the place of examination was at the *bunder* where the goods were delivered and not at the docks where they were carried by the buyer's agent.

Payment of price before comparison (as in c.i.f. contracts where payments are to be made on delivery of documents), an opportunity to inspect being not a condition precedent to payment, does not deprive the buyer of his right to recover the price if after comparison he finds that the bulk does not correspond with the sample and to reject the goods.<sup>5</sup>

A mistake in the sample exhibited may prevent the formation of any contract at all, as where the sample is inadvertently taken from a bulk different from specific bulk intended and expressed to be sold.<sup>6</sup>

The right of comparison of bulk, may, like any other implied right, be excluded by an express agreement. Thus, if the terms of the contract are that the price is payable in exchange for shipping documents, the right is waived although the buyer retains his right of subsequent inspection and rejection if the goods are not according to contract.<sup>7</sup>

1. *Lorymer v. Smith*, (1822) 1 B. & C. 1.  
 2. *Perkins v. Bell*, (1893) 1 Q.B. 193 C.A. (barley delivered at T station); *Grimoldby v. Wells*, (1875) L.R. 10 C.P. 391; *Saunt v. Belcher*, (1920) 26 Com. Cas. 115.  
 3. (1872) L.R. 7 C.P. 438 at p. 456.  
 4. (1930) 32 P.L.R. 454, 460; *Scaliaris v. Ofverberg & Co.*, (1921) 57 T.L.R. 307; examination of goods under a f.o.b. contract when the goods were diverted to another less suitable port

under an Admiralty order.  
 5. *Polenghi v. Dried Milk Co.*, (1904) 10 Com. Cas. 42.  
 6. *Megaw v. Molloy*, (1878) 2 L.R. Ir. 530. Contrast *Scott v. Littledale*, (1858), 8 E. & B. 815, 112 R.R. 791 where the seller attempted to set up his own mistake in exhibiting a wrong sample as a defence to an action by the buyer for non-delivery and was not permitted to do so.  
 7: Under section 41, post.



In *Lorymer v. Smith, supra*, there was sale by sample of two parcels of wheat containing 700 and 1400 bushels respectively on the 11th September. The buyer went to examine the bulk on the 19th September. The parcel containing the 700 bushels which was lying in the seller's warehouse was shown to him, but the seller refused to show him the other parcel which was not then at the warehouse. The buyer was held entitled to rescind the contract and the fact that a few days later the seller offered the buyer the opportunity to inspect the second parcel did not affect the matter.

(c) The third implied condition is that the goods shall be free from any defect, rendering them unmerchantable which would not be apparent on reasonable examination of the sample. It presupposes that both the bulk and the sample contain a latent defect. If the defect in the sample is patent or discoverable by the exercise of ordinary diligence, the seller fulfils his contract by delivering the bulk in accordance with the defective sample. In *Mody v. Gregson*,<sup>1</sup> the defendants agreed to manufacture and supply 2,500 pieces of grey shirting according to sample at 18s. 6d. per piece, each piece to weigh seven pounds. The goods were manufactured, delivered, and accepted by the plaintiffs' agent as being according to sample. But the goods contained china clay to the extent of 15 per cent. of their weight, introduced into their texture for the *purpose only of making them weigh the seven pounds*. The goods were thus rendered unmerchantable. This defect could not be apparent on reasonable examination of the sample. *Held*, the sellers were bound by warranty of merchantable quality. "The object and use of either inspection of bulk or sample alike are to give information disclosing directly through the senses what any amount of circumlocution might fail to express. Neither inspection of bulk nor use of sample absolutely excludes an enquiry whether the thing supplied was otherwise in accordance with the contract." Under similar circumstances, Lord Herschell observed in *Drummond v. Van Ingen & Co.* :<sup>2</sup>

"When a purchaser states generally the nature of the article he requires and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer, just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will fit for the purposes for which an article is ordinarily used just as much as he has a right to rely on manufactured goods supplied on an order without sample complying with such a warranty."

This is so even where the goods have been expressly warranted only equal to sample, for such a term limits the buyer's right to complain of the quality but does not deprive him of the right to have the kind of goods he bargained for (see section 15 *ante*).

Section 17(2) presupposes that both the sample and the bulk contain a latent defect. If the latent defect is in the sample only, there is no breach of the provision and the question would seem to be whether under section 17(2) (a) the bulk corresponds with the apparent quality of the sample. If the defect in the sample is patent, the seller fulfils his contract

1, (1868) L.R. 4 Ex. 49 ; 38 L.J. Ex. 12.

2. (1887) 12 App. Cas. 284 ; cf. *Jatindra*

*Chandra Banerjee v. Muralidhar*,  
A.I.R. 1926 Cal. 740 ; 94 I.C. 873.



by delivering the bulk in accordance with the defective samples for any implied intention that the bulk shall be of higher quality is negatived.<sup>1</sup>

It is to be noted that under section 17(2) (c), the seller need not be the manufacturer or one who deals in such goods ; it refers to seller only. The authority of *Parkinson v. Lee*, (1802) 2 East 314 where the seller was held not liable as he was not the manufacturer, is no longer good law. See *Randall v. Newson*, (1877) 2 Q.B.D. at p. 106.

In a sale by sample, an additional condition may be implied if the seller undertakes that the goods are fit for a particular purpose made known to him under S. 16(1). In such cases it seems that in addition to the goods being equal to the sample they must be reasonably fit for the purpose.<sup>2</sup>

It is also to be observed that section 116 of the Contract Act which provided that in the absence of fraud and of any express warranty of quality the seller of an article which answers the description under which it is sold, is not responsible for a latent defect in it, has been repealed. In cases where there is an implied condition as to merchantable quality e.g. sections 16(2), 17(2) or as to fitness for a particular purpose e.g. section 16 (1), the seller is liable for latent defect, not discoverable on reasonable examination even if there is no fraud. In such cases the implied condition can only be excluded by express provisions to the contrary. See *Randall v. Newson*, (1877) 2 Q.B.D. 102 ; see *Pinnock Bros. v. Lewis Peat*, (1932) 1 K.B. 690, a clause excluding liability for latent defect does not protect the seller when the goods supplied are quite different in substance from the goods contracted for.<sup>3</sup>

#### (4) Dangerous goods.

As to the position of the seller of dangerous goods, Collins M.R. made the following observations in *Clarke v. Army & Navy* :<sup>4</sup> "It seems to me that, independently of any warranty, a relation arises out of the contract of sale between the vendor and purchaser, which imposes on the former a duty towards the latter ; namely a duty, if there is some dangerous quality in the goods sold which he knows, but of which the purchaser cannot be expected to be aware, of taking reasonable precautions in the way of warning the purchaser that special care will be requisite." In that case there was a sale of a tin of disinfectant powder which the seller knew was likely to cause danger, unless special care was taken in opening the tin. The buyer not having been warned of the danger opened it in the ordinary way when a portion of it flew out and injured the buyer's eyes. Held, the seller was liable for the injury so caused.

But the seller would not be liable if he had no knowledge of the dangerous character of the goods. In *Bates v. Batey & Co.*<sup>5</sup>, there was sale of ginger beer in bottle which was defective but the seller had no knowledge of it. The bottle burst when being opened by the buyer and

1. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 56 f.n.s. ; *Mody v. Gregson*, supra.

2. See *Drummond v. Van Ingen*, (1887) 12 A.C. 284, 294, cited at p. 364 ante.

3. See also *Canada Atlantic Grain, etc., Co. v. Eilers* (1930) 35 Com Cas. 9 cited at p. 351.

4. (1903) 1 K.B. 155, 164.

5. (1913) 3 K.B. 357.



injured him. It was *held* that the seller was not liable. In that case it was *also held* that the seller could have discovered the defect by the exercise of reasonable care, but still he was not liable inasmuch as the goods were not dangerous by themselves but became so through a defect occasioned by breach of contract in its delivery.<sup>1</sup>

With regard to an article which is dangerous in itself the manufacturer has a duty to the person to whom he supplies it to warn him of its character and a breach of this duty may render him liable to the recipient or to a third person in whose hands he ought to contemplate it may come, if he is injured while using it. But if its danger is disclosed or is apparent on the face of it there is no obligation if any person is injured through imperfect manufacture.<sup>2</sup> In this case it was also held that the question whether the article (in that case a brazing lamp) was dangerous in itself so as to impose a duty upon the sellers in regard to it to a person to whom they supplied it or into whose hands it came was a question of law for the Judge and not of fact for the jury.

In *Langridge v. Levy*,<sup>3</sup> the seller was held liable for injury caused to the son of the buyer by using a gun in which a defect was fraudulently concealed by the seller ; the use of the gun by the son was in the contemplation of the parties. *George v. Skivington* (1869) L.R. 5 Ex. 1 : dangerous hair wash was compounded by the seller himself ; seller was held liable for injury caused to purchaser's wife. *Cavalier v. Pope*, (1905) 2 K.B. 757. 761 confirmed (1906) A.C. 428 H.L. : Defective premises ; promise by landlord to repair ; personal injury to tenant's wife ; landlord not liable.

*See also notes on pages 342 to 345 ante.*

**(5) Sale of goods—Approval of sample condition precedent to payment—Not operative where condition cannot be fulfilled owing to buyer's default.**

In *Mitchell Cotts & Co. Ltd. v. Hairco. Ltd.*,<sup>4</sup> the defendant agreed to buy a quantity of goat hair from the plaintiff's branch in Sudan at an agreed price c.i.f. the buyers to pay cash after approval of the goods at the port of arrival. No mention was made as to who was to obtain an import licence under the Import of Goods (Control) Order, 1940, and each party was under the impression that it was the duty of the other. When the goods arrived the buyers had already accepted the shipping documents and, as there was no licence to import the goods, they were seized by the customs and forfeited. The sellers claimed the price from the buyers. The buyers contended that the duty to obtain the licence was on the sellers and that approval of the goods was a condition precedent to the obligation to pay. It was *held* : (i) The property in the goods passed to the buyers at latest when they received the shipping documents. Both under the contract and under the legislation affecting the matter the buyers were the importers and the duty to obtain the licence was upon them. (ii) The defence that approval of sample was a condition precedent

1. But see *White v. Statesman*, (1913) 3 K.B. 340 ; hire of a vicious horse.  
2. *Blacker v. Lake*, (1912) 106 L.T. 533.  
*George v. Skivington*, L.R. 5 Ex. 1

dissented from.  
3. (1867) 2 M. & W. 519.  
4. (1943) 2 All E.R. 552.



to the obligation to pay was not available to the buyers as the condition could not be fulfilled owing to the default.

### *Miscellaneous*

#### **(i) Sections 17, 41(2)—Applicability—Sale by the sample—Essentials.**

**C.I.F. contract—Buyer's right to inspect goods before taking delivery—Seller booking goods by rail and sending railway receipt and demand draft to bank—Duty of the buyer—Property in goods when passes.**

In *K.N. Lakshmiah v. Hajee S. Abdul Aziz, Proprietor, Abdul Aziz & Co.*,<sup>1</sup> the appellant entered into a contract with the respondent on 19th March, 1947, for the purchase of 150 cotton parachutes at Rs. 24-8-0 per parachute. The contract, *inter alia*, provided that the goods were to be booked by rail to Hindupur at the risk of the buyer and that every consignment refused or not taken delivery of would be sold by public auction and the buyer alone would be liable for the loss. The appellant was to pay the packing and cartage charges.

The goods were despatched by train to Hindupur where the appellant was to receive them, and the railway receipt was sent along with a demand draft through a bank in Hindupur according to the usual trade practice. The appellant refused to honour the documents and take delivery of the goods pleading that he was entitled to 'open delivery', that is, that he would first make an inspection of the goods and then take delivery of them only if he was satisfied that the goods substantially corresponded with the description or with the sample which, he alleged he was shown. After further correspondence between the parties, the goods being left undelivered at Hindupur, the respondent advertised the sale of goods to be held on 5th August, 1947, but it was stopped and ultimately it was actually held on 24th August, 1947, through certain public auctioneers. A notice sent by the respondent of the sale did not, it appeared, reach the appellant before the date of sale. It was *held* :

(i) There was a completed contract of sale and dominion in the goods passed to the appellant as soon as the contract of sale was signed ;

(ii) the contract was not a contract by sample, and there was no term, either express or implied, to justify an inference to that effect ;

(iii) there was absolutely no ground for any inference of any implied right of inspection in the appellant, and the terms of the contract totally exclude any such right ;

(iv) it was the appellant who committed the breach of contract and occasioned loss through his negligence ; and

(v) the respondent had a right to sell the goods in pursuance of the specific terms of the contract and the fact that a notice was sent which did not reach in time did not place the respondent in a worse position, as no notice was really required by the contract itself.



Section 17 of the Sale of Goods Act relates to a particular kind of sale known to trade usage as a sale by sample. To constitute such a transaction it is necessary that a particular sample should be agreed upon, between the parties, as that to which the goods supplied should correspond and there should also be a clear term in the contract that the sale will be with reference to such a sample. Even a sale at which a specimen of the goods is exhibited may nevertheless not be a sale by sample as it is consistent with the buyer relying on the description alone and not stipulating for conformity to the specimen produced.

S. 41 (2) of the Sale of Goods Act obviously relates to a case where the buyer is to be afforded an opportunity for examination and rejection of the goods before he actually takes delivery as one of the conditions of the understanding between the parties. But this rule is excluded in the case of a C.I.F. contract, the obligation of the seller being to tender the documents within a reasonable time, and he need not wait till the goods have arrived before calling upon the buyer to take up the documents.

**(ii) Latent defects common to sample and bulk.**

It is laid down in American Jurisprudence<sup>1</sup> : "Although there is authority to the contrary, the general rule at common law is that if there is a defect in the bulk and in the sample itself as a part thereof which is unknown and cannot be discovered by reasonable examination, there is no implied warranty against this defect. Thus, where clothing is sold by sample, and the seller is a jobber and not the manufacturer, it has been held that if the goods delivered conform to the sample, there is no implied warranty against a latent defect common to both. Moreover, in a case where the contract by its terms secured to the buyer the right to have the bulk of the goods correspond as to quality and appearance to a sample on which the sale was based, the buyer was held precluded from showing by parole a more enlarged or different contract, by evidence of representations that the mustard seed, the subject-matter of the contract, was clean and free from dirt and impurity, where both the bulk and the sample were defective in this respect, which could not be discovered by inspection. If, however, a manufacturer sells by sample, a warranty that the commodity will be free from latent defects due to the process of manufacture has also been implied at common law, although the defect may also exist in the sample. Moreover, the extent of a warranty in sales by sample is given a broader scope by an express provision of the Uniform Sales Act which provides that "if the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample."<sup>2</sup>

"Where the manufacturer of goods sells them by sample, it is generally held that at common law in addition to the warranty of conformity there is also an implied warranty, as in other sales by manufacturers, that the goods are free from latent defects due to negligence in the process of manufacture. But in such a case there is ordinarily no implied warranty of fitness."

1. Vol. 46, S. 65.

2. See clause (c) of sub-section (2) of S.

17 of the Act.



## CHAPTER III

### EFFECT OF THE CONTRACT

#### Transfer of property as between seller and buyer

#### SUMMARY

**Time when property passes from seller to buyer :** This is an important matter, because

(a) if goods are destroyed by fire or otherwise, it is essential to know who has to bear the loss ; and

(b) in bankruptcy of the either party, it is essential to know whether goods vest in bankrupt's trustee or not.

The property (ownership) passes—

(i) of *unascertained goods*—no property can pass to buyer until goods are ascertained (*Section 18*).

(ii) of *specific goods or ascertained goods*—when the parties intend it to pass (intention ascertained from contract, conduct and circumstances in each case (*Section 19*).

**Rules for ascertaining intention of parties** (unless a different intention appears)—

(1) *In unconditional contract of specific goods ready for delivery—Rule : When contract is made* (immaterial if payment or delivery time or both be postponed) (*Section 20*).

(2) *Of specific goods which require to be made deliverable, or to be measured, weighed or tested etc., for the purpose of ascertaining the price—Rule : When required act is done and the buyer has notice thereof* (*Section 22*).

(3) *In contract of unascertained or future goods by description—Rule : When goods of that description in a deliverable state are unconditionally appropriated to the contract by one party with consent. Such assent may be given either before or after the appropriation is made* [*Section 23 (1)*].

Where, in pursuance of the contract, the seller delivers the goods to buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have *unconditionally appropriated* the goods to the contract [*Section 23 (2)*].

(4) *Of goods delivered to buyer on approval, or “on sale or return” or other similar terms—Rule :*



(a) Immediately he *signifies approval* to seller, or *does not act showing adoption* of transaction ;

(b) If he *retains* goods (without notifying rejection) beyond time (a question of fact) (*Section 24*).

(5) Where seller places a reservation on goods of the *right of disposal* of such until fulfilment of certain conditions—*Rule* : When such *have been carried out* (as in hire-purchase) [*Section 25 (1)*].

In *Paharia Mal Ram Sahai v. Birdhi Chand Jain & Sons*,<sup>1</sup> it was held : Sections 18 to 25 of the Act lay down certain rules with a view to assist Courts to find out when the parties intended to pass the property in goods to the buyer. However, all these rules are only rules of construction and in each case the intention of the parties must be ascertained and then acted upon.

### **Where goods are shipped or put on rail.**

*Rule* : Apart from express reservation of right of disposal, such *right is deemed to be reserved* by seller in the following two cases :

(1) Goods shipped or delivered to a railway administration for carriage by railway and by *bill of lading* or railway receipt, as the case may be, goods are deliverable to the *order* of seller or his agent.

(2) Where seller sends *bill of exchange* for price of goods to a buyer for his acceptance together with bill of lading, or, as the case may be, the railway receipt, property does not pass to buyer *unless he accepts bill of exchange or the railway receipt*, as the case may be. [*Section 25(2), (3)*]

### **Risk prima facie passes with property.**

Unless otherwise agreed, goods are at seller's risk, until property passes to buyer.

When property has passed, goods are at buyer's risk, *whether there has been delivery or not*.

Where delivery delayed through fault of either party, risk falls on party at fault.

Where seller or buyer may be bailee for the other, he must show *ordinary diligence* (*Section 26*).

**\*18.** Where there is a contract for the sale of unascertained goods, no property in goods is transferred to the buyer unless and until the goods are ascertained.

### **Synopsis**

- |   |  |
|---|--|
| (1) <i>Transfer of property as between seller and buyer.</i>    | (3) <i>Portion of a bulk.</i>            |
| (2) <i>Property cannot pass until the goods are identified.</i> | (4) <i>Passing of property and risk.</i> |

1. A.I.R. 1956 Punj. 217 : 58 Punj. L.R. 253.

\*Analogous law

Section 16 of the English Sale of

Goods Act, 1893, which is the same as section 18 of the Indian Act.

Old section 82 of the Contract Act, (1872) (Appendix B).



**(1) Transfer of property as between seller and buyer.**

The passing or transfer of property constitutes the most important element in the law relating to contracts for the sale of goods. If goods are destroyed by fire or otherwise, it is essential to know who has to bear the loss ; and in bankruptcy of either party, it is essential to know whether goods vest in bankrupt's trustee or not.

"Unascertained goods", that is to say, goods defined by description only, must be distinguished from specific goods which according to S. 2(14) of the Act, mean goods identified and agreed upon at the time a contract of sale is made.

This and the five following sections of the Act deal with the question of transfer of property as between seller and buyer and distinguish for that purpose a contract for the sale of unascertained goods from a contract for the sale of ascertained goods.

According to the principle underlying Ss. 18 and 19 of the Sale of Goods Act property in the goods does not pass to the purchaser until he exercises an option and selects the article. Consequently, where it was left to the purchaser to choose one of the two tins of 'Runy' the sale would not be complete until he had exercised his choice and on his failure to do so he could be held liable for the price.<sup>1</sup>

Williston observes : "It is obviously not enough for a present transfer of the property that the goods are so described at some time subsequent to the bargain they will become specific. The earliest conceivable warrant for transfer of the property in such a case is when the goods become identified ; and generally, if not universally, the property will not pass until not only the goods are identified, but some agreed act of appropriation has taken place." (Vol. II. S. 258, p. 5).

**(2) Property cannot pass until the goods are identified—unascertained goods.**

A contract of sale of goods includes both sale as well as an agreement to sell.<sup>2</sup> When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory contract *i.e.*, an agreement to sell. "If A buys from B ten sheep generally, to be delivered hereafter, or ten sheep out of the flock of fifty, whether A is to select them, or B is to choose which he will deliver, or any other mode of separating the ten sheep be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract* ; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B, and to have become the property of A."<sup>3</sup> In accordance with these principles, this section provides that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods

1. Pukraj v. Maghraj, 1939 Marwar L.R. 103 (Civ.).

2. Section 4 of the Act.

3. Benjamin on Sale, 8th Edn., p. 293. See also *Badische etc. v. Hickson*,

(1906) A.C. at p. 421—"A contract to sell unascertained goods is not a complete sale, but a promise to sell"—per Lord Loreburn.



are ascertained. Bovill, C.J. observed in *Heilbutt v. Hickson*, (1872) L.R. 7 C.P. 438, at p. 449 :

“In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract from the nature of the transaction, no property in the goods can pass to the purchaser by virtue of the contract itself ; but where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands as to the vesting of the property very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain.”

Thus the ascertainment of the goods is the condition on which the transfer of the property depends. In any given case there may be a question whether this condition is fulfilled or not, and it may be that the property will not pass even if it is fulfilled, but until it if there is no possibility of the property passing ; or as put by Lord Blackburn, “it is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so, the contract cannot be construed as contract to pass the property in that article.....It is a question of the construction of the contract in each case at what stage the property shall pass and a question of fact whether that stage has been reached.”<sup>1</sup>

When there is a contract for sale of unascertained goods, it is necessary that they should be identified and ascertained before the contract can be performed. If the parties agree that the contract goods shall be taken from some specified larger stock, then there is no identification of goods as contract goods till they are ascertained on severance and in this connection a mere notional severance is not sufficient.<sup>2</sup>

The term “specific goods” is defined in the Act as meaning goods identified and agreed upon at the time a contract of sale is made.<sup>3</sup> Chief instances of “unascertained goods” are “future goods”, that is to say, articles to be manufactured or acquired, or a certain quantity of goods in general, without a specific identification of them, or an “appropriation” of them to the contract. “Ascertained goods probably mean goods identified in accordance with the agreement after the time a contract of sale is made.”<sup>4</sup>

Reading Ss. 18 and 19 together it appears that the word “unascertained” has been used as opposed to “specific or ascertained.” There does not appear to be any material difference between “specific” and “ascertained goods”. The meaning seems to be, more or less, the same. It has, however, been suggested that there is probably this difference that “specific goods” are goods identified at the time of sale, while “ascertained goods” are goods identified in accordance with the agreement after a

1. *Slath v. Moore*, (1886) 11 App. Cas. 350, at p. 370. See also *Gale v. New*, (1937) 4 All E.R. 645 C.A. (goods to be “collected” ; property passed when goods had been collected).  
2. *Paharia Mal Ram Sahai v. Birdhi-*

*chand Jain and Sons*, A.I.R. 1956 Punj. 217 : 58 Punj. L.R. 253.  
3. Section 2(14) of the Act, see pages 16, 17, 18 and 78 to 81.  
4. Per Atkin J. in *re Wait*, (1927) 1 Ch. at p. 630.



contract of sale is made.<sup>1</sup> In this case an agreement for sale of certain timber trees for the purpose of cutting and removing them within a certain period, stated that all the trees except those specifically mentioned therein were sold to the buyer for a consideration and further provided that the buyer could cut the trees only if they had attained a particular girth. It was contended that the sale was of specific goods and title had passed to the buyer. It was *held*: As what trees would fulfil the requirements of the agreement by attaining the necessary girth of cutting within the period of the agreement was a matter which could not be known to the parties at the time of agreement or even later, the sale was not of specific goods but of unascertained goods which were ascertainable from time to time during the period of the agreement and under S. 18 the property in the trees does not pass so long as the ascertainment had not been made.<sup>1</sup>

In *Re Wait*,<sup>2</sup> Wait bought 1,000 tons of wheat *ex motor vessel Challenger* and sold 500 tons of wheat of the same description to buyers who paid in advance of delivery of the goods or bill of lading. Before arrival of the goods Wait became bankrupt; the 500 tons bought by buyers had never been appropriated. It was held by the Court of Appeal that since the goods were unascertained, property in them had not passed to buyers, nor could they claim specific performance under S. 52 of the English Sale of Goods Act, 1893.<sup>3</sup>

The word "property" in the section means the general property in goods and not merely a special property [section (2) (11), *ante*].

It may be noted that the ascertainment is a necessary condition to the agreement to sell becoming a sale.<sup>4</sup> But other conditions to the passing of the property after ascertainment may be imposed.<sup>5</sup>

Goods may be ascertained by an act and in any manner which indicates their appropriation to the contract.

*See notes under S. 23, infra.*

### **(3) Portion of a bulk.**

If goods sold form portion of a bulk, they are not ascertained unless they are separated from the bulk and this is so even though the bulk be of uniform quality and value.<sup>6</sup> In *Laurie & Morewood v. Dudin*,<sup>7</sup> a delivery

1. *Dan Singh v. Firm Janki Saran Kailash Chandra*, A.I.R., 1948 All. 396. See also *Ram Karan Dass Jwala Sahai v. Kumar Sardar Singh*, 1950 All. L.J. 145.

2. (1927) 1 Ch. 606.

3. Corresponding to S. 58 of the Indian Sale of Goods Act, 1930. See also *Kursell v. Timber Operators and Contractors*, (1927) 1 K.B. 298 C.A.—sale of uncut timber in Latvian forest—Timber to be cut when merchantable (which meant conforming to certain measurements):—Cutting to be completed and timber removed within 15 years—Possession taken by purchasers—Subsequent appropriation of forest by Latvian Government—"Specific Goods"—Frustration of contract—Contract not a contract for the sale of specific goods in a deliverable state

within the meaning of S. 18, r. 1 of the English Act.

4. Section 4(3) and (4), *ante*.

5. *Wait v. Baker*, (1848) 2 Ex. 1, 9; 17 L.J.Ex. 307; 76 R.R. 469.

6. *Wallace v. Breeds*, (1811) 13 East 524; *Sale of oil in bulk*; *Boswell v. Killborn*, (1862) 15 Moo. P.C. 309 (hops not separated from bulk); *Shepley v. Davis* (1814) 5 Taunt 617; *hemp in bulk*; *Snell v. Heighton*, (1883) 1 Cal. & El. 95, *sale of bricks not separated from bulk*; *Pletts v. Campbell* (1895) 2 Q.B. 229; *sale of one jar of beer out of the other jars contained in a cart*; *Wardar's (Import and Export) Co. Ltd. v. Norwood & Sons, Ltd.*, (1968) 2 All E.R. 602 cited under S. 23 *post*.

7. (1926) 1 K.B. 223; 95 L.J.K.B. 191 (C.A.).



order for 200 quarters of maize had been given to the buyers and lodged with the warehousemen who held 618 quarters of maize. It was *held* by the Court of Appeal that the giving of the delivery order and its lodgment with the defendants did not pass the property before severance of the 200 quarters from the bulk. Similarly, contract for the sale of shares in a company, which are not identified by numbers, does not transfer any property to the buyers.<sup>1</sup>

Bayley B. observed in *Gillett v. Hill* :<sup>2</sup>

"Those cases may be divided into two classes : one in which there has been a sale of goods and something remains to be done by the vendor and until that is done, the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, *ex a* greater quantity and there is a power of selection in the vendor to deliver which he thinks fit : then the right to them does not pass to the vendee, until the vendor has made his selection, and trover is not maintainable before that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is *no individuality* until it has been divided."

And Scrutton L.J. further remarked in *Sterns v. Vickers* :<sup>3</sup>

"Nor probably will the acquisition of such an undivided interest pass the property, so as to entitle the purchaser to sue for a conversion, in the case where the power of appropriation is, as here, in a third party."

When, therefore, the individuality of the goods depends upon their being weighed, separated, counted, or having similar acts done in relation to them, the doing of such an act is the first condition precedent to the passing of the property.

In *P.S.N.S.A.C. & Co. v. Express Newspapers*, A.I.R. 1968 S.C. 741, the respondent agreed to buy from the appellants 500 tons of Russian newsprint in reels at 9 annas per lb., ex-wharf Bombay and to take delivery of the goods on payment of Rs. 5,60,000/-. At the same time, the appellants agreed to buy from the respondent 415 tons of Russian newsprint in sheets then lying in a godown at Madras, at 9 annas 6 pies per lb. upon the term that the appellants would pay the insurance charges and also interest at 5 per cent. per annum on an amount equivalent to the price of the goods calculated at 8 annas per lb. The understanding was that the appellants would within a reasonable time take delivery of the goods bought by them in instalments, and the accounts would be finally adjusted on the completion of the deliveries. Subsequently the quantities of purchase of both the appellants and the respondent were mutually changed.

1. *Domingo v. De Souza*, A.I.R. 1928 All. 481 : 50 All. 695, cf. *Maneckji Pestonji Bharucha v. Wadilal Sarabhai and Co.*, A.I.R. 1926 P.C. 38 : 94 I.C. 824 : 50 Bom 360.

2. 2 Cr. and M. 530 at 535 ; 3 L.J. Ex. 145 ; 39 R.R. 833.  
3. (1923) 1 K.B. 78 ; 92 L.J.K.B. 331 (C.A.).



The respondent took delivery of the quantity agreed upon while the appellants took delivery of a part of the quantity agreed to be purchased by them, and refused to take delivery of the balance, and finally repudiated the contract. On April 21, 1952, after giving notice to the appellants the respondent resold the balance goods at 6½ annas per lb. It was *held*: The parties agreed that the appellants would buy only 300 tons of the stock of 415 tons of newsprint then lying in the respondent's godown. The result was that in place of the original contract for sale of specific goods a contract for sale of unascertained goods was substituted. It was not a case of the appellants and the respondent becoming joint owners of the stock of 415 tons. Under S. 18 of the Act, it is a condition precedent to the passing of property under a contract of sale that the goods are ascertained. The condition is not fulfilled where there is a contract for sale of a portion of a specified larger stock. Till the portion is identified and appropriated to the contract, no property passes to the buyer. No portion of 415 tons of the newsprint lying in the respondent's godown was appropriated to the contract by the respondent with the appellant's consent before the re-sale. On the date of the re-sale, property in the goods had not passed to the buyer. Consequently the respondent had no right to resell the goods under S. 54(2). The claim to recover the deficiency or resale is therefore not sustainable. The respondent is, however, entitled to claim as damages the difference between the contract price and the market price on the date of the breach. Where no time is fixed under the contract of sale for acceptance of the goods, the measure of damages is *prima facie* the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods.

In *Wait & James v. Midland Bank*,<sup>1</sup> W. & J. sold to R. & Co. by three contracts 1,250 quarters of wheat out of a bulk in a warehouse. R. & Co. gave bills and took delivery of 400 quarters and pledged the remaining 850 quarters to the Midland Bank. R. & Co. paid for 250 quarters, but their subsequent bills were dishonoured, and W. & J. notified the warehousemen to stop delivery. R. & Co. then became insolvent. W. & J. in the meantime had sold all the wheat in the warehouse except the 850 quarters. *Held*, that the 850 quarters had become, by process of exhaustion, "ascertained", and the property had passed to R. & Co. and so to the bank. So long as the goods are unascertained, mere entering a delivery order or making a transfer in the books of the warehouseman will not pass the property in the goods.<sup>2</sup>

In *Brij Coomaree v. Salamander*<sup>3</sup>, it was *held* that a buyer had no insurable interest under a policy as the goods were not ascertained or appropriated, nor being separated from the bulk which contained goods sold to others.

It may be observed that the ascertainment of the goods does not of itself necessarily pass the property. It does so only if the parties have agreed that the property in the goods should pass when ascertained,<sup>4</sup> or in

1. (1926) 31 Com. Cas. 172; see also *R. v. Tideswell*, (1905) 2 K.B. 273.

2. *Busk v. Davis*, (1813) 105 E.R. 429; 15 R.R. 288; see also *Laurie v. Dudin*, (1926) 1 K.B. 223; *Re Wait*, (1927) 1 Ch. 606.

3. (1905) 32 Cal. 816.

4. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 61; *Wait v. Baker*, (1848) 3 Exch. 1, 9; *Campbell v. Mersey Docks and Harbour Board*, (1863) 14 C.B. (N.S.) 411.



other words, there must be also either appropriation with the assent, express or implied, of the parties or delivery. But the parties may agree that the property may pass at any stage. The intention of the parties, if clear, is the deciding factor in all cases.

According to the Civil Law of Rome, the mixing together things solid or dry (*commixtio*) or of things liquid (*confusio*) belonging to different owners, does not affect their ownership if the goods could be separated. If such separation is not practicable, the owners become the joint owners of the whole whenever the mixture has been made with the consent of all the parties, or by accident.

The same rule has been adopted by the courts in England, See *Spence v. Union Marine Ins. Co.*<sup>1</sup> In that case, cotton belonging to several owners was shipped in bales specifically marked. In the course of the voyage the ship was wrecked with the result that some of the goods were lost and with regard to those that were saved the marks were obliterated and, without the fault of the owner, were so mixed up that one part was undistinguishable from the other. It was *held* that all the owners became tenants-in-common of the goods saved.

There are cases where ownership existed before the mixing took place. Thus where part of the goods out of a bulk was sold and was subsequently appropriated and so property passed to the buyer, subsequent mixing up of the part with whole will not deprive the buyer of the property in it but make him owner in common with the seller.<sup>2</sup>

The contract may provide that on the occurrence of a specified event sufficient to identify the goods contracted for the property should *ipso facto* pass. Thus it is competent to parties to contract that fruit as it falls from the tree, or building materials as they are brought upon land by a builder<sup>3</sup> or certified by an engineer,<sup>4</sup> should become the property of the buyer.<sup>5</sup> In *Maneckji v. Wadilal*<sup>6</sup> it was *held* that in cases of contracts for the sale of shares, as soon as the seller hands over the certificates and blank transfers and the buyer accepts them and gives the seller the cheque, the goods become ascertained goods, the sale is complete and the property passes.

### **(5) Passing of property and risk.**

It is to be noted that the passing of the property, and the passing of the risk in regard to the goods need not necessarily be coeval. It is quite possible that the risk may pass independently of the passing of the property though usually it passes with the property. In *Sterns v. Vickers*,<sup>7</sup>

1. (1868) L.R. 3 C.P. 427, 437, distinguished in *Sandeman & Sons v. Tyzack And Branfoot Steamship Co.*, H.L. (Sc.) (1913) A.C. 680—Condition exempting ship from responsibility for obliteration or absence of marks; liability for unmarked goods; shipment failing to deliver the full number of bales shipped.  
2. See *Hayman v. M. Lintock*, (1907) 9 F. 936.  
3. *Reeves v. Barlow*, (1884) 12 Q.B.D. 436; 53 L.J.Q.B. 192 (C.A.).

4. *Banbury and Cheltenham Ry. Co. v. Daniel*, (1884) 54 L.J. Ch. 265.  
5. *Benjamin on Sale*, 8th Edn., 325.  
6. A.I.R. 1926 P.C. 39; 50 Bom. 360; see also *Shanker Lal v. Jamna Dass*, (1937) 39 P.L.R. 778 (provision for postponement of delivery till payment will not *per se* stay passing of property).  
7. (1923) 1 K.B. 78; 92 L.J.K.B. 331 (C.A.); see also *Laurie v. Dudin*, (1925) 2 K.B. 383; (1926) 1 K.B. 223 and notes under section 26 of the Act.



the defendants sold to the plaintiffs a quantity of white spirit, part of a larger quantity lying in a tank belonging to a storage company, and handed to the plaintiffs a delivery warrant by which the storage company undertook to deliver that quantity of spirit to the plaintiffs' order. The plaintiffs endorsed the warrant to their purchaser who paid rent to the storage company from the date of the warrant. Subsequently and before severance the spirit in the tank deteriorated in quality. It was *held* by the Court of Appeal on the fact that the risk passed to the plaintiffs by delivery of the warrant, although they might have acquired, strictly speaking, not property but only an undivided interest in the whole bulk.

#### *Other illustrations*

(1) Where under a clause in the agreement for sale of goods the seller is required to treat the goods as ascertained and appropriated to the contract, the seller cannot by a unilateral action on his part make goods either ascertained or appropriated to the contract particularly in the case of the insolvency of the purchaser. Even if the seller goes to the Insolvency Court and under a wrong apprehension of law makes a claim as if there was already a loss sustained by him on the resale of the goods, that error by itself cannot in fact turn the goods into either specific or ascertained.<sup>1</sup>

(2) In *Firm Bachhraj Amolackchand v. Firm Khupchand Narsingdas*,<sup>2</sup> the defendants, residents of Sambalpur, purchased in December 1939, 31 bales of yarn from the plaintiff who was sole distributing agent of yarn Mills at Akola. The delivery of the goods was to be made at the railway station of Akola. The contract was not for any particular bales but for any 31 bales from the Mills answering that description and forming part of large stock stocked in the Mills. The defendants later repudiated the contract by not taking delivery. The plaintiff after notice to buyer, resold the goods at a loss in June 1940. In a suit against the defendants the plaintiff contended that the property in the goods passed in December 1939 and he had an unpaid seller's lien over the goods under S. 461 (1) and that accordingly he was entitled to sell the goods under S. 54 (2) and recover the resultant damages. It was *held*: (i) The property in the goods did not pass in December 1939 as they were not ascertained till the plaintiff went to the Mills and picked out the 31 bales and appropriated them and this was not till June 1940. The question of lien, therefore, did not arise. (ii) The breach of the contract occurred on 6th January 1940 because that was the date on which delivery was to have been taken. (iii) The loss to be ascertained is the loss at the date of the breach. The plaintiff was, therefore, entitled to the difference between the contract price and the rate prevailing on 6th January 1940 and not on 30th June 1940.<sup>3</sup>

**19. (1)** Where there is a contract for the sale of specific or ascertained goods<sup>4</sup> the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Property passes when intended to pass.

1. *Pulgaon Cotton Mills Ltd. v. Mst. Gulabai*, A.I.R. 1953 Nag. 345.  
2. A.I.R. 1949 Nag. 199, (1948) N.L.J. 561.  
3. *Jamal v. Molla Dawood Sons and Co.*, A.I.R. 1915 P.C. 43 : 48 Cal. 49, 502 followed.

4. Similar principles apply to a contract for the sale of unascertained goods—*Chalmers*, 16th Edn., p. 112 citing *Ginzberg v. Barrow Haematite Steel Co. Ltd.*, and *McKellor*, (1966) 1 Lloyd's Rep. 343.



(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

### Synopsis

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|---|---|
| (1) <i>Analogous law.</i>                   | (5) <i>Transfer of shares in company—</i> |
| (2) <i>Meaning and scope of S. 19.</i>      | <i>complete title when passes—</i>        |
| (3) <i>Property passes when intended to</i> | <i>agreement to transfer and delivery</i> |
| <i>pass.</i>                                | <i>of shares certificates—effect of.</i>  |
| (4) <i>Ascertained goods.</i>               |   |

#### (1) Analogous law.

This section corresponds to section 17, and clause 1 of section 18, of the English Sale of Goods Act, 1893. Sub-sections (1) and (2) are a verbatim adoption of section 17 and sub-section (3) follows clause 1 of section 18, the remaining clauses being enacted as sections 20 to 24 of the Act. Section 19 is based on the principle of the English Law that the property may pass by the contract itself if such be the intention of the parties. "Where by the contract itself," says Parke B. "the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and assent of the vendee to take the specific chattel and to pay the parties is equivalent to his accepting possession. The effect of this contract, therefore, is to vest the property in the bargainee."<sup>1</sup>

#### (2) Meaning and scope of section 19.

Section 78 of the Contract Act<sup>2</sup> being vague and indefinite on this point, it was considered desirable by the Special Committee to follow the clear and definite rule recognised in English Law, viz., that unless a contrary intention appears by the contract, the contract itself is sufficient to pass the property in the goods sold.

*The parties no doubt may make any bargain they like and the law will give effect to it.* When the parties express their intention clearly no difficulty arises. The contract may pass the property at once<sup>3</sup> or at a

1. *Dixon v. Yates*, (1833) 5 B. and Ad. 313 (340).

2. Since repealed (see Appendix B). See Report of the Special Committee.

3. *Calcutta Co. v. De Mattos*, 32 L.J. Q.B. p. 329; *Furley v. Bates*, 33 L.J. Exch. 43; *Young v. Mathews*, L.R. 2 C.P. 127.



future time or contingently on the performance of some condition.. But in many cases the parties either form no intention on the point or fail to express it. To meet such cases a series of definite rules have been worked out for determining when the property is to be deemed to pass according to the imputed intention of the parties. The rules have been reproduced in section 18 of the English Act and they have been adopted in sections 20 to 24 of the Indian Act.

Sub-section (3) states the general proposition that unless a different intention appears, the property passes in accordance with the rules mentioned in sections 20 to 24. This applies both to specific and unascertained goods while sub-sections (1) and (2) apply to the case of specific or ascertained goods. These rules, however, are not exhaustive and in applying them to determine the intention of the parties, regard must be had of the provisions of sub-section (2) of the section *i.e.*, of the terms of the contract, the conduct of the parties and the circumstances of the case. It is the intention of the parties which is of the first importance in determining this question and no hard and fast rule can be laid down which may cover all the cases but every case must be decided on its own fact and the rules here given are only illustrative and not exhaustive. The rules referred to are only rules of presumption which could be rebutted by evidence of a contrary intention ; they are rebutted when the terms of the contract, the conduct of the parties, and the circumstances of the cases, point to another intention.

In *State of Madras v. Ramalingam & Co.*,<sup>1</sup> the Madras High Court held : It is now well-settled law whether under the English Sale of Goods Act or the American Uniform Sales Act, or the Indian Sale of Goods Act which is based largely upon the English and American Acts, that the controlling factor in determining where the sale takes place is the intention of the parties.

A contract of sale is a consensual act. The parties are free to settle any terms they please. And sub-sec. (1) of sec. 19 gives effect to that basic principle of the law of contract. In formulating that intention the parties may fix any time when the property is to pass. It may be the time of delivery, the time of payment of price, the time of the contract, or any other point of time.

It is for the court to ascertain the intention of the parties. And S. 19(2) lays down a rule of guidance for them. Where the terms of the contract are reduced to writing, Sec. 19 of the Indian Evidence Act comes into play. The primary evidence from which the intention of the parties is to be gathered then becomes the document itself.

In practice the method becomes this : The Court first collects the material by allowing the parties to give evidence of the terms of the contract, their conduct in relation to the contract and other surrounding circumstances. Then it sees as to which of the rules in Ss. 20 to 24 is applicable and how far the applicability of a particular rule is contradicted.

### **(3) Property passes when intended to pass.**

If the parties so agree, the property may pass in goods appropriated by mutual assent to the contract although there remain acts to be done by

1. A.I.R. 1956 Mad. 695.



the seller before the goods are deliverable.<sup>1</sup> If the article is not in a deliverable state and the possession is still with the seller who is required by the contract to do something in connection with it and the price also is not paid, the presumption is that the parties did not intend to pass the property by the mere fact of entering into the contract. Where, however, it appears from the agreement that the price is agreed to be paid before the goods are in a deliverable state, that fact itself affords an indication that the parties intended the property to pass immediately. For whilst the seller is unpaid it is exclusively to his interest that the property should pass, for he gets rid of the risk, but if he was paid partially or entirely it is in the buyer's interest that the property should pass to him for if the property has passed to him and the seller becomes bankrupt, he gets the article himself as being his property while if it has not passed, he can only share rateably with other creditors for what he has paid.

It is open to the parties to fix any time or stage of the transaction when the property may pass from the seller to the buyer and when such intention is expressed or can be unequivocally inferred from the agreement of the parties the mere fact that the seller had still something to do with the goods will not prevent the property from passing to the buyer at such time or stage.<sup>2</sup> Where a delivery order was given for bricks and the seller's agent informed the buyer that all the bricks finished as well as unfinished in certain clamps were appropriated to the contract, it was held the property in the bricks in all the clamps passed to the buyer.<sup>3</sup>

Sub-section (1) of this section lays down the rule that it is the intention of the parties that determines whether the property in the goods agreed to be sold has passed or not.<sup>4</sup> As observed by Lord Blackburn in *Seath & Co. v. Moore*,<sup>5</sup> "it is competent to parties to agree for valuable consideration that specific article shall be sold and become the property of the buyer as soon as it attained a certain stage though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *prima facie* presumption against its being the intention of the parties that the property should then pass. It is, I think, question of the construction of the contract in each case at what stage the property shall pass; and a question of fact in each case whether that stage has been reached."

The intention is to be gathered from the terms of the contract, the conduct of the parties and surrounding circumstances.<sup>6</sup> "The rule of construction", observed Kelby C.B., "applicable in general to all written contracts is, that they are to be constructed according to the real intention of the parties, to be collected from the language they have used; that effect is to be given, if possible, to every word used, and that every word is to be interpreted according to its natural and ordinary meaning unless such construction would be contrary to the manifest intention of the parties, or

1. Remfry, p. 143.

2. *Seath v. Moore*, 11 App. Cas. 350 (370); *Furley v. Bates*, 33 L.J. Ex. Ch. 43; *Kershaw v. Ogden*, 34 L.J. Ex. Ch. 159.

3. *Young v. Mathews*, 36 L.J.C.P. 61.

4. *Seath v. Moore*, (1886) 11 App. Cas. 350; *Reid v. Macbeth*, (1904) A.C.

228 H.L.; *McEntire v. Crossley*, (1895) A.C. 457; *Sir J. Laing v. Barclay*, (1908) A.C., 5, H.L.

5. (1886) 11 App. Cas. 350.

6. Sub-section (2); *The Parchim* (1918) A.C. 157, at p. 161; *Badische Anilin v. Hickson*, (1906) A.C. 419; *Saks v. Tilley*, (1915) 32 T.L.R. 148, C.A.



would necessarily lead to some contradiction or absurdity. But this rule, though applicable to contracts in general, must be received with some qualification, when the contract or a portion of the contract in question consists of an incomplete sentence, ambiguous in its terms, and upon which a liberal construction of every word would either be impracticable or would leave the contract indeterminable and uncertain.”<sup>1</sup> The inference in mercantile contracts,” says Kennedy L.J., “is that each party will do what is merchantably reasonable.”<sup>2</sup>

Williston observes :<sup>3</sup> “As late as the beginning of the nineteenth century it seems to have been supposed that mere assent of the parties to a contract to buy and sell goods was insufficient to transfer the property, unless a term of credit was expressly agreed upon. But now the rule has become clearly recognized that in case of an agreement for consideration, whether the consideration consists in some actual performance as payment of the price, or in a promise, express or implied, the time of the transfer of the property (whether such transfer is possible) depends upon the intention of the parties, however indicated.

But intention in this connection is meant in the law of sales as throughout the law governing of the formulation of contracts, expressed intention. This is indicated by the provisions of sub-section (2) of the section. Parties should not be allowed to testify as to their mental intentions, but merely as to what they said and did.”

In *Re Anchor Line (Henderson Brothers) Ltd.*,<sup>4</sup> the Anchor Line succeeded the Ocean S.S. Co., as occupiers of a basin and agreed to take over a crane, owned by Ocean Co., on the following terms ; deferred purchase price to be £ 4,000, in the meantime certain yearly sums to be paid for interest and depreciation, the total amount paid in respect of depreciation to be deducted from the price of £ 4,000 on completion of the purchase whenever it took place. The Anchor Line paid under the agreement for some four years and then went into liquidation. As against the liquidation it was held that the property in the crane had not passed to the Anchor Line because under the agreement there was a postponement of the purchase itself and not merely a postponement of the payment of the price upon the completed purchase. Section 18 of the English Sale of Goods Act, 1893, had no application because in fact a different intention appeared from the agreement.

In *Chidambaram Chettiar v. Steel Bros.*,<sup>5</sup> there was a mixed contract for storage of paddy and its subsequent sale. The paddy was in the first instance delivered to the defendant for storage, and the plaintiff had the option to name a day on which the defendant was to buy at his current buying rate for that day. In these circumstances the property in the goods was held not to pass until the option had been exercised ; and as to

1. Per Kelby C.B. in *Coddington v. Paleolego*, (1867) L.R. 2 Exch. 193 (200) ; cf. Per Lord Esher in *Horick v. Muller*, 7 Q.B.D. 92 (103). See *Dennant v. Skinner*, (1948) 2 All E.R. 29 for auction sales (under S. 54, post).  
2. *Biddell Bros. v. E. Clemens Horst & Co.*, 1911) 1 K.B., p. 958.

3. Williston on Sales (Revised Edition), Vol. II, S. 261, pp. 9, 10  
4. (1936) 2 All E.R. 941 ; (1937) 1 Ch. 1. See also *Cheetham & Co. v. Thornham Spinning Co.*, (1964) 2 Lloyd's Rep. 17 (retention of shipping documents pending payment).  
5. A.I.R. 1946 Rangoon 419 ; 165 I.C. 308.



the price, it was held that if the defendant had made no purchase that day the rate must be fixed having regard to the market price.

In *Prem Singh Hyanki v. Deb Singh Bisht*,<sup>1</sup> A entered into a contract with B by which A sold certain quantity of wool to B. The terms of the contract recited that A was to give the wool in possession of B within 5 days ; that he had received certain amount from B by way of earnest money and was to receive remaining amount when the wool was given in possession of B, that if the wool was not transferred to the possession of B within time, or if B did not take it, B or A was to have damages and lastly, that if the wool was found rotten in any way, B would have right to take out of it after making choice. Their Lordships were inclined to the view that it was a contract for the sale of the ascertained goods : that the parties intended the property in goods to be transferred to the purchaser B on the signing of the contract and that the last condition amounted to only to a warranty given by A, the existence whereof did not prevent the property from passing.

In *Kahn & Kahn v. Premsukh*,<sup>2</sup> it was remarked that though the incidence of risk is a good test in determining in which of the two parties the property in the goods vests, it is not a conclusive test and the question always is one of the intention of the parties, as other circumstances may show that the property was retained by one party in spite of the fact that they were shipped or booked at the risk of the other party.

Cases where in the past the Indian courts recognized that they would be free to give effect to the agreement of the parties on this point, may still be cited as authorities under the present law.

In *Nenuram v. State of Rajasthan*,<sup>3</sup> the petitioner entered into a contract with the State Government for supply of window frames and doors and for fixing them to buildings. It was *held* : The contract was a works contract and was indivisible. Hence, the materials supplied in execution of works contract was not sale of goods but formed part of the contract. Further, at the time when the goods were prepared and taken to the employer's premises, there was no sale of goods, because the property in the goods could not pass from the petitioner to the employer until they were fixed to the building. But once they were so fixed they became part and parcel of the immovable property of the employer on the principle of accretion and not because of a contract for sale of moveable goods.

In *The Parchim*<sup>4</sup> it appeared from the facts of the case that the intention of the parties to the contract was that the property in the cargo should pass to the purchaser on shipment and be at his risk but that he was not intended to have possession of it, or of the bills of lading, until actual payment of the purchase price at the expiration of an agreed period of credit, which did not expire till after the ship had been captured. It was held : The inference that the property in the cargo had passed to the purchaser before the capture was not displaced by the form of the bills of lading, which was ambiguous.

1. A.I.R. 1948 P.C. 20 ; Watt v. Thomas, (1947) 1 All E.R. 582 on reversal on a question of fact by an Appellate Court referred to.

2. A.I.R. 1931 Lah. 260 ; 144 I.C. 1110.  
3. A.I.R. 1967 Raj. 50.  
4. (1918) A.C. 157 P.C. ; 39 Digest. Rep. p. 634.



Referring to this case Halsbury<sup>1</sup> says : If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract. This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods of the contract, he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract. (See per Lord Parker *the Parchim*, (1918) A.C. at p. 170).

In *Reid v. Macbeth & Gray*<sup>2</sup>, there was a contract to build a ship to be classed AI at Lloyd's. The contract contained this clause : "The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds, become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase-money." Before the ship was completed, the shipbuilders became bankrupt. At the date of the bankruptcy, there were lying at the railway stations a quantity of iron and steel plates at the orders of the shipbuilders, marked for the ship. It was held that the contract was for the purchase of a complete ship, and the materials in question could not be regarded as appropriated to the contract or sold under the Act.

In *Sir James Laing & Sons, Ltd. v. Barclay, Curle & Co. Ltd.*<sup>3</sup>, it was held : Where it appears to be the intention of the parties to a contract for the building of a ship that the vessel is not to be delivered and finally accepted until after an official trial off a foreign coast, and until after conditions of the contract have been fulfilled as to speed, consumption of coal, capacity etc., the property in the ship does not pass to the purchaser while the vessel remains uncompleted, although the contract contains stipulations for the price to be paid by instalments at certain periods of construction.

In *Badische Anilin Fabrik v. Hickson*,<sup>4</sup> A in the United Kingdom agreed to sell to B patented goods which were in Switzerland. A procured the goods in Switzerland and forwarded those to Basle and his agent held them at B's disposal. If B assents to this, the property in the goods thereupon passed to B.

An interesting case *Lacis v. Cashmarts*, (1969) 2 Q.B. 400, D.C. is cited by Chalmers<sup>5</sup> as follows : A selects goods in a supermarket and

1. Laws of England, 3rd Edn. Vol. 34th, p. 182.

2. (1904) A.C. 223 Cf. *In re Blyth Shipbuilding Co.*, (1926) Ch. 494.

3. (1908) A.C. 35; 39 Digest Rep. p. 612.

4. (1906) A.C. 419. See Chalmers, 16th Edn., p. 112; Digest. 39 Rep., p. 605.

5. Sale of Goods Act, 16th Edn., p. 113.



takes them to the cash desk. The price is £ 185, but the cash register records only £ 85, being incapable of recording over £ 100. A pays £ 85, knowing it is not the true price, and removes the goods. The manager of the supermarket is supervising at the cash desk. Although normally it is the intention of the parties in this type of case that the property shall not pass until the price is paid, the property here passes to A upon payment of £ 85, because the manager intended the property so to pass.

In *District Board, Hoshiarpur v. Hira Singh*<sup>1</sup> it was observed : Sale can be completed without effecting immediate delivery or even without immediate payment. Though passing of title in goods is an essential ingredient of sale, physical delivery of goods is not essential.

Similarly in *Rane Ltd. v. State*,<sup>2</sup> it was observed : "The governing principle which should determine as to the passing of the property in the goods must be to find out what is the intention of the parties. On a perusal of the entire documents we have no hesitation to agree with the finding of the Appellate Tribunal that the property in the vehicles passed only after they were delivered in the State of Kerala."

In *Looke P.P. v. N.J. Mathew*, 1968 Cr. L.J. 561 (Ker.), the company pledged to Financial Corporation its plant and machinery executing a deed of assignment transferring its right, title and interest to the Corporation absolutely till liability of the Company was discharged. The Company was not entitled to transfer the property without concurrence of the Corporation. Later on, the company agreed to sell property to R who was aware of the position, and transferred custody of the plant and received purchase-money, both parties intending that the property would be conveyed only after receiving the concurrence of the Corporation. Company's balance sheet showed value of machinery as an item of asset and R as a sundry creditor in respect of purchase money paid by him. It was held that there was nothing wrong in doing this and no criminal act was done.

In *Saks v. Tilley*<sup>3</sup>, A made an oral offer to purchase from B, diamonds at a price fixed and to give a six months' bill. B, who were diamond merchants abroad accepted the offer, sent the diamonds by post to A together with the bill for acceptance and an invoice marked "settled by acceptance". The bill was never accepted and the transaction was repudiated by A. It was admitted that all similar dealings in diamonds were carried through on the credit of acceptances. It was held that as the bill of exchange was not accepted, the ownership of the diamonds remained in the seller B.

In *President of India v. Metcalfe Shipping Co. Ltd.*<sup>4</sup>, in 1961, the Government of India, the charterers, bought a quantity of fertilisers from sellers in Italy. They chartered a British ship to carry the fertiliser from Ancona to Madras. The Italian sellers loaded the fertiliser on to the ship and took a bill of lading to order. They indorsed it in blank. They presented it in due course to the charterer who paid the price, took the bill of lading and obtained

1. A.I.R. 1968 Punj. 289.

2. A.I.R. 1968 Kerala 74, 76.

3. (1965) 32 T.L.R. 148, C.A.

4. (1969) 3 All E.R. 1549 affirming (1969)  
1 All E.R. 861.



delivery of the goods. But they claimed that there was a shortage on delivery and asked for arbitration in accordance with a clause in the charterparty. The shipowners refused. They said that the carriage was governed not by the charterparty but by the bill of lading which did not contain an arbitration clause. The bill of lading was subject to "All conditions and exceptions as per charterparty." It was held: In a case such as this the relations between shipowner and charterer are governed by the charterparty. Even though the charterer is not the shipper and takes as indorsee of a bill of lading, nevertheless their relations are governed by the charter, at any rate when the master is only authorised to sign bills of lading without prejudice to the charter.

#### (4) Ascertained goods.

The Act does not define the term "ascertained goods", though "specific goods" is defined as meaning goods identified and agreed upon at the time a contract of sale is made. The former is really of wider import. As contrasted with specific goods, it may be intended to cover the case of goods which have become ascertained subsequently to the formation of the contract,<sup>1</sup> although they would not be "specific goods" as defined by the Act.

#### (5) Transfer of shares in company—Complete title when passes—Agreement to transfer and delivery of share certificates—Effect on.

A promissory note was executed for cash paid, and it was agreed that the note should be returned duly cancelled on the promisor getting 20 shares of a company standing in the name of his father-in-law, R, transferred to the payee or his nominee. R executed an agreement in which he undertook to transfer the shares to the payee and further stated, "I herewith hand over to you duly endorsed the share certificates." This agreement was signed by R and countersigned by the payee. The actual share certificate contained an endorsement of transfer signed by R transferring the shares to the payee, but the space for the signature of transferee and the company's officials was not filled up. Nothing further was done in the matter of the transfer until the company got into difficulties and went into liquidation after some months. In a suit on the promissory note for the amount thereunder, *held*, that it could not be said that the agreement executed by R, itself would amount to a transfer deed sufficient to cause title to pass; it purported to be an agreement of transfer accompanying the actual instrument of transfer, and if the instrument of transfer had not been completed so far as the transferor could complete it, the agreement by itself would be nothing more than an enforceable agreement to convey, and until the transfer endorsement was signed, the shares would be *unascertained goods* and they would not be in a deliverable state. But if R signed both the agreement and the transfer endorsement on the share certificate and communicated the fact to the payee who countersigned the agreement in token of acceptance of the transfer, then it would be the buyer's fault that he did not cancel the note and get the formalities of the transfer completed. In such circumstances the title in the shares would

1. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 67(1): Atkin L.J. (in re.

Wait, (1927) 1 Ch. 606 at p. 630.



pass to the transferee and the payee would be disentitled to sue on the note.<sup>1</sup>

*Some miscellaneous cases*

(i) In *Shantilal Nagindas v. Jumabhai Sarifbhai*,<sup>2</sup> there was sale of specific goods already shipped to be delivered at B by plaintiff's agent. Letter authorising defendant to take delivery from agent was given to him. Goods were lost at sea. It was *held* that property in goods did not pass to defendant and the plaintiff was not entitled to recover price of the goods sold. Moreover, under S. 21 of the Act it was further necessary to prove that the agent of the plaintiff informed the defendant that he was ready to give the delivery, and it was only after the stage had passed that the defendant would be responsible for the loss of property.

**(ii) Goods despatched by railway addressed to self—Sale when becomes completed—Sale of Goods Act, 1930, Sections 19, 20; Bihar Sales Tax Act, 1947, Section 2 (g).**

As provided in Ss. 19 and 20 of the Sale of Goods Act, 1930, the property in goods sold may pass to the buyer at the time of the conduct of sale even though it is despatched subsequently to the address of the seller himself. The sale is completed as soon as the property in the goods passes. However, the seller may show that the sale is not a completed sale. And in this respect, the onus is on the assessee to prove under what circumstances the despatches of goods were made. The terms of the contract being within the special knowledge of the assessee if he withholds to place them before the taxing authorities, they are within the limits of law in holding on the materials that were before them that the despatches of goods amounted to sale within the meaning of Bihar Sales Tax Act.<sup>3</sup>

**(iii) Section 19—Delivery to be free alongside vessel—Property passes as soon as goods are placed alongside vessel.**

In a contract of sale of jute the vendor and vendee agreed that delivery was to be free alongside the vessel in port. The goods were appropriated to the contract and were placed alongside the vessel. It was *held* that the property in the goods passed as soon as the goods were placed alongside the vessel.<sup>4</sup>

**(iv) Sections 19, 25—Place of sale—Test—Constitution of India, Art. 286—Madras General Sales Tax Act, 1939, S. 3.**

The test for determining whether a sale took place in the State or not was whether under the contract between the buyer and seller the property in the goods did or did not pass within the State.

Under the rules framed under the Madras General Sales Tax Act in regard to ground-nut, the tax is levied on the purchaser.

1. *Kuppiah Chetty v. Saraswathi Ammal*, A.I.R. 1941 Mad. 769; 1941 M.W. N. 919. See also *Bank of India v. J.A.H. Chinoy*, A.I.R. 1950 P.C. 90—contract for sale of shares—Right to dividends.

2. (1948) Sau. L.R. 96.

3. *G.I. Rice and Oil Mills v. State of Bihar*, A.I.R. 1957 Pat. 178.

4. *Bhagwandas v. A.J. Mills Co.*, A.I.R. 1957 Cal. 143.



The assesseees were a limited liability company incorporated in England and carried on business *inter alia* in ground-nut at, among other places, Madras, and with their head office in Bombay. During the war, the assesseees contracted to supply ground-nut to the British Ministry of Food, the export from India being from the port of Marmagoa. The offer and acceptance which resulted in the contract of sale and the final acceptance of the goods in performance thereof as well as the payment of the price all took place outside the Madras State. The only matters which occurred in this jurisdiction were (1) the presence of the goods at the time of the formation of the contract and their despatch from Madras to implement it; (2) the consignment of the goods by rail or railway receipts in which the buyer was shown as both consignor or consignee. It was held: The presence of the goods in Madras at the time of the sale was irrelevant. Delivery to a carrier would no doubt be an appropriation in cases where the buyer authorises the despatch of goods through that agency, but the appropriation involved in such act need not necessarily be unconditional, which it has to be for the passing of property—where delivery to the carrier is the only fact relied on for constituting the appropriation and so the transfer of property. In the present case there were several circumstances which militated against the delivery to the carrier and the goods being consigned in the name of the assessee being treated as sufficient to pass property.<sup>1</sup>

**(v) Purchase of shares—Passing of title—Delivery—Companies Act, (1913), S. 34.**

In *A. Sinha & Sons v. Smt. Sushila Sen*,<sup>2</sup> it was held: The delivery of share scrips by a broker together with transfer deeds in blank duly executed by the registered holders of the shares effects a valid transfer of the shares in favour of the purchasers. It is not necessary for the broker first to get his own name entered in the register of shareholders and then to execute a transfer deed as vendor in favour of the purchaser. There would, in a case where there were no other agreed terms governing the mode of transfer, be an effective delivery once the share scrips and duly executed transfer deeds in blank were handed over. Therefore, the purchaser would have had no case for the recovery of money paid for the shares, except for the fact that the plaintiff set up special agreement that the defendant would also get the shares duly registered in the books of the company. There is nothing illegal in view of S. 19 (3) of the Sale of Goods Act in such a special contract being entered into between the parties who may stipulate that mere delivery of share scrips and signed transfer deeds in blank to the vendee would not suffice to complete the transfer but that due registration by the company of the name of the vendee would also be required and if the broker did not succeed in getting the share scrips so registered, then the contract would fail and the purchaser would be entitled to a refund of whatever money he had paid against return of the share scrips.

**(vi) Passing of property defeasibly.**

In *McDougall v. Aeromarine of Emsworth Ltd.*<sup>3</sup>, it was held: It is not an unfamiliar conception in contracts for the sale of goods that the

1. *State of Madras v. Louis Dreyfus and Co. Ltd.*, A.I.R. 1956 Mad. 659.

2. (1957) All W.R. (H.C.) 104.

3. (1958) 1 W.L.R. 1126.



property should pass defeasibly. It cannot, therefore, be said that a clause providing for the transfer of property, whether qualified by the adjective "absolute" or not, in incomplete goods or their components of itself irrevocably deprives the buyer of any right to reject the goods when completed, and to divest himself of his property therein. The question seems to depend on the construction of the contract as a whole.

**(vii) Sale under F.O.B. contracts—Property in goods passes to seller only when they are put on board the ship—Such sales are exempt from sales-tax.**

In *B.K. Wadeyar v. M/s. Daulatram Rameshwari*,<sup>1</sup> the Supreme Court held: Sales in which the goods remain the seller's property till they had been brought on board the ship are exempt from sales-tax under Art. 286(1) (b) of the Constitution. The law is now well settled that if property in the goods passes to the buyer after they have, for the purpose of export to a foreign country, crossed the customs' frontier, the sale has taken place "in the course of the export" out of the territory of India. The normal rule in F.O.B. contracts is that, in the absence of special agreement, the property in the goods does not pass until the goods are actually put on board the ship.

The question whether the parties came to a different agreement as to when the property in the goods shall pass has to be decided on a consideration of all the surrounding circumstances. The following circumstances are not sufficient to hold that the seller and the buyer agreed that the property will pass to the buyer even before shipment :

(i) The fact that the Bill of Lading was taken in the name of the buyer when it has been retained by the sellers. When the Bills of Lading though made out as if the goods were shipped by the buyer, were actually obtained by the sellers, that fact itself would ordinarily indicate an intention of the parties that property in the goods would not pass till after payment.

(ii) The circumstance that the export was, under the contract, to be under the buyer's export licence because the ordinary rule in F.O.B. contracts is that it is the duty of the buyer to obtain the necessary licence.

(iii) The intention of the parties is that in compliance with the requirements of Clause 5(2) of the Exports (Control) Order, 1954, the goods shall be the property of the licensee at the time of the export. The word "export" in that order must be taken to have the same meaning as given to it by the definition in the Import & Export (Control) Act, 1947, and on that definition the time of export is the time when the goods go out of the territorial limits of India. These territorial limits would include the territorial waters of India. Consequently, the time of the export is when the ship with the goods goes beyond the territorial limits. At any rate, the export of the goods cannot be considered to have commenced before the ship carrying goods leaves the port. Hence, the intention of the parties would mean nothing more than that the property in the goods shall pass immediately before the ship goes beyond the territorial waters of the country or at the earlier when the ship leaves the port. Whichever

1. A.I.R. 1961 S.C. 311, dismissing appeals from *Daulatram Rameshwari v.*

*B.K. Wadeyar*, A.I.R. 1958 Bom. 120.



view is taken, there is nothing to indicate that the intention to comply with the requirements of Clause 5(2) of the Exports (Control) Order carries with it an intention that the property should pass to the buyer at the time the goods cross the customs' frontier.

**(viii) Unconditional contract of sale of specific goods in deliverable state—Property passes on date of contract though goods are delivered later on.**

*See D.S. Sahni v. Faqir Singh*, A.I.R. 1960 J. & K. 6 cited at p. 163 ante under S. 4.

**(ix) Sections 19, 20—Evidence Act, 1872, S. 115—Income-tax Act, 1922, Ss. 26(2), 46.**

Where there is an agreement to sell with sanction of military authorities as condition precedent, the title passes after sanction. Attachment of goods for recovery of income-tax arrears due from the vendor after passing of title is illegal. Section 26(2) and S. 46 of the Income-tax Act, (1922), did not apply. Where there is auction sale for recovery of income-tax arrears, the vendee purchasing property is not estopped from challenging the attachment. (*Badri Das v. Union of India*, A.I.R. 1963 All. 346).

**(x) Sections 19, 23(1) and 25(1)—Railways Act, 1890, (as amended by Act of 1961), S 57.**

Where the Railways deliver goods to consignee on executing indemnity bond contrary to consignor's instructions, the Railway is liable in a suit by the consignor for recovery of price of goods against the Railway. (*Mussadi Lal Phool Chand v. Union of India*, A.I.R. 1964 Punj. 20).

**(xi) Sections 19, 23, 25, 29—Situs of sale.**

There was a contract for sale of bamboos by a dealer in Orissa. Goods were booked from a station in Orissa in the name of the buyer as consignor for delivery to third party outside Orissa. Part payment of the price was to be made on delivery of railway receipt. In these circumstances, the seller lost his property right over the goods sold to P firm as soon as he booked them by rail at Sambalpur in the name of P as consignor and as such the sales came within the taxing ambit of the State of Orissa for the purposes of assessing sales tax. The seller had not led any evidence to rebut the inference.<sup>1</sup>

**(xii) Section 19—Indian Contract Act, Ss. 2(h), 4 and 10—Sale of forest produce by auction—Sale notification laying down the condition of sale—Mere acceptance of highest bid by sale officer whether concludes contract and passes property in goods to the purchaser.**

In *State v. R. Ranganathan Chettiar*, A.I.R. 1975 Mad. 292, a clause in the conditions of sale provided :

"The sale is subject to confirmation by the District Forest Officer, Thanjavur or the Conservation of Forests, Coimbatore, as the case may be, who reserves to himself the right to reject any bid including the highest bid without assigning any reason for so doing. Subject to the right of the District Forest Officer or the Conservator



of Forests to reject any bid without assigning any reason therefor, and subject to the fact that the conditions of the sale notice have been fulfilled, bidders are warned that the highest bid will be accepted. Even though the bids are absurdly high, sales will not, on this account, be refused confirmation nor will there be any sealing down of the bid nor sale by negotiation at a lower figure."

It was *held* : A distinction is made between the highest bidder and the successful bidder at such auctions. A successful bidder should be deemed to be one to whom a communication has been sent by the appropriate officer intimating him of the order confirming the sale in the prescribed form. A "successful bidder" would be one who was not only the highest bidder, but also one who has paid the sale amount and the security deposit and a person to whom an intimation as to confirmation of the sale has been sent and who is ready and willing to execute an agreement as provided in clause 19 within ten days of the receipt of the order of confirmation. In the absence of it, there was no concluded contract between the parties which could be legally enforced.

No doubt it is accepted law that on the fall of the hammer a contract of sale is concluded invariably in an auction sale. But this is only a *prima facie* presumption. This can be set at naught by establishing a manifest intention on the part of the parties to the said auction which would prevent an automatic application of the rule. The passing of title on the fall of the hammer may be an accepted mercantile practice in the case of ordinary auctions. But in a peculiar auction of the kind before us one has to gather the intention of the parties by meticulously invoking each and every condition under which the auction was so held. Whether the fall of the hammer or as in this case, the acceptance of the highest bid would amount to absolute acceptance or provisional acceptance or conditional acceptance of the offer made by the bidder is a matter which has to be adjudged with reference to the facts of each case and in particular to the conditions and stipulation under which the auction by the department of a State is undertaken. As the words and conditions in the Forest notification are clear and unambiguous a strict interpretation is called for in the instant case. Non-compliance with any or more of the conditions so expressed in the contract would necessarily lead to the conclusion that the contract is not concluded though the hammer has fallen in the auction. On the facts of this case there being no concluded contract the property in the goods did not pass to the plaintiff. He was, therefore, entitled to a return of the sale amount and the security deposit made by him (see also *Somasundaram Pillai v. Provincial Government of Madras*, A.I.R. 1947 Mad. 366 with special reference to the observations of the learned Chief Justice, quoted at p. 302 of A.I.R. 1975 Mad. 292).

*See also notes on pp. 180, 181, 182 ante.*

**\*20.** Where there is an unconditional contract for the sale of specific goods in deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

**\*Analogous law.**  
Rule 1, section 18 of the English Sale of Goods Act, 1893, which is the

same as section 20 of the Indian Act.



## Synopsis

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|--|---|
| <p>(1) <i>Unconditional sale of specific goods in a deliverable state—property in the goods passes to the buyer when the contract is made.</i></p> <p>(2) <i>Presumption created by this section not displaced by postponement of the time of payment of the price or the time of delivery</i></p> | <p><i>of the goods or both.</i></p> <p>(3) <i>Unless a different intention appears—intention of the parties to be regarded.</i></p> <p>(4) <i>Deliverable state.</i></p> <p>(5) <i>Non-severable contract of moveable and immoveable property.</i></p> <p>(6) <i>Bilty-cut transaction.</i></p> |
|--|---|

**(1) Unconditional sale of specific goods in a deliverable state—Property in the goods passes to the buyer when the contract is made.**

Sub-section (2) of section 4 of the Act refers to conditional contracts of sale.<sup>1</sup> The present section lays down that where there is an *unconditional* contract for the sale of *specific goods* in a *deliverable state*, the property in the goods passes to the buyer when the contract is made, and that it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

The term “specific goods” is defined in section 2(14) of the Act as meaning ‘goods identified and agreed upon at the time a contract of sale is made’. And according to section 2(3), goods are said to be in a “deliverable state” when they are in such state that the buyer would under the contract be bound to take delivery of them.

## Illustrations

The section may be illustrated by the following examples :

(1) The defendant agreed to sell to the plaintiff a certain stack of hay for £ 145, payable on the ensuing February 4, the stack to be allowed to stand on the premises until the first day of May. This was held to be an immediate, not a prospective sale, the goods being specific and in a deliverable state although there was also a stipulation that the hay was not to be cut till paid for.<sup>2</sup> “The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee.”

(2) Sale of a specific number of bushels of oats, the contents of a bin in a warehouse. The seller gives a delivery order to the buyer, addressed to the warehouseman, authorising delivery of the oats to the buyer and asking the warehouseman to weigh them. The warehouseman accepts the order and enters it in his books. The property has passed to the buyer as the weighing was not necessary to identify the oats or to ascertain the price, but was merely for the satisfaction of the buyer.<sup>3</sup>

(3) In *Provincial Automobile Co. Ltd. v. The State*,<sup>4</sup> the Ford Motor Company of India Ltd., Bombay, placed allotment of cars in favour of the

1. See notes on pages 150-157.

2. *Tarling v. Baxter*, (1827) 6 B. & C. 360, 30 R.R. 355.

3. *Swanwick v. Sothorn*, (1839) 9 A. & E. 895, 48 R.R. 740. See also *District*

*Board, Hoshiarpur v. Hira Singh*, A.I.R. 1968 Punj. 289 cited at p. 389 *ante*.

4. (1952) S.T.C. 147; (1952) Nag. L.J. 149.



applicant who was their distributor at Nagpur. Within the allotments placed at its disposal, the applicant struck bargains with others and sold the cars to them. The Diwan of Nandgaon State wanted one car of a particular variety. In the allotment of May, 1947, the company allotted to the applicant 4 cars of that variety. On 15th May, 1947, the applicant asked the company to send a car direct to Rajnandgaon by rail. The car was accordingly sent by rail on 9th June, 1947. In the invoice dated 4th June, 1947, the engine number was mentioned. The question was whether sales-tax would be levied on this sale under the Central Provinces and Berar Sales Tax Act, 1947. The Sales Tax Commissioner basing his arguments on S. 20 of the Sale of Goods Act held that the cars were specific goods in a deliverable state and that the transfer of property took place at the place where the contracts of sale took place. The distributor contended that the sales were made outside the province and that sales-tax was not leviable on these transactions. It was *held*: (i) Section 20 of the Sale of Goods Act was not applicable to the case and the transfer of property did not occur at the time when the contract was made. (ii) The word "identified" in section 2(14) of the Act implies establishment of identity of the goods in question. Thus the buyer and the seller must both be quite clear about the identity of the goods in question and there should be no ambiguity whatsoever about it. When a seller agrees to sell one of a number of vehicles which are identical in all respects, it cannot be said that specific goods have been sold because one does not know with respect to which vehicle the property is transferred. (iii) Section 20 of the Act only fixes the point of time when the transfer of property takes place. It does not state that the place where the contract is made should be deemed to be the place where the transfer of property takes place. In a case where goods are situated at a place different from where the contract of sale takes place it is somewhat unnatural to assume that the goods have been transported in space to the place where the contract is made. It is more natural to assume that the transfer of property in goods takes place at the place where the goods are actually situated. In any case, unless there is a specific provision of law to that effect, it would not be correct to assume that the transfer of property takes place where the contract of sale is made. (iv) Under S. 23(1) of the Sale of Goods Act the transfer of property took place on the date of appropriation *viz.*, 4th June, 1947, and on that date both the transfers of property, from the company to the applicant, and from the applicant to the Diwan of Nandgaon State, took place at Bombay.

In *Badriprasad v. The State of M.P.*,<sup>1</sup> there was an auction sale of cut timber in forest, that is, of specified goods in deliverable state. The price was payable in instalments. The first instalment was paid at the time of provisional acceptance of bid by the Divisional Forest Officer. Formal contract signed by both the Divisional Forest Officer and the purchaser was sent for acceptance to the Chief Conservator of Forests and delivery of goods was made to the purchaser. The goods were destroyed by fire before the Chief Conservator signed the contract on 3-5-1957. It was *held*: (1) The fact that the Chief Conservator of Forests signed the deed on 3-5-1957 did not make the sale effective from the date of his signature. His signature had no effect of ratifying any action of the Divisional Forest

1. A.I.R. 1966 S.C. 58.



Officer taken beyond his competence. The goods sold were specified goods.

(2) Section 20 and not S. 25 of the Act applied to the case. The contract was unconditional and the goods sold were specified and in a deliverable state: the property in the goods therefore did pass to the respondent contractor at the time when the contract was made by virtue of S. 20. Since the payment allowed by instalments was to be deemed payment in full at the time of delivery of goods sold, there could be no occasion for the Government to reserve a right of disposal of the property within the meaning of S. 25 of the Act. As a matter of fact, there was nothing in the deed of contract or in the forest contract Rules which reserved such a right of disposal in the State.

(3) Even if it be held that "the Chief Conservator of Forests ratified the unauthorised act of the Divisional Forest Officer on May 3, 1957, after the fire had taken place, such ratification could be made under the law. The provisional acceptance by the Divisional Forest Officer must, in the circumstances, be held to be subject to ratification. It was within the realm of possibility that the forest produce might be lost on account of fire or any other risk mentioned in R. 32 of the Forest contract Rules before the deed of contract was formally signed by the Chief Conservator." The contract entered into involved the possibility of the loss of goods by fire as the basis of the contract.

It is to be observed that this and the following four sections must be read subject to the opening words of section 19(3): "Unless a different intention appears."<sup>1</sup> Parke B. said in *Dixon v. Yates* :<sup>2</sup>

"I take it to be clear that by the law of England, the sale of a specific chattel passes the property in it to the vendee without delivery...The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price is equivalent to his accepting possession."

Similarly, Sir Cresswell observed in *Gilmour v. Supple* :<sup>3</sup>

"By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, *unless it can be shown that such was not the intention of the parties.*

See also *D.S. Sahni v. Faqir Singh*, A.I.R. 1960 J. & K. 6 cited at p. 163 *ante*—Unconditional contract of sale of specific goods in deliverable state; property passes on date of contract though goods are delivered later on.

1. See *inter alia* *Anchor Line (Henderson Brothers), Ltd.*, (1936) 2 All E.R. 941; *Young v. Matthews*, (1866) L.R. 2 C.P. 127; *Lambert v. G. & C. Finance Corporation* (1963) 106 Sol. J. 666 (retention of car log book showed absence of intention to pass property in car); *Turley v. Bates*, (1863) 2 H. & C. 200; *Cheetham & Co. v. Thornham Spinning Co.*, (1864) 2 Lloyd's

Rep. 17 (retention of shipping documents pending payment); *Lacis v. Cashmarts*, (1969) 2 Q.B. 400 D.C. See *Chalmers*, 16th Edn., p. 114.

2. (1833) 110 E.R. 806; 39 R.R. 489.  
3. (1858) 11 Moo. P.C. 551 at p. 566; 117 R.R. 97, 106; approved by *Blackburn J.* in the *Calcutta Company v. De Mottos*, (1813) 32 L.J.Q.B. 322, at p. 329; 339 R.R. 752, 764.



*See too Arun Private Ltd. v. State of Madras*, A.I.R. 1961 Mad. 216 (cited at p. 80 *ante*)—Sale of unascertained goods ; title held passed to the buyers at the point of delivery of the goods.

**(2) Presumption created by this section not displaced by postponement of the time of payment of the price or the time of delivery of the goods, or both.**

The rule laid down in this section is not affected by the fact that the time of payment of the price or the time of delivery of the goods, or both, is postponed. The rule will still be applicable where the price is not fixed by the contract.<sup>1</sup> Similarly "it may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was by the contract to precede delivery, but still the property is changed."<sup>2</sup>

In *Dwarka Das v. Ram Rattan*,<sup>3</sup> where specific goods in a deliverable state were sold but the buyer requested the seller to postpone delivery till a convenient time, it was *held* that the property had passed. In *Shanker Das v. Bhana Ram*,<sup>4</sup> where the vendors who had not actual possession, but had only the railway receipt in their hand, made a sale by endorsing the railway receipt in favour of the buyer, it was *held* that property passed on the making of the contract.

In *Commissioner of Income-tax, Madras v. Raman*<sup>5</sup> A, a company, entered into an agreement with B for purchase of five buses for Rs. 31,000. Rs. 1,000 were to be paid to B on the date of agreement, Rs. 10,000 within a week and Rs. 20,000 within a week after the transfer of the ownership of the buses and of the route permits. The agreement stated that the buses were already handed over to a company who thereafter plied them for a week on their route, though under B's name. It was *held* : As there was a definite contract to the contrary, namely, that the price was to be paid in specified instalments, S. 32 did not apply and the contract being an unconditional contract for sale of five specified buses which were already delivered to the purchaser, title in them passed to the A company on the date of the contract itself under S. 20. It was immaterial whether the time for payment was postponed. The property in the buses vested in the A company thereafter.

To constitute a complete sale, the precise thing sold as well as the price must be ascertained. Where ascertained existing goods are the subject of a contract of immediate sale and whether there is a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor there has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done, such as, for instance, in most cases, delivery—in some cases actual payment of the price—and in other cases weighing in order to ascertain

1. *Joyce v. Swann*, (1869) 17 C.B. (N.S.) 84, 142 R.R. 258.

2. Per Lord Blackburn, *Seath v. Moore*, (1886) 11 App. Cas. 350, at p. 370 ; *Peare Lal-Kishan Prasad v. Diwan Singh Ganeshi Lal*, A.I.R. 1930 All.

661 : 125 I.C. 453.

3. A.I.R. 1922 All. 458 : 68 I.C. 239.

4. A.I.R. 1926 Lah. 606 : 7 Lah. 406.

5. (1951) 1 Mad. L.J. 684 : (1951) 19 I.T.R. 558.



the price, or making, packing, coopering, filling up casks, or the like. The case where there is a warranty of the quality of such specific goods has already been examined.<sup>1</sup> The circumstances will not prevent the property in them passing to the purchaser, and, if it is simply a warranty, will not entitle the purchaser to refuse to accept the goods, or to return them, merely because the warranty is not fulfilled ; and, in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so.

The mere fact that something remains to be done by the *buyer* under the contract with reference to the goods, is not of itself sufficient to displace the presumption. In *Furley v. Bates*,<sup>2</sup> the contract was for the sale of heap of clay as a whole at a certain price per ton, and by contract the buyer was to load the clay on his own carts, and to weigh each load at a certain weighing machine which his carts had to pass on their way from the seller's ground, on which the heap of clay lay, to the buyer's place of deposit. It was *held* that the property in the clay had passed to the buyer. The clay in this case was in a state in which the buyer was bound to take delivery of it, and nothing further remained to be done by the seller to ascertain the price. In *Shoshi Mohun Pal v. Novo Krishto*,<sup>3</sup> the plaintiff contracted with the defendant to sell him 975 maunds of rice, being the whole contents of a certain gola at a certain rate, and the defendant paid certain earnest money and agreed to remove the whole of the rice after weighing on or before a certain date, and delivery was taken of a part. It was *held* that the property in the goods had passed to the defendant. So far as the vendors were concerned, nothing remained to be done on their part to the rice sold for the purpose of ascertaining the amount of the price. The rice was to be weighed for the satisfaction of the purchaser.

When the subject-matter of the sale is ascertained at the time the bargain is struck, and the price is likewise agreed upon, the sale is a complete sale from the time of the making of bargain, and the right of property in the thing sold and the risk of loss are transferred to the purchaser, although the right of possession may continue in the vendor until the purchase money has been paid or tendered.<sup>4</sup> The right of property and the attendant risk may be transferred by the buyer to a third party by another contract of sale, although the price may not have been paid and the right of possession divested out of the original vendor.<sup>5</sup>

But the mere fact that goods are bought by lot after inspection will not make section 20 of the Act applicable so as to pass property in the goods to the buyer the very moment the sale is effected. Where the seller has to deliver the goods to the buyer at a place different from that where the contract of sale is effected and to tranship the goods by rail to the place of delivery, and the buyer has to pay only for the actual weight of goods delivered to him at the place of delivery, property in the goods cannot pass to the buyer until the goods, if so required by the buyer, are

1. See under section 16 of the Act.

2. (1863) 2 H. & C. 200, 133 R.R. 639. Compare *Kershaw v. Ogden*, (1865) 3 H. & C. 717, 140 R.R. 694.

3. (1878) 4 Cal. 801. Compare *Swanwick v. Sothern*, *supra* : *Nanka-Bruce v. Commonwealth Trust*, (1926) A.C.

77 P.C. ; *Peare Lal-Kishan Prasad v. Diwan Singh Ganeshi Lal*, A.I.R. 1930 All. 661 : 125 I.C. 453.

4. *Bloxam v. Sanders*, 4 B. & C. 941 ; *Knight v. Hopper*, *Skin.*, 647.

5. *Scott v. England*, 14 L.J.Q.B. 43.



weighed at the place of delivery. In such a case section 22 applies. This is particularly so in the case of goods as scrap iron the weight of which decreases to certain extent in transit.<sup>1</sup>

**(3) "Unless a different intention appears"—Intention of the parties to be regarded.**

As already observed, this and the following four sections must be read subject to the opening words of section 19(3): "Unless a different intention appears." Thus, whereas the rule laid down in this section is the *prima facie* rule of construction, in each case the intention of the parties must be ascertained and acted upon. In *Abdul Aziz v. Jogendra Krishna*,<sup>2</sup> nothing remained to be done to the goods by the seller for the purpose of ascertaining the amount of the price. It was *held* by the Calcutta High Court that the property did not pass to the buyer, since the intention of the parties, to be inferred from the usage of the trade, was that the sale should not be complete until the goods had been tested, selected and weighed by the buyer. In *Amies v. Jal*,<sup>3</sup> an agreement for the sale of a motor car, of which the price was to be paid in monthly instalments, contained among others a term that in default of payment of any one instalment the seller should be at liberty to terminate the agreement and take possession of the car, without being liable to refund to the buyer the instalments paid by him. The court held that the intention of the parties as expressed in the condition was that the property in the car should not pass until the full price was paid.

On the other hand, in *Kuttayan Chetty v. Palaniappa Chetty*,<sup>4</sup> where the defendant agreed to sell paddy to the plaintiff on the terms that the plaintiff should pay 1,000 rupees in advance, and the balance of price on delivery, and it was agreed that an assignment of a debt of 100 rupees and a *hundi* for 900 rupees should be accepted as payment of the advance, it was *held* that the property in the goods passed to the plaintiff on assignment of the debt and delivery of the *hundi* by the plaintiff to the defendant and the plaintiff was entitled to damages for the wrongful sale of the paddy to a third person.

**(4) Deliverable state.**

In order that the rule laid down in this section may apply, the specific goods must be in a deliverable state and the property would not pass if the goods are not in a deliverable state.<sup>5</sup> Consequently, where the contract was for the sale of a condensing engine bolted to and embedded in a flooring of concrete, which had to be detached and dismantled and delivered free on rail at a specified price and it was damaged in transit before it reached

1. *Ugarchand Gajanand v. Motiram Ghanshamdas*, A.I.R. 1938 Sind 18 : 173 I.C. 535.

2. (1916) 44 Cal. 93 : 36 I.C. 119.

3. A.I.R. 1924 Bom. 41 : 77 I.C. 150.

4. (1904) 27 Mad. 540 ; cf. *Aronson v. Mologa Holzindustrie A.G.* Lenin-

grad, (1928) 138 L.T. 470, C.A.

5. *Simmons v. Swift*, (1826) 5 B. & C. 857 ; sale of a stack of bark at a certain price per ton ; *held*, property did not pass until weighing, that being necessary to ascertain the amount to be paid.



the railway it was *held* that the property had not passed, as when it reached the railway it was not in a deliverable state.<sup>1</sup>

Again, if the contract is conditional, the property would not pass unless the condition is fulfilled. In *Anglo-Egyptian etc. v. Rennie*,<sup>2</sup> it was *held* that the property in new boilers and certain new machinery for a steamship was not intended to pass until they were fixed on board the ship.

**(5) Non-severable contract of moveable and immoveable property.**

This section does not apply to the case of a non-severable contract for the sale of specific goods and of an interest in land. Such a contract is with regard to the goods, *prima facie*, only an agreement to sell, and the transfer of the property in the goods is *prima facie* conditional on the conveyance of the interest in the land.<sup>3</sup> If, however, the buyer has appropriated the goods without a conveyance of the interest in land, he must pay for the goods.<sup>4</sup> The rule stated above applies even though separate prices have been fixed for the goods and for the interest in land.<sup>5</sup>

As to the period of limitation for suit by a purchaser of moveable and immoveable property to recover the moveable property from the hands of a subsequent purchaser, see *Dhondiba v. Ramachandra*.<sup>6</sup>

The expression 'sale of immoveable and moveable property combined' does not necessarily mean 'sale of connected immoveable and moveable property' but applies to all agreements for the sale of property part of which is moveable and part immoveable.<sup>7</sup>

**(6) Sections 20, 21, 22 and 23—Bilty-cut transaction—Incidents of—Property in goods when passes to buyer—Extent of responsibility of seller.**

Where there is an unconditional contract for the sale of specific goods, but the sale is bilty-cut it is the seller who undertakes to get the goods booked. He will not be deemed to have performed his part of the contract unless he arranges for the wagon, the goods are booked and the railway receipt obtained for the same, for which service payment is already included in the 'bilty-cut' rate. It may be that in a particular bilty-cut transaction the buyer may himself agree to arrange for the wagon and booking of the goods and all what the seller may be liable in

1. *Underwood v. Burg Castle Cement Syndicate*, (1922) 1 K.B. 343, C.A. The property will pass though something remains to be done by the seller after they are put into a deliverable state e.g. pay for warehousing; *Hammond v. Anderson*, (1803) 1 B. & P.N.R. 69; *Greaves v. Hepke*, (1818) 2 B. & Ald. 131. See also *Kursell v. Timber Operators* (1927) 1 K.B. 298 (C.A.): cited at pp. 78, 378 *ante* and *Logan v. Le Mesurier*, (1847) 6 Moo. P.C. 116; sale of timber to be sold after measurement.

2. L.R. 10 C.P. 271.

3. *Lanyon v. Toogood*, (1844) 13 M. & W. 27 (sale of house and furniture);

cf. old section 85 of the Indian Contract Act which provided that where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property. This section has been omitted from the present Act. See also Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 68.

4. *Sleddon v. Cruikshank*, (1846) 16 M. & W. 71.

5. *Neal v. Viney*, (1808) 1 Camp. 471.

6. (1881) 5 Bom. 554.

7. *Maung Paw v. Maung Saw*, 12 I.C. 805.



such a case may be only to bear all the expenses up to the booking of the goods. If that is so, necessary allegations will have to be made and evidence led to prove the extra terms of the contract. If all what is alleged or proved is that the parties had entered into a bilty-cut transaction at a particular rate the obvious inference would be that the responsibility for the booking of the goods was that of the seller. In that view, therefore, the sellers are bound to do something to the goods for the purpose of putting them into a deliverable state *i.e.* get them booked and obtain a railway receipt for the same. It is, therefore, S. 21 which applies to such a case. There could be no passing of property in the goods to the buyer till the goods are booked.<sup>1</sup>

**\*21.** Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and buyer has notice thereof.

Specific goods to be put into a deliverable state.

### Synopsis

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|---|--|
| (1) <i>Seller to put the specific goods in a deliverable state.</i> | (3) <i>Notice to the buyer.</i>                      |
| (2) <i>Specific goods.</i>  | (4) <i>Collateral act.</i>                           |
|   | (5) <i>Intention of the parties to the contrary.</i> |

#### (1) Seller to put the specific goods in a deliverable state.

This section lays down that where there is a contract for the sale of specific goods and the *seller* is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof. Where, however, no such act is required or is obligatory on the seller, as where it is to be done merely for the satisfaction of the buyer and not in pursuance of a condition in the contract, or where the buyer is to do such act himself or for his own satisfaction and not the seller, section 21 does not postpone the passing of the property and section 20 may apply. In *Rugg v Minett*,<sup>2</sup> a quantity of turpentine, in casks, was put up at auction in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the sellers out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity, and the last two lots were then to be measured and paid for. The plaintiff bought the last two lots, and twenty-two of the other. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up, but they had not been gauged by the Custom House Officers, which it was the *buyer's* duty to get done. A few remained

1. *Lachhmi Newas v. Firm Ram Das Ramnivas*, A.I.R. 1963 All. 110.

\*Analogous law.

Rule (2) in section 18 of the English Sale of Goods Act, 1893 which is the same as section 21 of the Indian Act.

Old section 80 of the Indian Contract Act, 1872 since repealed (see Appendix B).

2. (1809) 11 East 210; 10 R.R. 575. See also *Padamsi v. Shanker*, A.I.R. 1926 Nag. 410; 95 I.C. 188.



unfilled, and the last two lots had not been measured when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The court *held* that the property had passed in those lots only which had been filled up because "everything had been done by the sellers which lay upon them to perform in order to put the goods in deliverable state."

Blackburn observes :<sup>1</sup>

"Where by the agreement, the seller is to do anything to the goods for the purpose of putting them into that state in which the buyer is to be bound to accept them, or as it is sometimes worded into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property.....In general, it is for the benefit of the seller that the property should pass ; the risk of loss is thereby transferred to the buyer, and as the seller may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is in the seller's pure gain.<sup>2</sup> It is therefore reasonable that where by the agreement *the seller is to do something* before he can call upon the buyer to accept the goods as corresponding to the agreement the intention of the parties should be taken to be that the seller was to do this before he obtained the benefit of the transfer of the property."

The important points are that something should remain to be done (i) by the seller, (ii) to the goods, (iii) for the purpose of putting them into a deliverable state, and (iv) the buyer must have notice.

Williston observes :<sup>3</sup>

"In S. 76(4) of the Sales Act it is provided as it is in S. 63 (4) of the English statute and, it may be assumed, that it is in accordance with the common law, that, 'goods are in a deliverable state'..... when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. Therefore, it is not necessary in order to preclude presumption of an immediate transfer of the property in the goods that the work to be done by the seller shall be such as to change the character of the goods. An obligation to pack or load them will make the presumption applicable if the seller's undertaking was to sell the goods packed or loaded.

"The rule, however, is only one of presumption and if the parties intend that the property shall pass and clearly manifest that intention, their purpose will be effectuated. Various circumstances may have weight as indicating an intention to transfer the property immediately though something remains to be done. Delivery of the goods to the buyer almost certainly indicates such an intention, if it is not expressly stated that the property is retained. Payment of the whole price or of a considerable part of it would also seem

1. Blackburn on Sale, 3rd. Edn., pp. 184-185. See also District Board, Hoshiarpur v. Firm Hira Singh Jagat Singh, A.I.R. 1968 (Punj. 289 cited at

pp. 125, 389 *ante*.  
2. See section 26 of the Act.  
3. Williston, Vol. 11, Ss. 265, 265a. pp. 17, 18, 20, 21.



some evidence of an intention to make an immediate transfer since it is not very common for buyers to pay in advance. But this reasoning is inapplicable if the payment is small and apparently intended merely to bind the bargain. The question, however, is purely one of fact in each case.

"Sometimes a bargain provides in an indivisible contract for both specific goods and any goods that comply with a description, as, for instance, where the seller has on hand part but not all of the goods to which the contract relates. In other cases, though all the goods may be specific, some of them may not be in deliverable condition. In neither case, unless it is in terms provided otherwise, will the property in any of the goods pass until the property in all the goods can pass. Therefore, though nothing need be done by the seller to put some of the goods in deliverable condition, or though whatever is so needed has been done, the seller still retains ownership of all the goods until all, including those sold by description, are accepted by the buyer or with his consent (which may be given in advance) appropriated to him by the seller."

In *Acraman v. Morrice*,<sup>1</sup> where in respect of a contract for sale of certain oak trees, it was the custom of the trade for the buyer to select and for the seller to sever the portions rejected, it was *held* that the goods could not be said to be in a deliverable state unless the severing of the rejected portions had been done by the seller and that the buyer could not claim that property had passed merely by making the severance himself.

Where the sale was of a specified stack of bark, at £ 9 5s. per ton, to be weighed by the seller's and the buyer's agents, and part was weighed and taken away and paid for, *held*, that the property had not passed in the unweighed residue, although the specific thing was ascertained, because it was to be weighed, and the concurrence of the seller in the act of weighing was necessary.<sup>2</sup> "Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods; although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done, the property is not changed."<sup>3</sup>

On the other hand, in *Gilmour v. Supple*,<sup>4</sup> the words of the contract were: "Sold Allan, Gilmour & Co., a raft of timber, now at Cronge, containing white and red pine, the quantity about 71,000 feet to be delivered at Indian cove Booms. Price for the whole 7s. 6d. per foot." The raft had been measured for the seller by a public officer, and his specification showing the contents of each log, and the total, had been given to the buyer before the contract. The raft *was delivered* to the buyer's servant, at the appointed place, and broken up by a storm the

1. (1849) 137 E.R. 584; 70 R.R. 568.  
2. *Simmons v. Swift*, 5 B. & C. 857; 5 L.J.K.B. 10; see also *Hanson v. Meyer*, 6 East 614; 8 R.R. 572 (weighing); *Zagtry v. Furnell*, 2 Camp. 240; 11 R.R. 704 (counting); *Logan v. LeMesurier*, 6 Moo. P.C. 116; 79

R.R. 10 (measurement); *Gilmour v. Supple*, 11 Moo. P.C. 551; 117 R.R. 97 (measurement); see also *Kursell v. Timber Operators*, (1927) 1 K.B. 298.  
3. Per Bayley J. in *Simmons v. Swift*, *supra* at p. 862.  
4. 11 Moo. P.C. 551; 117 R.R. 97.



same night. The court *held* in this case that the property had passed, because the raft *had been measured before delivery* and it was not to be measured again by the seller. The buyer was at liberty to measure it for his own satisfaction. "By the law of England, by a contract for the sale of specific ascertained goods the property immediately vests in the buyer and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Various circumstances have been treated by our courts as sufficiently indicating such contrary intention. If it appears that the seller is to do something to the goods sold on his own behalf, the property will not be changed until he has done it or waived his right to do it."

In *Nathmal Dhanraj v. Ganga Vishnu*,<sup>1</sup> on information sent by B at Sohdol, A from Calcutta wired to B to purchase certain quantity of mahua seeds and despatch it to Calcutta at the 'bilty-cut' rate quoted by B which was higher than the normal market rate and meant 'with the way bill made out.' B made purchase at Sohdol and sent two wagons charging the 'bilty-cut' rate. B, however, could not secure third wagon for 14 months during which the seeds were lying with B in his godown and deteriorated. After notice to A, B auctioned the stock and sued A at Sohdol for the difference as damages and for certain other charges. It was *held* that under S. 21 of the Act property did not pass to A until B had put the goods in a wagon and obtained a way bill for it as the contract was at the "bilty-cut" rate and that A was therefore not liable for any damages. It was *further held* that the information sent by B did not amount to a proposal that the proposal in this case started from A and was accepted by B at Sohdol, and that the cause of action therefore arose at Sohdol, the Court at which had jurisdiction to try the suit.

Although the vendor has given a delivery order, or a dock-warrant to a warehouse-keeper, wharfinger, or bailee having the custody of the goods commanding him to deliver them to the purchaser, yet, so long as the precise quality of goods to be delivered under the order has not been ascertained and separated from the bulk, and put into a deliverable state and placed at the disposal of the purchaser, the sale is not complete and the right of property is not altered.<sup>2</sup>

Where there was a contract for the sale of a cargo, it was *held* that no property passed and the buyer had no insurable interest in the cargo until the cargo was completely loaded, so that the shipping documents could be made out, this being a thing done by the seller in order to put the goods into a deliverable state.<sup>3</sup>

The word, 'something' in this section contemplates some act done directly to the goods and not merely an act done with reference to them. So also the purpose of the act must be to put the goods in a deliverable state according to the terms of the contract. So also the mere fact that the seller is to pay warehouse or wharfage rent for the goods,<sup>4</sup> or that he is

1. A.I.R. 1952 V.P. 62.

2. *Busk v. Davis*, 5 M. & S. 395; *Shipley v. Davis*, 5 Taunt. 617.

3. *Anderson v. Morice*, (1876) 1 App. Cas. 713. But see *Castle v. Playford*, (1872) L.R. 7 Exch. 98 which contained the clause, "the vendors forwarding bills of lading to the pur-

chaser, and upon receipt thereof, the purchaser takes upon himself all risks and dangers of the seas"; property passes when the seller has done his part.

4. *Hammond v. Anderson*, (1803) 127 E.R. 384; see also *Halsbury*, 3rd Edn., Vol. 34, p. 69 f.n. (f).



to pay custom duties,<sup>1</sup> does not suspend the passing of the property, even though the seller retains the warrants of delivery for that purpose.<sup>2</sup> The principle of this rule applies also where a specific chattel, which is partially manufactured at the time of the contract is by the contract to be completed by the seller;<sup>3</sup> and also where, subsequently to a contract for the manufacture and sale of a chattel, the parties agree that the specific partially manufactured chattel, and no other, shall be the subject-matter of the contract.<sup>4</sup> "Unless a different intention be clearly shown, the rule is that the property in an article, which the seller is to make or complete for the buyer does not pass until the article is delivered in a finished state, or until it is ready for delivery and is approved by the buyer in that state."<sup>5</sup>

In *H.M. Abdul Rahim Sait v. K.V. Kunhalan Kutty*,<sup>6</sup> it was held: The property sold was not the trees on the site on which they stood but the severed trees and the contract contemplated severance by felling only subsequent to the contract. Under S. 21 of the Act the property in the moveables would not pass to the buyer until the seller did something to the goods for the purpose of putting them into a deliverable state viz., the seller having been bound to refrain from causing any obstruction either by himself or through his successors-in-interest. Where there is breach committed by the seller in this, then the buyer is not bound to reimburse the sale price to the seller.

Where the contract was entered into by the buyer with the seller that the seller would co-operate with him in obtaining the necessary permission of the Collector for cutting the trees and where the seller had failed to do so, then the seller would be bound to refund the money that he had received from the buyer.

## (2) "Specific goods."

A contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, cannot be held to be a contract of sale of specific goods within the meaning of S. 21 above. The expression "specific goods" necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of some specified quantity of liquor out of a storehouse of cask would not be capable of ascertainment until it was removed or separated. "Specific goods would, according to their natural interpretation, mean goods whose delivery can be demanded *in specie*. A contract of sale of a small quantity of liquor stored in bulk would more appropriately be regarded as a contract for sale of unascertained goods and would fall under S. 23 of the Act. The ownership will not pass till the

1. *Hinde v. Whitehouse*, 7 East 558.

2. *North British & Mercantile Ins. Co. v. Moffatt*, L.R. 7 C.P. 25.

3. *Laidler v. Burlinson*, (1837) 2 M. & W. 602, (ship in course of building).

4. *Wait v. Baker*, (1848) 2 Exch. 1 at pp. 8, 9 per Parke B. See Halsbury, 3rd Edn., Vol. 34, p. 69.

5. *Chalmers*, 16th Edn., p. 119 citing *Clarke v. Spence* (1836), 4 A. & E. 448, at p. 466 (ship in course of build-

ing). As to an article begun by one person and finished by another, see *Oldfield v. Lowe*, (1829), 9 B. & C. 73, at p. 78 (machinery). See Halsbury, 3rd Edn., Vol. 34, p. 65.

6. (1959) 2 Mad. L.J. 498. See also *Arun (Private) Ltd. v. State of Madras*, A.I.R. 1961 Mad. 216 (cited at p. 80 ante).—Sale of unascertained goods; title held passed to the buyers at the point of delivery of the goods.



quantity ordered by the purchaser is ascertained and appropriated. The bottling of the quantity of liquor ordered would be an act of ascertainment and appropriation. Where the servant of a licensed vendor of liquor goes about canvassing order for liquors and gets orders from customers and thereafter gets the quantities so canvassed measured off at the shop of the vendor and carries the quantities to the respective houses of the customers it cannot be held that the sale is completed at the house of buyers upon delivery of liquor and not before. Under S. 23(2) of the Act, the servant of the seller can very well be treated as a bailee for the purpose of transmission to the buyer and delivery to such servant at the place of the licensed vendor would be effective delivery to the buyer himself. It is immaterial whether the price of the liquor is paid at the shop of the vendor or at the house of the buyer, for the completion of the sale does not depend upon payment of the price of the goods sold. The sale must be taken to be completed within the premises of the licensed vendor and the latter cannot therefore be convicted under S. 45(c) of the Bombay Abkari Act for contravention of a clause in his licence prohibiting sale of liquor at any place except the licensed premises.<sup>1</sup>

If the specific goods sold are attached to, or form part of, realty at the time of the contract, and are to be severed by the buyer, the property will only pass when they are severed.<sup>2</sup>

### (3) Notice to the buyer.

The section provides that the buyer must have notice that the seller has put them into a deliverable state. The section only requires that the buyer must have notice and it is not insisted that notice should be given by the seller. It would appear that "notice" is equivalent to "knowledge".

### (4) Collateral acts.

Where the act to be done is not for the purpose of putting the goods in a deliverable state, but for some other collateral purpose, such as paying warehouse charges, or duties, the passing of the property will not be delayed.<sup>3</sup> Thus in *Ramiah Asari v. Chidambara*<sup>4</sup> where an author sold the right to publish and sell a literary production, it was *held* that the mere fact that the author had undertaken to revise the work did not prevent the passing of property.

### (5) Intention of the parties to the contrary.

As in the case of the preceding section the rule in this section is only a *prima facie* rule, which is subject to any contrary intention appearing. Property in unfinished goods may pass if the goods are ascertained and pointed out with the intention of transferring ownership.<sup>5</sup>

As the thing to be done by the seller is to put the goods into a *deliverable state*, it follows that *prima facie* the property in goods will pass,

1. *Emperor v. Kunverji Kuvasji*, A.I.R. 1941 Bom. 106 : 194 I.C. 302 ; 43 Bom. L.R. 95.

2. *Jones v. Earl of Tamberville*, (1909) 2 Ch. 440, 442 ; *Kursell v. Timber Operators*, (1927) 1 K.B. 298, C.A., cited at pp. 78, 378 *ante*. See *Chalmers*, 16th Edn., p. 119 ; *Halsbury*,

3rd Edn., Vol. 34, p. 70.

3. *Hammond v. Anderson*, *supra* ; *Hinde v. Whitehouse*, (1806) 103 E.R. 338 ; 8 R.R. 676 (duties payable).

4. (1920) 39 M.L.J. 341 : 59 I.C. 229.

5. *Young v. Mathews* (1866) L.R. 2 C.P. 127 cited at p. 383.



even though something remains to be done by the seller in relation to the goods sold, after their delivery to the buyer.<sup>1</sup>

Schmitthoff observes :<sup>2</sup> "Where the goods have to be sent to buyer the intention of the parties often differs from that presumed by rules 1 and 2 (of S. 18 of the English Act<sup>3</sup>) which, in that event, are inapplicable. If no bill of lading issued, the parties will often intend that delivery to the carrier shall pass the property, and if a bill of lading is issued, their normal intention is that delivery of the bill of lading shall have that effect ; thus, unless another intention of the parties is apparent<sup>4</sup> delivery to the carrier passes the property under the normal f.o.r. and f.o.b.<sup>5</sup> contract ; delivery of the bill of lading passes the property in the goods where the sale is on c.i.f. terms, or the seller under an f.o.b. contract undertakes, in addition to his ordinary duties, to ship the goods ; this effect of the passing of the bill of lading is in harmony with the presumption of S. 19(2)."<sup>6</sup>

**\*22.** Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

*Specific goods in a deliverable state when the seller has to do anything thereto in order to ascertain price.*

### Synopsis

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| <p>(1) <i>Specific goods in a deliverable state when the seller has to do anything thereto in order to ascertain price—scope of the section.</i></p> | <p>(2) "Unless a different intention appears."<br/>(3) <i>Agreement remains executory until the condition is fulfilled.</i><br/>(4) <i>Notice to the buyer.</i></p> |
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**(1) Specific goods in a deliverable state when the seller has to do anything thereto in order to ascertain price—Scope of the section.**

Generally speaking, to constitute a sale which shall immediately pass the property it is necessary not only that the thing sold should be ascertained, but that there should be a price ascertained or ascertainable. The parties may buy or sell a given thing, nothing remaining to be done for

1. Benjamin on Sale, 8th Edn., p. 311.

2. Schmitthoff, "The Sale of Goods," 2nd Edn., p. 90.

3. Corresponding to Ss. 20, 21 respectively of the Indian Act.

4. Free on railway ; Underwood Ltd. v. Burgh Castle, Brick and Cement Syndicate, (1922) 1 K.B. 343 ; Thomas Young & Sons Ltd. v. Hobson and Partners, (1949) 95 T.L.R. 365.

5. Wimble, Son & Co. v. Rosenberg and

Sons. (1913) 3 K.B. 743, 752.

6. Corresponding to S. 25(2) of the Indian Act.

\*Analogous law.

Section 18, Rule 3 of the English Sale of Goods Act, 1893, which is the same as section 22 of the Indian Act.

Old section 81 of the Indian Contract Act, 1872, since repealed (See Appendix B).



ascertaining it, but the price to be afterwards ascertained in the manner fixed by the contract of self or on a *quantum valebat*;<sup>1</sup> or they may agree that the sale shall be complete and the property shall pass although the delivery of possession is postponed and although something shall remain to be done by the seller before the delivery ; or they may agree that, nothing remaining to be done for ascertaining the thing sold, yet the sale shall not be complete and the property shall not pass before something is done to ascertain the amount of the price. Section 22 covers a case where the contract for the sale is of specific goods, as for example, the whole quantity in bulk or in heap and the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price. In such a case the property does not pass until such act or thing is done and the buyer has notice thereof.<sup>2</sup>

This section lays down that where there is a contract for the sale of specific goods in a deliverable state, but the *seller* is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. The rule applies when the parties have agreed upon some data on which the price is to be calculated (*e.g.* so much per ton or cub. feet) and the weighing, etc., involves the mechanical process of calculating the total amount of the price. But if the goods have been weighed, etc., the mere arithmetical calculation of the price may not defer passing of property. In *Tansley v. Turner*,<sup>3</sup> there was sale of felled timber, lying on another's ground, the purchaser having the power of removing them when he pleased. The number of cubic feet in each tree was ascertained and the trees marked so as to show they belonged to the purchaser, but the several sums were not added into a total. It was *held* that the property and possession had passed to the purchaser. In *Simmons v. Swift*,<sup>4</sup> a vendor sold the bark stacked at Redbrook at £ 9 5s. per ton of 21 cwt., to be weighed before delivery, and 8 tons 14 cwt. of the bark was weighed and delivered, but before the residue was weighed and the quantity thereof ascertained, a high flood arose and destroyed it. It was *held* that the right of property in the unweighed residue had not been altered ; seller, consequently, had the risk of loss.

Where there was a sale of 289 specified bales of goatskins, containing five dozen in each bale, at a certain price per dozen, but by the usage of the trade, it was the *seller's* duty to count the bales to see whether they contained the number specified in the contract and before the seller had done this the bales were destroyed by fire, it was *held* that the loss fell on the seller.<sup>5</sup>

But the distinction must be observed between a sale by measure or weight requiring the measuring or weighing to be accomplished *for the purpose of determining and fixing price*, and a sale of specific goods in the lump at an ascertained price, accompanied with representation on warranty of the weight or quantity, where the weighing or measuring is necessary only for the purpose of satisfying the purchaser that he has

1. See section 9 of the Act.

2. *Union of India v. Dwarka Das Radha Krishna*, A.I.R., 1959 Pat. 39. For full facts of the case see under S. 23 *post*.

3. (1835) 2 Bing. N.C. 151.

4. 5 B. & C. 857 ; 5 L.J. (O.S.) K.B. 10 ; 29 R.R. 438.

5. *Zagury v. Furnell*, (1809) 2 Camp. 240 ; 11 R.R. 794. See also *Martineau v. Kitching*, (1872) L.R. 7 Q.B. 436.



got the quantity bargained for.<sup>1</sup> The rule applies when the goods are in a deliverable state ; so it does not apply when weighing etc., are necessary to put the goods into a deliverable state. Again, the rule does not apply when weighing, measuring, etc. are necessary to ascertain the goods (e.g. separation from bulk) as in such cases there is no sale of ascertained or specific goods (see *Abdul Aziz v. Jogendra*, 44 Cal. 98, at p 401 ante).

In *Shoshi v. Nobo*,<sup>2</sup> there was the sale of rice to be weighed for satisfaction of the buyer, but so far as the vendors were concerned, nothing remained to be done on their part to the rice sold. *Held*, that the property passed when the contract was made. In *Nanka Bruce v. Commonwealth Trust Ltd.*,<sup>3</sup> the seller was to consign cocoa to the buyer at a certain rate per lb. who was to resell the same to merchants and to transfer to them the Railway consignment notes. The merchants were to weigh up the goods at their premises and check the weights and the buyer would pay the seller according to the weights so checked. It was *held* that the checking of the weights by the merchants was not a condition precedent to the passing of the property. "The goods were transferred, their price was fixed and the testing was merely to see whether the goods fitted the weights as represented, but this testing was not suspensive of the contract of sale on the condition precedent to it. To effect such suspension or impose such condition would require a clear contract between vendor and vendee to the effect."

In *Eldon (Lord) v. Hedley Bros.*,<sup>4</sup> the contracts were for the sale of stocks of hay as standing on a farm subject to the right of the buyers to cut and tie into trusses the hay in the stack and to reject any part that turned out to be "not good marketable hay clear of mould." The buyers were to take delivery, "when convenient" and the price was to be a price put free on rails. The court *held* that the contract was for ascertained or specific goods seen and identified by the buyers, and that the intention was that the property in the stacks should pass to the buyers at the date of the contract. Greer L.J. said :

"The special terms of the contracts entitling the buyers to refuse to take delivery of or to pay for mouldy or unmarketable hay did not prevent the property from so passing, but only operated to enable the buyers though they had become the owners of all the hay in the stack, to refuse to take delivery and so revert in the seller any hay found to be mouldy or unmarketable at the time of delivery."

As regards the weighing of hay before delivery for ascertaining the price, Slesser L.J. said :

"It was further argued, that in so far as the seller would have to weigh the hay in order to ascertain the price, the property would not pass until the seller has so weighed the goods within the meaning of section 18, Rule 3, of the Sale of Goods Act, 1893.....I do not think that this was a case where after the price of the stacks had been fixed by tonnage and a sum expressed to be in part payment

1. See *Furley v. Bates*, (1863) 159 E.R. 83 ; 133 R.R. 639 cited at pp. 400, 420; *Abdul Aziz v. Jogendra Krishna*, (1917) 44 Cal. 98.

2. (1879) 4 Cal. 801 (805).

3. (1926) A.C. 27.

4. (1935) 2 K.B. 1.



made that there remained such an obligation on the seller to weigh for the purpose of ascertaining the price as would bring the case within section 18, Rule 3, of the English Sale of Goods Act."

In *Hoe Kim Seing v. Maung Ba Chit*,<sup>1</sup> there was a sale of paddy where the price and the quantity had been fixed and it required only a simple calculation to determine the total price, the *buyer* having to measure the paddy only in order to satisfy himself that he had not the quantity bargained for. It was *held* that the passing of the property was not delayed by reason of the fact that the measurement remained to be made.

In *Kanshi Ram v. Mul Chand*,<sup>2</sup> where under the contract, it was the buyer who has to weigh the goods at the time of delivery and the seller had undertaken responsibility for any deficiency, it was *held* that the property had passed. Similarly, in *Deva Singh v. Narain Singh*,<sup>3</sup> where, in payment of debt due to the buyer, the latter was to take, at specific rates, all the bricks in the seller's kiln, the expenses of stacking etc. to be debited to the seller, it was *held* that as the seller had nothing more to do in connection with the sale, there was a completed sale and property passed to the buyer. In *District Board, Hoshiarpur v. Firm Hira Singh Jagat Singh*, A.I.R. 1968 Punj. 289, the price was paid out at the shop before dealer's man went to the godown to give delivery. Goods were not weighed, measured or tested at the godown. It was held that section 22 of the Act did not apply.

In *Hanson v. Meyer*,<sup>4</sup> the defendant sold a specific parcel of starch at £6 per cwt. and directed the warehouse-man to weigh and deliver it. After a part of the quantity was weighed and delivered, the purchaser became bankrupt. The seller thereupon countermanded the order for the delivery of the remainder and took it away. The assignee of the bankrupt purchaser brought an action for trover against the seller. The court *held* that the act of weighing was in the nature of a condition precedent to the passing of the property by the terms of the contract because the price was made to depend upon the weight.

Where timber was sold which was to be measured off before delivery and paid for accordingly, it was *held* that the property would not pass until it was measured, and the purchaser could therefore recover back the price paid for all timber not received by them and damages for breach of contract.<sup>5</sup>

If by the terms of the contract the seller agrees to deliver the goods sold at a given place, and there is nothing to show that the goods are to be in the meantime at the buyer's risk, the contract is not fulfilled by the seller unless he delivers the goods accordingly, that is to say, the property would remain in the seller and the goods would remain at his risk.<sup>6</sup>

1. A.I.R. 1935 P.C. 182 : (1935) 62 I.A. 242 : 14 Rang. 1 : 157 I.C. 891.  
 2. A.I.R. 1930 Lah. 469 : 127 I.C. 158.  
 3. A.I.R. 1927 Lah. 894 : 103 I.C. 222 ; see also, *In Re : David Sassoon & Co.*, (1926) Sind 245 : 95 I.C. 453.  
 4. (1805) 6 East 614 ; 8 R.R. 572.  
 5. *Logan v. LeMesurier*, (1847) 6 Moo.

P.C. 116 ; 79 R.R. 10.  
 6. *The Calcutta Co. v. De Mattos*, (1863) 32 L.J.Q.B. 322, at p. 329 ; 139 R.R. 752, 762. See also *Badische etc. Fabrik v. Basle Chemical Works*, (1898) A.C. 200, at p. 207 in which a buyer in England had ordered goods to be sent by post from Switzerland,



It may be noted that the acts to be done with reference to the goods for ascertaining the price are confined to acts to be done by the *seller*. Thus, if the weighing is not necessary to fix the identity or price, and is only for the buyer's satisfaction, the property passes even though the goods have not been weighed.<sup>1</sup>

This section assumes that the goods are already in a deliverable state, but some act requires to be done by the seller for ascertaining the price such as weighing, measuring, testing them. It has been observed that a merely mental act, such as counting the items of a specified lot of goods would seem not to be "an act or thing" within the meaning of the section.<sup>2</sup>

".....Suppose the owner of a flock of sheep were to offer to sell, and a purchaser agreed to buy, the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep and ascertain the exact number of the flock...the property would have passed to the purchaser."<sup>3</sup>

**(2) "Unless a different intention appears."**

The rule laid down in this section also is subject to the intention of the parties. If it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass, although the goods have still to be weighed, measured or tested, provided the subject-matter of the sale is ascertained<sup>4</sup>; and there may be a complete contract so as to pass the property in the goods, although the price has been definitely agreed on,<sup>5</sup> or although the goods are still unfinished,<sup>6</sup> or unweighed.<sup>7</sup>

The fact that the parties have agreed upon a provisional estimate of the price of the goods, the actual amount whereof is to be afterwards more exactly calculated, is relevant to prove a common intention that the transfer of the property shall not depend upon the final adjustment of the price.<sup>8</sup>

**(3) Agreement remains executory until the condition is fulfilled.**

Whether the condition precedent to the passing of the property is one which is implied, or is expressly made by the parties, its effect is the same; the property does not pass till the condition is fulfilled. As observed by Blackburn,<sup>9</sup> "in the interval between the making of the agreement and the fulfilment of those conditions on which the property is to vest, the buyer has no interest in the thing itself, and it follows as necessary consequence that if in the interval a third party has fairly acquired an interest

1. *Swanwick v. Sothern*, (1839) 9 A. & E. 895; 48 R.R. 740; *Gilmour v. Supple*, (1858) 11 Moo. P.C. 551; 117 R.R. 97. See also *Rugg v. Minett*, (1809) 11 East 210; *Turley v. Bates*, (1863) 2 H. & C. 200; *Kershaw v. Ogden*, (1865) 3 H. & C. 717.  
2. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 69, f.n. (r).  
3. *Lord Alverstone C.J. in R. v. Tideswell* (1905) 2 K.B. 273.  
4. *Turley v. Bates* *supra*; *Martineau v. Kitching*, L.R. 7 Q.B. 436; 41 L.J. Q.B. 727. See also *Arun (Private)*

*Ltd. v. State of Madras*, A.I.R. 1961 Mad. 216 (cited at p. 80 ante)—Sale of unascertained goods; title held passed to the buyers at the point of delivery of the goods.  
5. *Joyce v. Swann*, 17 C.B.N.S. 84.  
6. *Young v. Matthews*, L.R. 2 C.P. 127; 36 L.J.C.P. 61.  
7. *Martineau v. Kitching*, *supra*.  
8. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 70; *Martineau v. Kitching*, *supra*.  
9. *Blackburn on Sale*, 3rd Edn., p. 209.



in the chattel, the buyer cannot on the fulfilment of the condition deprive him of it. He may have a remedy against the seller for breaking his agreement by suffering this interest to be created, but he cannot take the property in derogation of a right acquired, whilst the agreement was only executory and he had no interest in the goods but only a chose in action.

#### (4) Notice to the buyer.

This section also requires notice to the buyer when the seller has performed the condition precedent to the passing of property. It is clear that in order to pass the risk (and so the property) to the buyer he must have notice of it, for in that case he might take proper step to protect his rights. This is not possible unless he has notice.

**23.** (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

#### Synopsis

- |   |   |
|---|---|
| (1) <i>Analogous law.</i>   | <i>between parties that seller will</i>   |
| (2) <i>Scope and effect of section 23.</i>                                      | <i>have right of re-sale against buyer</i>  |
| (3) <i>Executory agreement converted into sale by subsequent appropriation.</i> | <i>on breach and to recover godown and insurance charges etc., although goods have not been appropriated by either party—</i> |
| (4) <i>Appropriation—essentials.</i>  | <i>seller is entitled to recover these charges, although goods have not been appropriated.</i>                                |
| (5) <i>Delivery as to a carrier—subsection (2).</i>                             | (9) <i>Present sale of future goods—goods in potential existence.</i>   |
| (6) <i>Goods to be manufactured—unfinished ships etc.</i>                       | (10) <i>Contract for a quantity of goods.</i>   |
| (7) <i>Appropriation—when final.</i>  |   |
| (8) <i>Goods unascertained—agreement</i>  |   |

#### (1) Analogous law.

This section follows section 18, Rule 5 of the English Sale of Goods Act, 1893. See Appendix A. See also sections 79, 83 and 84 of the Indian Contract Act, 1872 (Appendix B) since repealed.



**(2) Scope and effect of section 23.**

Sub-section (2) of S. 23 is wholly independent of sub-section (1). Sub-section (1) does not contemplate unconditional appropriation in pursuance of a contract ; it refers to unconditional appropriation with the assent of the parties, whereas in sub-section (2), it is the delivery to a carrier in pursuance of a contract which operates as an unconditional appropriation, and is, therefore, deemed to be unconditional appropriation. Where, therefore, a party relies upon what must be deemed to be an unconditional appropriation within the meaning of sub-section (2), he cannot be allowed to say that it was also, without more, an unconditional appropriation within the meaning of sub-section (1).<sup>1</sup>

In this case, the assessee despatched 46 consignments of jute from Assam to Calcutta on Board of a river steamer. Out of 46 consignments 41 were consigned by them to their buyers as consignees against contract of sale made in Calcutta prior to the dates of despatch. The remaining 5 consignments were despatched to the commission agents as consignees, but were not made against any contracts of sale. The jute was to be delivered free at the buyer's mill or godown at Calcutta, where it was to be weighed but before the goods were delivered at the buyer's mill or godown, the buyers were required to pay 90% of the price of the goods against delivery of documents, namely, the steamer or railway receipts ; the remaining 10% was to be paid after inspection, weighment and delivery at the buyer's mill or godown in Calcutta : if the sellers failed to deliver the Railway or Steamer Receipts to the buyers in Calcutta, the buyers had the option to cancel the contract. In some contracts it was provided that if the buyer failed to accept the Railway or Steamer Receipts, the seller had the right to cancel the contract. It was *held* ; (i) The property in the 46 consignments did not pass to the buyers when the consignments were put on board the river steamer in Assam ; (ii) the property in the goods passed to buyers in Calcutta when the terms of the contract as to delivery and payment of price were fulfilled ; (iii) where a contract of sale contemplates delivery to the buyer in Calcutta, the seller in making over the goods to a carrier in Assam, merely acts in execution of the contract as to the carriage of goods and not as to their delivery and the act of the seller cannot be deemed to be unconditional appropriation within the meaning of S. 23 (2) ; (iv) where the right of disposal is reserved by the seller, the property in the goods does not pass to the buyer notwithstanding the fact that the goods are made over to a carrier for the purpose of transmission to the buyer ; (v) section 25 (2) of the Act applies only to a ship's bill of lading, and not to a steamer receipts or a railway receipt. It is, therefore, not correct to say that if a railway or steamer receipt is made out in the name of a buyer, property in the goods passes to the buyer ; (vi) where there is an unconditional appropriation within the meaning of sub-sections (1) and (2) of S. 23, the question whether the seller intends to transfer the property in goods still persists and in ascertaining that intention regard must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case, as laid down in S. 19 (2) ; (vii) in a given contract, there cannot be two distinct deliveries. Delivery in pursuance of one delivery made in different stages but it is nevertheless of the contract as to

1. *Ramnivas v. Commr. of Taxes*, A.I.R. 1952 Assam 178. This was, however, the decision before the amendment

of S. 25 by the Amending Act of 1963  
See now notes under S. 25 *post*.



delivery. The mere making over of the goods to the carrier for transmission to the buyer in pursuance of the contracts as to the carriage of the goods, as distinct from delivery cannot be regarded as delivery in pursuance of the contract.

In *Union of India v. Dwarkadas Radhakrishna*<sup>1</sup> also it was observed : What is required under S. 23, sub-section (1) to pass the property in the goods to the buyer is an unconditional appropriation of the goods to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller ; such assent may be express or implied, or may be given either before or after the appropriation is made.

In this case, the plaintiff agreed to supply the defendant, the Union of India as owner of E.I.R. Railway, certain quantity of mustard oil, on monthly quota basis at the controlled rate of Rs. 46-8-0 per maund, cost of tin containers at Rs. 2 each and the incidental charges. The plaintiff duly supplied 1,000 maunds for October quota. On 4-12-1944 the plaintiff wrote to the Divisional Superintendent, E.I. Railway, informing him that 2,000 maunds of mustard oil for November and December quotas had been filled in tin containers and were ready for delivery in accordance with the letter dated 18-11-1944 of the Divisional Superintendent. On 11-12-1944 the controlled rate of mustard oil was reduced to Rs. 40 per maund and the cost of container was reduced to Re. 1 each by Government Notification. The delivery of November and December quota was taken by the Divisional Superintendent on 31-12-1944. The plaintiff accepted the price of November and December quota at the new controlled price under protest, and brought a suit for the recovery of balance of price at the old controlled rate. It was *held* :

(i) The case was governed by S. 23 and not by S. 22, Sale of Goods Act. The plaintiff unconditionally appropriated the goods to the contract of the defendant and for delivery to the Divisional Superintendent with his consent. The property in the goods passed on to the buyer on 4-12-1944 or in any event before 11-12-1944 when the new controlled price had come into force by the publication of the notification.

(ii) The plaintiff was entitled to recover the full price at the old controlled rate.

(iii) The plaintiff having accepted the price at the new rate only under protest, there was no question of his being estopped from claiming at the old rate.

Benjamin observes :<sup>2</sup> "The difficulty is to determine what constitutes the appropriation : to find out at what point the seller is no longer at liberty to change his intention. It is plain that his act in simply selecting such goods as he intends to send cannot change the property in them. He may lay them aside and change his mind afterwards ; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the seller may not set aside other goods for him. It is a question of law whether the selection made by the seller in any case is a mere revocable manifestation of his intention, or a determination of his right conclusive on him."

1. A.I.R. 1959 Pat. 39.

2. Benjamin on Sale, 8th Edn., pp. 327,



**(3) Executory agreement converted into sale by subsequent appropriation.**

After an agreement to sell has been made, it may be converted into a complete sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of goods specifically to the contract. For example, suppose A sells out of stack of bricks one thousand to B, who is to send his cart and *fetch* them away. Here B is to do the first act, and cannot do it till the election is determined. He, therefore, has authority to make the choice, but he may choose first one part of the stack and then another and repeatedly change his mind until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away; when that is done his election is determined, and he cannot put back the bricks and take others from the stack. So, if the contract were that A should *load* the bricks into B's cart, A's election would be determined as soon as that act was done, and not before.<sup>1</sup>

Sir Mackenzie Chalmers observes<sup>2</sup> on this point as follows :

“When there is a contract for the sale of unascertained goods, and the goods are afterwards selected by the buyer, or if selected by the seller are approved by the buyer, no difficulty arises. The difficulty arises when the seller makes the selection pursuant to an authority derived from the buyer; and it is often a nice question of law whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract, or whether they show an irrevocable determination of a right of election.<sup>2</sup> The general rule seems to be that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of agreement: when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.”<sup>3</sup>

When the goods to be delivered under the contract have been identified, in a manner binding on the parties, as the goods on which the contract is to attach, and therefore as the goods in which the property is to be transferred to the buyer and nothing further remains to be done to pass the property, the property may, and, in the absence of a contrary intention, will pass: nor does the fact that the seller intimates that he will not deliver, or refuses to deliver, except on payment of the price, of itself displace the presumption; for, as has already been explained, the right of the seller to retain possession of the goods until payment is quite consistent with the change of property. It is this which is described in the section as an unconditional appropriation of the goods in a deliverable state to contract by one of the parties with the assent of the other.

The word “appropriation” has not been defined by the Act but it involves acts such as separation or selection of goods from the bulk either

1. Benjamin on Sale, 8th Edn., p. 328. See also illustration to repealed S. 84 of the Indian Contract Act (Appendix B).

2. Sale of Goods Act, 16th Edn., p. 121.  
3. Blackburn on Sale, 1st edition, p. 128 citing Heyward's Case, 2 Coke. 35a.



by weighing measuring, or counting for the purpose of satisfying a particular contract, and before there is the assent of the buyer the seller may change his mind as often as he likes and allot any goods he chooses to a particular contract ; but once the buyer gives his assent to a particular act of appropriation by the seller, it is irrevocable, and both the seller and the buyer are once for all bound by it. The property passes on the giving of such assent by the buyer. Ordinarily the appropriation is made by the seller and then the buyer subsequently assents to it, and then the property passes.

Parke, B., in *Wait v. Baker*, (1848) 2 Exch. 1, at p. 8. points out that the word "appropriation" is used in the cases in two senses. It may mean a selection with common consent of the goods as the goods to be delivered, no property nevertheless passing, thus constituting an *obligato certi corporis* ; or a final appropriation of the goods to the contract, so as to pass the property therein to the buyer.<sup>1</sup> Chalmers<sup>2</sup> also refers to it and adds : If the decisions be carefully examined, it will be found that in every case where the property has been held to pass, there has been an actual or constructive delivery to the buyer.

It is to be noted that the *prima facie* presumption of this section can only be relied upon where the goods appropriated are in accordance with the contract.<sup>3</sup>

#### (4) Appropriation—Essentials.

1. The goods should *conform* to the description in the contract. The appropriation shall be of goods "of the description" contracted for, and "in a deliverable state". In *Vigers v. Sanderson*,<sup>4</sup> there was a contract for two parcels of swan laths of specified length, and it was provided that property should pass on shipment ; and that if any dispute arose under the stipulation in the contract, the buyers were not to reject any of the goods but the dispute was to be referred to arbitration ; but as it happened that the goods supplied were not of the contract description, it was *held* that no question of the passing of property arose at all. In *Levy v. Green*,<sup>5</sup> the goods sent in excess of those ordered were articles entirely different, but packed in the same crate : the order being for certain earthenware teapots, dishes and jugs, to which the plaintiff had added other earthenware articles of various patterns not ordered. It was unanimously held in the Exchequer Chamber that the property had not passed and that the purchaser had the right to reject the whole.

2. The goods must be in a *deliverable* state. Thus, shipment of part of the goods where the contract was indivisible did not pass the property in the goods shipped.<sup>6</sup>

1. See Halsbury, 3rd Edn., Vol. 34, p. 62. f.n. (g).

2. 16th Edn., p. 121 referring to *Wardar's (Import and Export) Co. Ltd. v. W. Norwood & Sons Ltd.*, (1968) 2 All E.R. 602 when the Court of Appeal left open the question whether there was an unconditional appropriation of frozen kidneys when these were removed from a cold store and placed on the pavement to await collection (per Salmon L.J., p. 605).

3. Parke B., in *Wait v. Baker*, (1848) 2 Exch. 1, 7.

4. (1901) 1 K.B. 608 ; see also *Buch & Co. v. Gordhandas*, A.I.R. 1923 Bom. 95 ; cf. *Cunliffe v. Harrison*, (1851) 155 E.R. 813 ; 86 R.R. 543 (Order for ten hogsheads of claret—fifteen sent—no specific appropriation).

5. 1 F. & F. 969 ; 27 L.J.Q.B. 111 ; 28 L.J.Q.B. 319 ; 117 R.R. 552

6. *Sadasook v. Chaitram*, (1924) 29 C.W.N. 808.



3. The goods must be *unconditionally appropriated* to the contract.

Sub-section (2) of the present section defines what is unconditional appropriation. The essence is that there is no reservation on the part of the seller of the *jus disponendi*.<sup>1</sup> If, for instance, it is conditional on payment of the price, there is no appropriation within the meaning of the section. An executory agreement to sell unascertained goods will become a sale by a subsequent unconditional appropriation of them to the contract. Thus in *Shanker Das v. Bhana Ram*,<sup>2</sup> where the sellers who had contracted to sell oil, and had received the price thereof, subsequently received from their vendors a railway receipt for the goods, and endorsed them to the buyers, it was *held* that the property had passed to the buyer and the risk of destruction in transit lay with him.

In *Commr. of I. T., Madras v. Mysore Chromite Ltd.*,<sup>3</sup> an assessee company carrying on its business in India shipped the goods to American and European buyers outside India under bill of lading issued in its own name. Under the contract it was not obliged to part with the bill of lading (which is the document of the title to the goods) until the bill of exchange drawn by it on the buyer's Bank in London where the irrevocable letter of credit was opened was honoured. Upon the terms of the contract in this case and the course of dealings between the parties the property in the goods could not have passed to the buyers earlier than the date when the bill of exchange was accepted by the buyers' Bank in London and the documents were delivered by the assessee company's agent, the Eastern Bank Ltd., London, to the buyers' Bank. This always took place in London. It was *held* that at the earliest the property in the goods passed in London where the bill of lading was handed over to the buyers' Bank against the acceptance of the relative bill of exchange and that the sales took place outside British India and *ex-hypothesi* the profits derived from such sales arose outside British India.

It was observed in the above case : The requirement of S. 23 of the Indian Sale of Goods Act, 1930, is not only that there shall be appropriation of the goods to the contract but that such appropriation must be made unconditionally. This is further elaborated by S. 25 of the Act which provides that where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Placing of the goods on board the steamer named by the buyer (a foreigner residing outside India) under a F.O.B. contract discharges the

1. *Ford Automobiles v. Delhi Motor Engineering Co.*, A.I.R. 1923 Bom. 125 ; cf. *Nripendra Kumar Bose, In re.* A.I.R. 1930 Cal. 171 ; 56 Cal. 1074 ; *Campbell v. Mersey Docks and Harbour Board*, (1863) 143 E.R. 506 ; 135 R.R. 752. See also *Juggernath v. Smith*, (1907) 34 Cal. 173. See

also *Arun (Private) Ltd. v. State of Madras*, A.I.R. 1961 Mad. 216 (cited at p. 80 ante)—Sale of unascertained goods ; title held passed to the buyers at the point of delivery of the goods.  
2. A.I.R. 1926 Lah. 606 ; 7 Lah. 406 ; 97 I.C. 765.  
3. A.I.R. 1955 S.C. 98,



contractual liability of the seller as seller and the delivery to the buyer is complete and the goods may thenceforward be also at the risk of the buyer against which he may cover himself by taking out an insurance. *Prima facie* such delivery of the goods to the buyer and the passing of the risk in respect of the goods from the seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer but they are not decisive and may be negatived. for under S. 25 of the Act the seller may yet reserve to himself the right of disposal of the goods until the fulfilment of certain conditions and thereby prevent the passing of property in the goods from him to the buyer.

4. The appropriation must be either by the seller with the assent of the buyer or by the buyer with the assent of the seller. The assent may be express or implied, and may be given either before or after the appropriation is made. A mere appropriation by the seller without the consent of the buyer, either express or implied, would not pass the property in the goods from the seller to the buyer.<sup>1</sup>

If the commodity was selectetd in bulk by the purchaser, the ownership and risk pass as soon as the quantity sold has been separated from the mass and tendered to the purchaser or placed at his disposal.<sup>2</sup> If the bulk of the commodity bought and sold has not been selected by the purchaser in the first instance, the sale may be rendered complete, so as to operate as a transfer of the property and risk, by a subsequent selection by the vendor and approved by the purchaser, such subsequent selection and approval being the same as if the article had been fixed upon in the first instance;<sup>3</sup> but a selection by the vendor only without the approval of the purchaser will not transfer the property in the goods so selected.<sup>4</sup> If the article is to be selected by the vendor but the purchaser makes its acceptance dependent upon his approval of it as regards workmanship, convenience or taste, the latter will be entitled to reject it, if it does not meet his approval upon some one or more of the grounds stated.<sup>5</sup> When everything that the seller is to do to complete the sale has been performed, the property and the attendant risk pass to the purchaser, although the latter may not have got the right of possession of the subject-matter of the sale, or perfect control over it by reason of the non-performance of some act to be done exclusively by him.<sup>6</sup> But it was not competent to the buyer to perfect the contract and vest the property in himself by the performance of the act which it is the duty of the vendor to perform, unless the acts are done by the authority of the vendor.<sup>7</sup>

The assent may be express or may be inferred from the conduct of the buyer. Thus, though the buyer may assent that goods are not of the contract quality, assent may be

Assent.

1. See Haji P.K. Moidoo Bros. v. State of Madras, A.I.R. 1959 Ker. 29 cited at p. 174 ante.
2. Rugg v. Minett, 11 East 210; Simmons v. Swift, 5 B. & C. 857; Aldridge v. Johnson, 6 E. & B. 885; Langton v. Higgins, 4 H. and N. 402; Langton v. Waring, 18 C.B. (N.S.) 315.
3. Rhode v. Thwaites, 6 B. and C. 388; Sparkes v. Marshall, 2 Bing. N.C. 761; 5 L.J.C.P. 286.
4. Jenner v. Smith, L.R. 4 C.P. 270; Campbell v. Mersey Docks, 14 C.B. (N.S.) 412.
5. Andrews v. Belfield, 2 C.B. (N.S.) 779.
6. Rugg v. Minett, supra; Furley v. Bates, (1863) 2 H. & C. 200; Sweeting v. Turner, (1871) L.R. 7 Q.B. 310.
7. Acraman v. Morrice, 8 C.B. 449; 19 L.J.C.P. 57. For general principles, see also Lord Coke's discussion in Heyward's case, and adopted in Comyns' Digest, Election.



inferred from his contract, *e.g.*, by a reference to arbitration.<sup>1</sup> The buyer's conduct in paying custom duty and godown rent was held amounting to an assent to the appropriation.<sup>2</sup>

Where the seller advises buyer of the appropriation and the buyer does not respond promptly, he must be taken as having impliedly assented.<sup>3</sup> "Implied assent may be given before the appropriation *e.g.*, a bookseller orders certain books from a publisher; when the books, properly packed and addressed are delivered to the railway, they are deemed to have been unconditionally appropriated by the seller and since the buyer, when placing the order, has impliedly assented to such appropriation, property passes at that time."<sup>4</sup>

Where in a contract the selection of goods agreed to be sold is left by the buyer to the seller and the seller makes the selection, it must be deemed that he has done so with the implied consent of the buyer. But where no such option is given, there is no express or implied consent to entitle him to appropriate the goods to the contract, so that the title to the goods should pass to the buyer.<sup>5</sup>

### Illustrations

(a) Goods answering the description in a contract were manufactured by the vendor and by him appropriated to the contract, and the purchaser on being informed of it directed the vendor to make and despatch them for shipment according to certain instructions, and the goods were marked and despatched from the vendor's mill but could not be shipped, as the vessels named by the purchaser were not available at their usual place. *Held*, that the property in the goods passed to the purchaser and he was liable in damages for declining to take delivery of the goods. "The act of despatching the goods from the mill was..... the act of the defendant (*i.e.* the purchaser) through his agents, the plaintiffs, and this act of the defendant constituted an *implied* assent to the appropriation by the plaintiffs, which then became no longer revocable."<sup>6</sup>

(b) A contracted to sell to B 1,999 bales of jute, the goods to be placed alongside S.S. "Uganda," and to be paid for in cash against the mate's receipt. The goods were marked by A with B's private mark pursuant to B's instructions and they were placed alongside the vessel, shipped in due course. The mate's receipts were made out in B's name, and A sent on to B, together with his bill for the receipt for bills of lading, and B pledged them with C, who advanced the money in good faith. B became insolvent. A sued C for the price of the goods alleging that the property in the goods did not pass to B, and B therefore could not make a valid pledge thereof. *Held*, that the property in the goods passed to B, the above facts affording sufficient evidence of an appropriation by A of the goods to the contract and of B's assent to the appropriation. *Held*, further, that a clause in the contract that if B retained the mate's receipts

1. *Finlay Muir & Co. v. Radhakissen*, (1909) 36 Cal. 736, 744.

2. *Buch and Co. v. Gordhandas*, (1922) 24 Bom. L.R. 991.

3. *Pignataro v. Gilroy*, (1919) 1 K.B. 459.

4. *Schmithoff on "Sale of Goods"*, p. 71

5. *Moti Lal v. Mool Chand*, 1950 All. L.J. 583.

6. *Clive Jute Mills Co. v. Ebrahim Arab* (1896) 24 Cal. 177, 182.



without paying for the goods, the receipts should be deemed to be the property of A until B paid for the goods, did not render the appropriation conditional only. The effect of that clause was, it was said, not to reserve the *jus disponendi* in A, but to provide him with a security for the payment of the price of the goods by empowering him to hold possession of the mate's receipts, and so to prevent B from dealing with the goods until the price was paid.<sup>1</sup>

(bb) A purchased goods on behalf of B and received part price of goods. The amount was debited to the account of B. A sent the goods by railway to Allahabad. The railway receipts were not handed over to B but were sent through Bank with instruction to hand it over to B only on payment of the price. The goods were addressed to self. The Railway misdelivered goods to a third person. A had ownership and title of goods in order to file suit against the Railway for the loss. The goods were not unconditionally appropriated to the contract.<sup>2</sup>

(c) B sends an order from Madras to A, a manufacturer at Calcutta, for certain goods "to be despatched on insurance being effected." A packs goods according to the order in a cask marked with B's initials and ships it from Calcutta, to B, having insured the goods in B's name. The goods become B's property as soon as they are despatched from Calcutta.<sup>3</sup>

(a) A contracted to sell to B 100 maunds of grain, according to a sample produced, out of a large bulk which B had not seen, and which was already in sacks of A's. A marked a certain number of the sacks with B's name and the words "To wait orders". The sacks so dealt did not become B's property in the absence of specific assent from B, or previous authority from B to A to select them on B's behalf.<sup>4</sup>

(e) In *Rhode v. Thwaites*,<sup>5</sup> the buyer bought twenty hogsheads of sugar out of a lot of sugar in bulk belonging to the seller. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated by the seller, who gave notice to the buyer to take them away, which the latter promised to do. *Held*, that this was an implied subsequent assent to the appropriation of sixteen hogsheads; that the contract was thereby converted into a sale, and the property passed."

(f) The plaintiff agreed to take from K 100 quarters of barley out of the bulk, which he had inspected and approved, in K's granary at £2 8s. a quarter, in exchange for thirty-two bullocks, at £6 a price; the difference to be paid to K in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which *K was to fill*, to take to the railway, and to place upon trucks free of charge. Plaintiff sent 200 sacks. K filled 155 sacks, but could not succeed in obtaining trucks. The plaintiff requested that the 155 sacks should be sent to him and K assured that it would be put on the rail that day, but this was not done. K finding

1. *Juggernath Augurwallah v. Smith*, (1906) 33 Cal. 547.

2. *Union of India v. Laxminarain Harnarain*, A.I.R. 1963 Raj. 162.

3. *Fragano v. Long*, (1825) 4 B. and C. 219, 28 R.R. 226.

4. See *Jenner v. Smith*, (1869) L.R. 4 C.P. 276. Compare *Healy v. Howlett and Sons*, (1917) 1 K.B. 337 cited at p. 426 *post*.

5. (1827) 6 B. and N. 388; 5 L.J. (O.S.) K.B. 163; 30 R.R. 363.



himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again. It was *held* that the grain put in the sacks became plaintiff's property as each sack was filled and did not cease to be so by K's subsequent wrongful dealing with it.<sup>1</sup>

(g) In *Langton v. Higgins*,<sup>2</sup> there was a contract for all the oil to be produced in one year's crop of peppermint on A's farm. When the crop was got in and the oil ready, A put it into bottles furnished by E. It was *held* that there was an appropriation and assent and that the property passed to the buyer.

(h) When the seller sends notice of appropriation to which the buyer does not reply, property is deemed to pass on the expiry of a reasonable time after receipt of notice. B orders 140 bags of rice from A, pays for them and asks for delivery. A sends him a delivery order for 125, and asks him to send for the remaining 15 at A's place of business. B waits a month before sending for them, and in the meantime they are stolen. The property in the 15 bags has passed to B, and he must bear the loss.<sup>3</sup>

(i) A in England writes to B at Basle in Switzerland for a packet of patent dye, to be sent by parcel post. B posts the packet to A. The property passes to A as soon as the packet is posted in Basle.<sup>4</sup>

(j) K consigned a wagon-load of lime and sold the consignment to the firm M. M paid portion of the purchase money and the remaining portion was to be paid on weighing of the lime according as the weight was more or less. The lime did not reach its destination till 14th March, 1920, the contract being entered into on 9th February, 1920. M found that the lime was damaged in the trans-shipment and was less in weight. M did not make any further payment and K instituted suit against him for the balance of the purchase money. *Held*, that the property in the lime had passed to M on 9th February, 1920, and any loss subsequent to the date was to be borne by M.<sup>5</sup>

(k) The broker hands the certificates to the buyer, together with transfers signed in blank by the registered holders. The shares are ascertained, the sale is complete and the property has passed to the buyer.<sup>6</sup>

(l) In *Gulab Rai v. Nirbheram*<sup>7</sup> where the seller forwarded the Bill of Lading with a Bill of exchange attached, with directions for delivery of the former only on the acceptance or payment of the Bills of Exchange, it was held that the appropriation which was conditional became final when the draft was accepted.<sup>8</sup>

1. *Aldridge v. Johnson*, (1857) 7 E. and B. 885 ; 110 R.R. 875.

2. (1859) 157 E.R. 896 ; 118 R.R. 515.

3. *Pignataro v. Gilroy and Son*, (1919) 1 K.B. 459. For converse case, see *Healy v. Howlett and Sons*, (1917) 1 K.B. 337 cited at p. 426 *post* ; see also *Nath Mul v. Jugal Kishore*, A.I.R. 1929 Lah. 268.

4. *Badische Anilin Fabrik v. Basle Chemical Works*, (1898) A.C. 200, at pp. 203, 204.

5. *Kanshi Ram v. Mul Chand Bhagwan Das*, A.I.R. 1930 Lah. 469 ; 127 I.C. 158 ; A.I.R. 1926 Lah. 606, *supra*, followed.

6. *Maneckji Pestonji Bharucha v. Wadilal Sarabhai and Co.*, A.I.R. 1926 (P.C.) 31 ; 50 Bom. 160 ; 94 I.C. 824.

7. A.I.R. 1924 Lah. 239 ; 4 Lah. 423 ; 79 I.C. 124.

8. See *Blackburn on Sale*, 3rd, Edn. pp. 148, 149.



Where in pursuance of a contract entered into on 26th April, 1943, for the sale of bales of cotton yarn, the seller informed the buyer on 6th July, 1943, that the bales sold were ready and required him to take delivery early and the buyer replied on 7th July, 1943, that he would make arrangement to take delivery at the end of the month or early next month pending the decision of the Government in respect of maximum prices of cloth or yarn, it was *held* that by his letter of 6th July, 1943, the seller had appropriated specific goods towards the contract and the buyer had, by his reply, accepted the appropriation, and that property in the goods had passed to the buyer and there was a concluded sale.<sup>1</sup>

(n) Where the buyer rejects the goods that they are not of contract quality (though they are so in fact) there is no assent. In *Yule & Co. v. Mahomed*,<sup>2</sup> the seller tendered certain bales of contract quality but the buyer refused to accept them on the ground that they were wrongly marked and so were not in terms of the contract. It was *held* that as the bales were at once refused by the buyer the property in the goods did not pass to him but remained in the seller in the same way as it was vested in him before the tender.

(o) When the goods have been rejected by the buyer it is open to the seller to make another election within the contract time, for until a particular election has been assented to by the buyer, it is not final. But the buyer is not bound to accept an election after the contract period has expired.<sup>3</sup>

(p) The Company manufactured timber sleepers, squares, logs etc. at their workshop. The Company had taken a big railway contract and the bulk of the timber manufactured by it was supplied to the railways and despatched to different destinations from Jogbani railway station after obtaining instructions from Sleeper Control Officer. The goods were stored in its godown at Jogbani so long as wagons were not available. The Sleeper Passing Officer had under the terms of the contract the right to inspect, pass and brand the sleepers at Jogbani railway station. The sleepers were offered for inspection at Jogbani railway station and the Sleeper Passing Officer inspected the sleepers and put his brand on the passed sleepers in the presence of the Contractor, who also put a dot of white paint on each passed sleeper near the Sleeper Passing Officer's brand.

After the sleepers were passed by the Sleeper Passing Officer the Contractor loaded the goods in the railway wagons at Jogbani and despatched the consignments to the various destinations. Paragraph 11 (g) of the contract stated that such sleepers as were acknowledged by the consignee as possessing the passing mark of the Sleeper Passing Officer and the private mark of the Contractor would be deemed to be fully delivered. It was also clear from the terms of the contract that the petitioner delivered the goods to the buyer at Jogbani railway station without reserving the right of disposal. It was *held* : (i) that upon a consideration of all the provisions of the contract it was manifest that the goods in question were unconditionally appropriated to the contract at Jogbani railway station. As soon as the sleepers were passed and branded by the Sleeper Passing

1. *M. Siddique and Co. v. P. Rangiah Chettiar*, A.I.R. 1948 Mad, 122.

2. (1897) 24 Cal. 124. See also *Wait v.*

*Baker*, (1848) 2 Exch. 1, 10.

3. *Burrowman v. Free*, 48 L.J.Q.B. 65.



Officer at Jogbani, there was a legal appropriation to the contract on the part of the buyer within the meaning of S. 23 (1). Alternatively, there was appropriation of the goods within the meaning of S. 23 (2) at Jogbani railway station. There was nothing to suggest from the terms of the contract that the Contractor reserved the *jus disponendi*. There was delivery to the carrier at Jogbani railway station and there was an unconditional appropriation of the goods also within the meaning of S. 23 (2). (ii) Though there was a condition in the contract that sleepers would be subjected to a second inspection at destination, the transaction could not by any stretch of reasoning be deemed to be a contract within the meaning of S. 24. The transaction was a transaction in the nature of a conditional sale and the title to the sleepers passed to the buyer at Jogbani railway station subject to the buyer's option to return the goods if they had not passed at the second test by the Sleeper Control Officer at the respective destinations. It was of a different legal character from the transaction of "sale or return" which was only a contract of a bailment and did not pass title to the goods. Section 24 had no application.<sup>1</sup>

(q) The assessee company was a dealer in chemicals with its registered office at Calcutta. The District Board and the Municipality of Bhagalpur placed order for certain goods with assessee and the orders were received by the assessee in Calcutta. On receipt of the orders the goods were separated and appropriated against the orders in the assessee's factory in Bengal. The goods were then delivered to the railway authorities and the railway receipts were sent in the name of the Chairman or Vice-Chairman, of the Municipality or the District Board. The railway receipts were not sent by V.P.P. The Municipality and the District Board took delivery of the goods and subsequently made payments by means of cheques drawn on the branch of the Imperial Bank at Bhagalpur. *Held*, (Per *Ramaswami and Das JJ.*) that the sales of chemicals to the Municipality and the District Board for which tax had been assessed were effected in West Bengal and as such were not liable to be taxed under the provisions of the Bihar Sales Tax Act, 1944.

The assessee company also despatched goods to various destinations in the Province of Bihar in the name of the assessee itself as consignee and the price of which was realised from the dealers either through the agent of the assessee in Bihar or by sending the railway receipts by V.P.P. *Held*, (per *Ramaswami and Rai JJ.*) that these transactions constituted sales within the meaning of the Bihar Sales Tax Act, 1944, and the assessee was therefore a dealer within the meaning of the Bihar Sales Tax Act, 1944, section 2 (c).<sup>2</sup>

(r) Before the property in unascertained or future goods can pass they must be "unconditionally appropriated" to the contract and they cannot be said to be so appropriated if the seller reserves the right of disposal or what is called in English law, the *jus disponendi*. Where at the time when the goods are delivered to the railway the consignor reserves right of disposal by taking the consignment in his own name and stipulating that the railway receipt can only be handed over on payment of the price, there is an unconditional appropriation of the goods.<sup>3</sup>

1. *Birendra Nath Guha & Co. v. State of Bihar*, A.I.R. 1955 Pat. 245  
 2. *State of Bihar v. Bengal Chemical and Pharmaceutical Works Ltd.*, (1954) 5 S.T.C. 28 : see also *Provincial Auto-*

*mobile Co. Ltd. v. State of M.P.*, 1952 Nag. L.J. 149, cited at p. 396 *ante*.  
 3. *Ramanlal Ratilal & Co. v. Abdulla Basha*, (1949) 54 Mys. H.C.R. 186.



(s) In *Noblett v. Hopkinson*,<sup>1</sup> beer was ordered at a public house on a Saturday to be delivered on the following Sunday. The beer was drawn and bottled on the Saturday. It was *held* that there was no appropriation on the Saturday so as to constitute a sale on that day. There was no evidence that the buyers assented to the bottling and this was done on the seller's own responsibility; he would have been obliged to supply other beer if the bottle had been broken before delivery.

(t) In *Healy v. Howlett & Sons*,<sup>2</sup> the defendants ordered 20 boxes of hard bright mackerel of which 170 boxes were delivered to the Railway company at Valentia by the plaintiff for transit to Holyhead to the plaintiff's order. At Holyhead the Railway company was instructed to deliver 20 boxes to the defendants. The fish was found unsound on arrival, having been delayed *en route* Valentia to Holyhead and the defendants refused to accept. It was *held* that there had been no appropriation at Valentia and neither the property nor the risk had passed to the defendants prior to the arrival of the fish at Holyhead.

(u) The question of appropriation is a question of fact, and the law does not require any particular mode or form of appropriation. In *Maradugala v. Kotala*,<sup>3</sup> the property in timber was held to pass as soon as it was cut.

(v) In *Philip Head v. Showfronts, Ltd.*, (1970) 1 Lloyd's Rep. 140, A ordered carpets from B to be laid by B on A's premises. B delivered carpets to A's premises, but before B could lay them they were stolen. It was held that the carpets were not in a deliverable state and the property in them had not passed.<sup>4</sup>

(w) In *Messrs. General Limited v. Messrs. A.P.A. Pakkir Mohideen and Brothers*<sup>5</sup>, the contract to supply the Unascertained goods. goods was entered into at Madras and the goods were to be despatched by railway to the Sattur Railway Station and the entire price and charges were to be paid by the buyers at Tenkasi to the Bank to whom the railway receipt was sent by the sellers consigning the goods to self and not to the buyers. The orders were placed at Madras after inspection and approval of goods, but without separating the goods covered by the contract from the general stock. The goods were destroyed by the fire during transit. It was *held*: The sellers did not take out the goods contracted for from the general stock with them and put them into any cart or box sent by the buyers, when alone the appropriation with the implied assent of the buyers would be made out and property would pass. An inspection of the general stock and approval of the quality of the goods and fixation of the price and agreement regarding payments of freight, sales-tax and packing charges will not be sufficient to pass property to the buyers, if the goods, were not separated from the general stock.

1. (1905) 2 K.B. 414.

2. (1917) 1 K.B. 337. See also *Fragano v. Long*, (1825) 4 B. & C. 219—though delivery to a carrier is *prima facie* an appropriation by sub-section (2), if the seller contracts to deliver to the buyer at the destination of the goods, the property does not pass until such delivery.

3. 21 Mad. L.J. 413.

4. See Chalmers, *Sale of Goods Act*, 16th Edn., p. 118.

5. (1958) 1 Mad. L.J. 294. See also *Arun (Private) Ltd. v. State of Madras*, A.I.R. 1961 Mad. 216 cited at p. 80 ante—sale of unascertained goods; title held passed to the buyers at the point of delivery of the goods.



Though payment of price is not a condition precedent to the passing of the property in the goods, yet if there was no express or implied assent of the buyer when the appropriation was made by the seller at his godown of the particular goods, there would be no passing of property.

By assigning the goods to self and sending the railway receipt to the bank, which must, in the circumstances, be held to be the agent of the seller, directing the bank to deliver the railway receipts duly endorsed to the buyers after the buyers had paid the money, the seller had reserved the right of disposal over the goods and they were still the owners of the goods.

Blackburn has observed on this point as follows :

“The difficulty arises when the original agreement does not ascertain the specific goods, and party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and not binding on the other party, unless it was made in pursuance of an authority to make the election conferred by agreement, or unless the act is subsequently and before its revocation adopted by the other party. In either case it became final and irrevocably binding on both parties.

“The question of whether there has been a subsequent assent or not, is one of fact ; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of nicety.

“The general rule laid down by Lord Coke in *Heyward's case*,<sup>1</sup> and adopted in *Comyen's Digest*, *Election* seems to be that when from the nature of an agreement an election is to be made, the party, who is by the agreement to do the first act which, from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement ; when once he has performed the act, the choice has been made and the election irrevocably determined ; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.

“It follows from this, that where from the terms of an executory agreement to sell unspecified goods, the vendor is to despatch the goods, or to do anything to them that cannot be done until the goods are appropriated, he has right to choose what the goods shall be ; and the property is transferred the moment the despatch or other act has commenced, for then an appropriation is made, finally and conclusively, by the authority conferred in the agreement and in Lord Coke's language, ‘the certainty’ and thereby the property begins by election”<sup>2</sup> but however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agree-

1. 2 Coke, 36.

2. Heyward's case, supra.



ment with those particular goods, yet until the act has actually commenced the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him."<sup>1</sup>

It may be noted that where both parties have subsequently assented to the appropriation of some specific goods to fulfil the agreement, no difficulty arises. The effect is then the same as if they had from the first agreed upon the sale of those specific goods. The selection of the goods by the one party and the adoption of that act by the other converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes.<sup>2</sup>

If there is previous assent by the buyer, subsequent appropriation or selection by the seller passes the property at once. **Appropriation with the previous assent of the buyer.** As has been stated above, there must be the selection of goods, by one party and the adoption of it by the other party but the order may vary. Thus if the authority to select is conferred by the contract on the seller, as soon as the selection is made, property passes to the buyer.<sup>3</sup> Previous authority to appropriate may be withdrawn before it is exercised and if the seller in spite of that appropriates, property does not pass and the seller cannot sue for price but he can sue for damage for non-acceptance.

If there is neither previous authority nor subsequent assent to appropriation, the property does not pass.<sup>4</sup> So too, if a **Appropriation by mistake.** mistake is made in the appropriation.<sup>5</sup> A common mistake as to the identity of the goods appropriated is, of course, ineffectual. Thus, where a buyer bought a quantity of goods at auction under the denomination of class 2, and certain packages were subsequently appropriated by both parties as the buyer's purchase, whereas they contained, unknown to the parties, goods of class 1, it was *held* that no property passed to the buyer.<sup>6</sup> But where a common intention to appropriate exists, a mistake by the agent receiving the goods as to the particular buyer for whom they are delivered is immaterial. Thus where each buyer of 500 quarters of oats out of a cargo sent the same lighterman to receive the parcels, and the lighterman intended to take delivery of S and D respectively, whereas the shipping clerk delivered on behalf of D and S respectively, and the parcel which the seller intended to deliver to S was lost, it was *held* that as both D and the seller intended the parcel received by the lighterman for S to be appropriated to D, D was entitled to it.<sup>7</sup>

In a contract for unascertained goods, the property in the goods **Unascertained goods — Property when passes.** does not pass to the buyer unless and until the goods are ascertained and unconditionally appropriated to the contract and the buyer has notice of this fact.<sup>8</sup>

1. Blackburn on Sale, 3rd Edn., pp. 137, 138. This statement of the law was approved by Erle J. in Aldridge v. Johnson, 26 L.J.Q.B. 296, 7 E. & B. 885.  
2. See Rhode v. Thwaites, *supra*, p. 393 per Holroyd J.  
3. Gath v. Lees, (1865), 3 H. and C. 558. See Chalmers, 15th Edn., p. 84.

4. See Jenner v. Smith, *supra*.  
5. Campbell v. Mersey Docks and Harbour Board, (1863) 143 E.R. 506 : 135 R.R. 752.  
6. Harvey v. Harris, 112 Mass. 32.  
7. Denny v. Skelton, (1916) 115 L.T. 305.  
8. Loon Karan Sohan Lal v. Firm John & Co., A.I.R. 1967 All. 308.



**Contract for sale of unascertained goods—Appropriation when complete—Property in goods when passes to buyer.**

In a contract for sale and purchase of unascertained or future goods, the appropriation of goods is not complete unless the goods are earmarked or unless the seller sets apart the specific goods for supplying them to a contracting buyer, and unless the seller gives up his right to sell them to others or deal with them in any other way. The property in the goods does not pass to buyer unless the goods are appropriated to the contract.

In this case the contract was for supply of goods by Rail and for receiving the price thereof on delivery of the railway receipt through V.P.P. or through the Bank and the purchaser could not have received documents of title without making payment. In such case, the property in the goods could only pass when the documents of title were handed over to the purchaser and when he had paid for the same.<sup>1</sup>

In *Carona Sahu Co. (P). Ltd. v. state of Maharashtra*,<sup>2</sup> the Supreme Court held: The law is well established that in the case of contract for sale of unascertained goods the property does not pass to the purchaser unless there is unconditional appropriation of the goods in a deliverable state to the contract. In the case of such a contract delivery of the goods by the vendor to the common carrier is an appropriation sufficient to pass the property. But there is a difference in legal effect of delivering goods to a common carrier on the one hand and shipment on board under a bill of lading on the other hand; where goods are delivered on board of a vessel to be carried and a bill of lading is taken, the delivery by the seller is not delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading. The seller may therefore take the bill of lading to his own order. The effect of this transaction is to control the possession of the captain and make the captain accountable to deliver the goods to the seller as the holder of the bill of lading. The bill of lading is the symbol of property, and by so taking the bill of lading the seller keeps to himself the right of dealing with property shipped and also the right of demanding possession from the captain, and this is consistent even with a special term that the goods are shipped on account of and at the risk of the buyer.

The Cochin sellers had their agents in Bombay who received the order of the appellant company and arranged for the shipping of the goods. In accordance with these orders the goods were shipped by the Cochin seller from Cochin to Bombay. The Bills of Lading were in the name of the sellers as consignor and consignees. The invoices however showed that the goods were shipped at the risk and on account of the appellant company. The insurance charges were borne by the appellant who also paid freight and other charges. The bills of lading were sent by the sellers through the bank to be delivered to the buyers in Bombay on payment of the price of the goods.

On the facts, the property in the consignment passed to the appellant in the State of Bombay and not in Cochin. The endorsement in the invoice

1. *Hira Lal Kedar Nath v. Hari Nath Onkar Nath*, 1962 All. L.J. 396.

2. A.I.R. 1966 S.C. 1153.



merely indicated that the insurance charges were to be paid by the appellant and the clause had no bearing on the question of the passing of title.

**(5) Delivery to a carrier—Sub-section (2).**

“The commonest method of appropriating goods to a contract is by delivering them to a carrier, and then, if there be authority so to deliver them, and the seller does not reserve the right of disposal, the moment the goods which have been selected in pursuance of contract are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and the vendee (either by note in writing or part payment or subsequently by part acceptance) then there is no doubt that the property passes by such delivery to the carrier. It is necessary of course, that the goods should agree with the contract.”<sup>1</sup>

In order to come within the rule laid down in sub-section (2), there must be (i) delivery in pursuance of the contract, *i.e.* in the manner indicated and goods of the description in the contract, (ii) delivery should be to the buyer, (iii) or to a carrier or other bailee for transmission to the buyer, and (iv) the seller does not reserve the right of disposal. Under S. 23 (2) of the Act there is a presumption that title passes as soon as the goods are delivered to the carrier but this presumption is subject to the express terms embodied in the actual contract between the parties.<sup>2</sup> This is made clear by S. 19 of the Act.

Sub-section (2) recognizes an important principle, *viz.* that, where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not (for the purpose of transmission to the buyer, and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract. The rule is, however, silent as to the passing of the property to effect which there should be previous or subsequent assent of the buyer. In cases where the buyer asks the seller to send the goods by a common carrier (whether by sea or by rail), it has been *held* that the buyer's assent to the appropriation is already given to the seller and that when the seller despatches the goods and delivers them to the common carrier for the purpose of transit to the buyer, the common carrier not only receives the goods as agent of the buyer, but also assents to the appropriation made by the seller.<sup>3</sup> If the intention finally to appropriate is clearly indicated and the carrier assents, it is immaterial by what documents the consignment is effected.<sup>4</sup> When goods are to be delivered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off though there may be a provision that they are to be paid for after arrival.<sup>5</sup>

1. Chalmers, Sale of Goods Act, 1893, 16th Edn., p. 122; Wait v. Baker, (1848), 2 Exch. 1, at p. 8 (unendorsed bill of lading) per Parke B; Napier v. Dexters Ltd., (1926) 26 Ll. L. Rep. 62.  
2. Coke Oven Construction Co. v. State, of Bihar, (1958) 9 S.T.C. 639 (Pat.).  
3. Colonial Insurance Co. v. Adelaide Insurance Co., (1886) 12 A.C. 128 (Buyers chartered ship—delivery on

board is delivery to buyer); Studdy v. Sanders, (1826) 108 E.R. 234 (delivery to buyer's servant; Fragano v. Long, (1825) 107 E.R. 1040; 28 R.R. 226; Dutton v. Solomonson, (1803) 3 B. & P. 582; 7 R.R. 883.  
4. Bryans v. Nix, (1839) 4 M & W. 775, 791; 51 R.R. 819, 833.  
5. Fragano v. Long, (1825) 4 B. & C. 219; 28 R.R. 226,



The rule, however, applies only where the carrier is, as he generally is, the buyer's agent to take delivery. If the facts show, as for example, where the seller exercises a right of disposal,<sup>1</sup> or where he agrees to deliver the goods at their destination,<sup>2</sup> that the carrier is the seller's agent delivery is not a final appropriation. In such cases under the Act "a different intention appears."<sup>3</sup> In *Louis Dreyfus & Co. etc. v. South Arcot Groundnut Market Committee etc.*,<sup>4</sup> under a contract it was provided that the vendor should send the goods to the godowns of the purchaser at the place C and give the purchaser the power of inspection and rejection. Though an advance was paid, the balance of the purchase money was to be paid on accepting the goods or the advance was to be refunded on rejection. The delivery was to be completed at place C. It was *held* that the sale and purchase were at C, and that by mere handing over of the goods to railway authorities the goods did not become unconditionally appropriated to the contract.

In *Wardar's (Import & Export) Co. Ltd. v. W. Norwood & Sons, Ltd.*,<sup>5</sup> the sellers had 1500 cartons of kidneys in a cold store in London. They sold six hundred of these to the buyers, who inspected some of the cartons in the store, on Oct. 13, 1964. On the morning of Oct. 14 the sellers' agent gave the buyers' carrier, a delivery note authorising him to pick up six hundred of the cartons. The carrier went to the cold store at about 8 a. m. and found that the six hundred cartons had already been put out of the cold store on to the pavement. He produced his delivery note, and the cartons were loaded into his lorrey. It was *held*: The contract when made was for the sale of unascertained goods, and the six hundred cartons were unconditionally appropriated to the contract at 8 a. m. when by accepting the delivery note, and indicating to the carrier that the cartons on the pavement were those that he was to take, the official at the cold store acknowledged that the goods were held on the buyers' behalf; accordingly the property in the goods then passed to the buyers under r. 5 of S. 18 of the Act of 1893 (corresponding to S. 23 of the Indian Act), and thereafter the goods were at the buyers' risk.

In *Sohan Singh v. Union of India*,<sup>6</sup> A ordered B to supply cane baskets. B was to deliver baskets to D railway station. B brought baskets to D and intimated to A that they were ready for despatch. B advised to book baskets to another railway station. B did so and sent Railway Receipts to A. The consignment was lost in transit. B brought a suit claiming value of baskets. It was *held* that the fact that the baskets were consigned to another railway station did not indicate change in terms of the contract as to delivery and that property in goods passed to A when goods were delivered to railway authorities.

In *Bhagwati Saran v. Baijnath Prasad*,<sup>7</sup> there was order for supply of goods according to description. Goods were despatched by railway. The

1. See section 25 of the Act.

2. *Badische Anilin and Soda Fabrik v. Basle Chemical Works*, (1893) A.C. 200; 67 L.J. Ch. 141, (cf.) *Sadasook v. Chaitram*, A.I.R. 1926 Cal. 218; 88 I.C. 910.

3. See Benjamin on Sale, 8th Edn., p. 336.

4. A.I.R. 1945 Mad. 383. See also

*Ramniwas v. Commr. of Taxes*, A.I.R. (1952) Assam 178 cited at p. 415 ante.

5. (1963) 2 All E.R. 602. See also this case as referred to at p. 378 ante.

6. F.A. No. 11 of 1950, 15-7-1952 (Assam); (1953) Indian Digest, column 584.

7. I.L.R. 1950 All. 112.



plaintiff made payment demanded under protest as it was in excess of contract price. On taking delivery bulk of goods was not found according to description. In suit for refund of price instituted four days after taking delivery it was *held* that there was no completed contract and the plaintiff was entitled to refund as property in goods did not pass to him.

In an ordinary contract for sale, the seller may retain the property in the goods till the price is paid. If the goods are made over to a bailee, the bailee would ordinarily be an agent of the seller unless the buyer agrees to make the bailee his agent, and asks the bailee to hold the goods for him.<sup>1</sup>

The property would not pass on delivery if the passing of property is conditional. Thus, if the contract provides that the property is not to pass to the buyer until he has actually received the goods, or examined or approved of them, delivery to a carrier does not pass the property.

In *Birendra Nath Guha v. Commissioner of Taxes, Assam*,<sup>2</sup> it was observed : Delivery to a carrier would no doubt be an appropriation in cases where the buyer authorises the despatch of goods through the agency but the appropriation involved in such act need not be unconditional. But in cases where the delivery of goods to the carrier is the only fact relied upon for constituting appropriation and so the transfer of property, it has to be unconditional.

The delivery must be "in pursuance of the contract", that is to say, it must be by the route prescribed. Thus, where the contract provided for a sea carriage from the port of loading to New York, the tender of goods which were sent part of the way by rail was held not to be a good tender, and the buyers were held entitled to reject the goods.<sup>3</sup> Similarly, if the buyer names the carrier, the seller does not duly pursue his authority to appropriate if he delivers to another carrier.<sup>4</sup>

It has been held by the Madras High Court that delivery to the railway company by taking a railway receipt in the risk note from is delivery to the buyer.<sup>5</sup> But where the goods were consigned by railway, but the railway receipt was taken in the consignor's name, it was *held* that there was no appropriation.<sup>6</sup>

Delivery to the buyer may not pass the property if the seller reserves his right of disposal. *See notes under section 25 post.*

As to the meaning of delivery, see sec. 33 *post.*

Unless there is something in the terms of the contract to show a contrary intention when the seller delivers the goods to the carrier for transmission to the buyer, the property passes to the buyer and the contract would

Goods sent by  
Railway.

1. Kishun Das v. Ganesh Ram, A.I.R. 1950 Pat. 481.
2. A.I.R. 1958 Assam 119.
3. In re Sutro and Heilbut, (1917) 2 K.B. 348, at p. 357.
4. Ullock v. Reddelein, (1828) Dan & Ll. 6; 29 Digest 574.

5. Alagappa v. Roopchand, A.I.R. 1929 Mad. 685 : 117 I.C. 136.
6. Billimoria v. Gouri Mal, A.I.R. 1928 Lah. 481 : 115 I.C. 457 ; Sundar Singh v. Gulab Singh, A.I.R. 1927 Lah. 269 : 100 I.C. 795.



be deemed to have been made as agent of the buyer. Nor does the fact that the seller intimates that he will not deliver, or refuses to deliver, except on payment of the price, of itself displace the presumption; for the right of the seller to retain possession of the goods until payment is quite consistent with the change of property. Obviously too once the property has passed to the buyer he can have no right of action against the seller for anything subsequently happening to it. The loss is his, and his remedy, if any, is against the railway company. The position is, however, different where the consignment is to self. Where goods are sent by Railway the consignment being made to self, the property in the goods does not pass to the buyer on delivery of the goods to the Railway Company as carrier. The seller, therefore, when he enters into the contract with the railway company is not in such a case, acting as the buyer's agent and the buyer cannot be considered to be the original party to the contract with the railway company.<sup>1</sup>

In *J. S. Basappa v. Provincial Government of Madras*,<sup>2</sup> it was held: What determines the *situs* of sale is a place where the property in the goods passes to the buyer. The principles for deciding whether and when the property in the goods is transferred to the buyer are laid down in Ss. 19 to 25 of the Sale of Goods Act. In the absence of any specific agreement or of intention, the buyer becomes the owner of the goods the moment the goods are delivered to him or to the railway which is deemed to be the agent of the buyer for purposes of carrying it to the buyer. The fact that the seller had taken back the railway receipt for the purpose of giving it to their bankers for collection of the price is not decisive of the *locus* of the sale. This circumstance does not in any way give an indication as to his intention to reserve the *jus disponendi*. It might only give him the right of lien over the goods.

In *Amrit Banaspati Co. Ltd., v. State of Punjab*, (1974) 76 P.L.R. 410 it was held: Where hundies are drawn in favour of the buyer and payment is made by the buyer to the banks at Rajpura, in the circumstances, it cannot be said that the property in goods passes to the buyer before the payment is made by the buyer to the bank and the Railway Receipt is got released. The Railway will be considered to be agent of the person who despatches the goods and draws the hundi. The sale is effected in favour of the buyer when the payment is made by the buyer to the bank who is agent of the owner of the goods. Therefore the sales were completed when the money was paid to the bank and the Railway Receipt delivered to the purchasers. (See also section 25(1) *post*) (See yearly Digest, 1974, column 549).

#### (6) Goods to be manufactured—unfinished ships etc.

A man may purchase a chattel whilst in process of making: or he may agree to purchase it when made;<sup>3</sup> whether he does the one thing or

<sup>1</sup> Governor-General in Council v. Joy-narain Ritolia, A.I.R. 1948 Pat. 36. See also M.S.M. Railway Co. Ltd. v. Rangaswamy Chetty, A.I.R. 1924 Mad. 517; Dawes v. Peck, (1799) 101 E.R. 1417. For the case when goods are consigned to self, see notes under section 25(1); Ugarchand v. Motiram, A.I.R. 1938 Sind 18; Ford

Automobiles (India) Ltd. v. Delhi Motor & Engineering Co., A.I.R. 1923 Bom. 125; Ramanlal Ratilal & Co. v. Abdullah Basha, (1949) 5 Mys. H.C.R. 186.  
<sup>2</sup> (1958) 2 Andh. W.R. 393.  
<sup>3</sup> Laidler v. Burlinson, 2 M & W. 602; 6 L.J. Ex. 160.



the other depends on the intention of the parties. In the latter case *i.e.* where a specific chattel is ordered to be made, *prima facie* the right of property is not vested in the party who gives the order, nor the right to the price in the vendor, until the thing ordered is completed and made ready for delivery, and has been approved of by the purchaser, or some person appointed on his behalf to inspect the materials and workmanship. The builder or maker is not bound to deliver to the purchaser the identical chattel which is in progress although the purchase money may have been paid in advance, but may, if he pleases, dispose of it to some other person, and deliver to the purchaser another chattel, provided it answers to the description contained in the contract.<sup>1</sup>

But parties may agree that property in the goods should pass even before they are completed, or at a certain stage. It is a question depending upon the construction of the contract at what stage of the manufacture of an article the property therein is intended to pass, and a question of fact whether that stage has been reached.<sup>2</sup>

As regards contracts for the building of such things as ships, where the price of a ship in course of construction is payable by instalments, a special rule of construction is established by the English authorities, *viz.*, that the property in the unfinished ship passes on payment of the first instalment and subsequent additions become the buyer's property as they are worked into the ship (subject in all these cases, to evidence of a contrary intention), and that despite the fact that the article is not in a deliverable state. The payment of instalments is held "to appropriate specifically to the buyer the very ship so in progress, and to vest in him a property in that ship."<sup>3</sup> This, however, is only a rule of construction and no rule of law.<sup>4</sup>

"The result of the rule stated above is that as between the buyer and the builder, the buyer is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other"<sup>5</sup> and this has long been taken as a settled rule.<sup>6</sup>

In *re Blyth Shipbuilding Co.*,<sup>7</sup> it was observed: For appropriation I think there must be some definite act such as the affixing of the property to the vessel itself, or some definite agreement between the parties which amounts to an assent to the property in the materials passing from the builders to the purchasers."

This rule, however, does not extend to auxiliaries intended to belong to the ship, not forming part of the structure, such as engines, before they are fitted in the vessel and approved as parcel of it.<sup>8</sup> Lord Watson observed in *Seath v. Moore*:<sup>9</sup>

"Materials provided by the builder and portions of the fabric whether wholly or partially finished, although intended to be used in

1. *Mucklow v. Mangles*, 1 Taunt. 318.  
2. *Atkinson v. Bell*, (1821) 8 B. & C. 277; 6 L.J. (O.S.) K.B. 258; *Laidler v. Burlinson*, *supra*; *Elliot v. Pybus*, 4 Moo. & Sc. 389, 397; 3 L.J.C.P. 182.  
3. *Woods v. Russell*, (1822) 5 B. & Ald. 942, 946.  
4. See *Clarke v. Spence*, (1836) 4 Ad. & E. 448; 43 R.R. 395; *Laing v. Barclay, Curle & Co.*, (1908) A.C. 35, See also *In re Blyth Shipbuilding & Dry Docks Co. Ltd.*, (1926) Ch. 494, C.A.

reviewing all the cases.  
5. *Woods v. Russell*, *supra*.  
6. *Mellish L.J.*, in *Ex-parte Lambton* (1875) L.R. 10 Ch. App. 405, 414.  
7. (1926) Ch. 494; per *Sargant L.J.* at p. 518.  
8. *Wood v. Bell*, (1856) 6 E. & B. 355, 103 R.R. 749; *Ex. Ch. Reid v. Macbeth & Gray*, (1904) A.C. 223; *In re Blyth Shipbuilding & Dry Docks Co. Ltd.*, *supra*.  
9. (1886) 11 App. Cas., at 381.



the execution of the contract, cannot be regarded as appropriated to the contract; or as sold, unless they have been affixed to or in a reasonable sense made part of the *corpus*.

Where the purchaser has paid part of the instalments by accepting bills drawn by the vendor, which have been discounted with third parties and the purchaser and vendor subsequently become bankrupt, the holders of the bills have no lien on the ship if the bills are dishonoured.<sup>1</sup>

It is not absolutely necessary that there shall have been in the original contract a stipulation for payment by the instalments, or that the instalment has actually been paid. The absence of these considerations might be supplied by the other circumstances from which the inference could be drawn. There must, however, always be facts admitted or proved sufficient to warrant the inference that the purchaser has agreed to accept the completed portion of the ship in part fulfilment of the contract of sale.<sup>2</sup>

As already observed, it is a question depending upon the construction of the contract at what stage of the manufacture of an article the property therein is intended to pass, and a question of fact whether that has been reached. In *Sir James Laing & Sone v. Barclay Curle & Co.*,<sup>3</sup> certain ships were to be built for an Italian company, but the contract provided that the vessels were not to be considered as delivered to, and finally accepted by the purchasers until they had passed certain official trials. Payment was made by the purchasers in instalments and the ships were arrested for a debt due from them. It was *held* that the contract was for a completed ship, that the risk lay with the builders till delivery, and there was no intention to part with the property until the vessels were completed.

Where the seller has to incorporate with his own materials with those of the buyer, the materials become the property of the buyer as soon as they are incorporated with the goods belonging to the buyer. Before incorporation the seller may select any material for the purpose but there is no final election unless they are incorporated; so until then the property does not pass. When the contract is not for the sale and purchase of goods as moveables, but to make up materials and fix them until they are fixed by the very nature of the contract the property will not pass. In *Tripp v. Armitage*,<sup>4</sup> property was held not to pass in certain wooden sash-frames which were not fixed to the building though approved by the supervisor.

The presumption or inference inferred to above will not arise in the case of machinery or materials to be fitted to a ship which is already in existence.<sup>5</sup>

The principle enunciated above is not confined to ships; it seems that "the same reasoning would apply to any other Chattels other than ships. chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state."<sup>6</sup> There may be a contract for the sale of the component parts of a whole structure or the like as parts, coupled with a contract that the seller shall put them together after delivery to the buyer.

1. Ex-parte Lambton, *supra*.

2. Laidler v. Burlinson, (1837) 2 M. & W. 602 ; 46 R.R. 717 ; Seath v. Moore, *supra*.

3. (1908) A.C. 35, H.L.

4. (1839) 4 M & W. 687.

5. Anglo-Egyptian Navigation Co. v. Rennie, L.R. 10 C.P. 271, at pp 280, 281.

6. Seath v. Moore, *supra*, p. 385.



Here the parts as delivered are appropriated to the contract and become the buyer's property.<sup>1</sup>

**(7) Appropriation—when final.**

The question as to whether appropriation once made by the seller is final or whether it is revocable and he has got the right to further appropriate other goods answering the description within the time limited for performance sometimes arises. It has been held in *Reuter v. Sala*<sup>2</sup> that if the seller is still in time and the buyer is not prejudiced, it is open to the seller to make a fresh election and appropriation. Otherwise, an appropriation once made is final.<sup>3</sup>

“When the party authorised has determined his election by doing such act or thing, the appropriation is finally made. Until that time any act or thing done with reference to the goods towards appropriation by the party authorised is revocable, unless it has, previous to its revocation, been assented to by the other party. The question whether any act or thing done with reference to the goods is a final determination of an election to appropriate, or merely indicates a revocable intention to appropriate, is one of law.”<sup>4</sup>

In *Bailey, Son & Co. v. Smyth & Co. Ltd.*,<sup>5</sup> there was a contract for the sale of 15,000 units of corn and there was a term that there should be separate documents for each 1,000 units and each 1,000 units should be considered a separate contract. The sellers gave notice of appropriation of 15,444 quarters and sent 15 invoices for 1000 each and one for 444. The buyers having rejected, the seller on the same day sent an amended invoice for 15,000 quarters stating that there were 15 bills of lading dated August 26, each for a number of bushels equivalent to 1,000 units. It was held that the contract originally single and indivisible became 15 separate contracts on appropriation and that the amended provisional invoice had the effect of withdrawing the first tender and was a good tender and the goods had passed to the buyer and he had no right to reject them.

Though no doubt a defective declaration might be cured by a second declaration if in time, if each declaration by itself is bad, the two cannot read together to form a good declaration. In *Aure v. Van Cauwenberghe & Fils*,<sup>6</sup> there were three declarations one after the other as each was found bad and the argument that the second and third declarations between them constituted a valid declaration was rejected by the court.

**(8) Goods unascertained—Agreement between parties that seller will have right of resale against buyer in breach and to recover godown and insurance charges etc., although goods have not been appropriated by either party—Seller is entitled to recover these charges, although goods have not been appropriated.**

Although in a contract of sale relating to unascertained goods, there is no right of resale or the right to recover insuring and warehouse char-

1. *Pritchett & Gold etc. Co. v. Currie*, (1916) 2 Ch. 515, C.A.

2. (1879) 4 C.P.D. 239 (C.A.)

3. *Grain Union Co. v. Hans Larsen*, (1934) 150 L.T. 78 : 49 T.L.R. 540 (goods shipped per Triton—notice of appropriation erroneously given as

per Iris. Held, notice final and buyer can reject).

4. Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 63.

5. (1939) 1 All E.R. 115.

6. (1938) 2 All E.R. 300.



ges etc., so long as the goods are not appropriated, it is open to the parties to agree as between themselves that in spite of the fact that the property in goods has not passed, there having been no appropriation by either of them of the goods towards the contract, the seller will have the right of resale against the buyer in breach and also to recover the godown rent and cost of insurance etc. and where such agreement exists the seller is entitled to recover the godown and insurance charges etc. It is always open to the parties to agree to terms under which the question of appropriation or the passing of the property to the buyer would not arise.<sup>1</sup>

Where the contract related to sale of unascertained goods and the property in the goods was not to pass to the buyer until he had paid the purchase money and obtained the railway receipt, and the goods were carried at owner's risk, the consignor is responsible for loss of goods in the transit unless there was a contract that the carrier should make good the loss. The ownership in the property would pass to the buyer at the place of delivery and the court at that place would have jurisdiction.<sup>2</sup>

There was contract for sale of unascertained goods and by description. The contract gave seller right to resell on buyer's failure to take delivery. The seller had many more similar goods in his possession on date of contract. On the date fixed for delivery the seller sent intimation to buyer to take delivery. The buyer refused to take delivery. The seller sold goods and claimed difference between the contract rate and the rate prevailing on date of breach as damages. It was *held* that the seller was entitled to such damages.<sup>3</sup>

#### (9) Present sale of future goods—goods in potential existence.

As has already been noticed, where there is a contract purporting to be a present sale of future goods, and, when the goods come into existence or are acquired, the seller delivers them to the buyer, or otherwise appropriates them, to him, or the buyer takes possession of them by the authority, given by the terms of the contract or subsequently thereto, of the seller, the property in the goods is thereupon transferred to the buyer.<sup>4</sup>

Where, however, the goods are such as have, at the date of the contract, a potential existence, the property in them is *prima facie* transferred to the buyer when they come into existence, so as to be capable of identification, without any further act of appropriation.

"Goods are in potential existence when they are the natural product, or expected increase, of something owned or possessed by the seller at the time of the contract, such as the hay or wheat to be grown in his fields, the wool to be clipped from his existing sheep, the milk to be given by his existing cows, the young to be produced by his existing animals, and similar products.

"Where, however, the subject-matter of the contract is a product to be made or manufactured out of potentially existing future goods, a

1. Sheo Narain Gopi Ram v. New Sevan Sugar & Gur Refining Co. Ltd. etc., A.I.R., 1938 All. 272.

2. Ram Karan Dass Jwala Sahai v. Kumar Sardar Singh, 1950 All. L.J.

145.

3. Moti Lal v. Mool Chand, 1950 All. L.J. 583.

4. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 64.



subsequent act of appropriation when the goods come into actual existence is *prima facie* necessary.”<sup>1</sup>

**(10) Contract for a quantity of goods.**

Under a contract for the sale of a quantity of goods the question whether the property in any part of the goods passes before the full quantity is made up depends upon whether successive appropriations of separate portions of the goods were contemplated, or whether the goods were contracted for only as an indivisible whole, to be appropriated as such.<sup>2</sup>

The fact that the contract contemplates symbolic delivery of the goods as a whole by the transfer to the buyer of a bill of lading, or other document representing the whole quantity, is relevant to show that the goods were contracted for as an indivisible whole.<sup>3</sup>

The fact that successive instalments of goods are deliverable to the buyer during a period of time, especially when the earlier instalments would be consumed or otherwise dealt with before the completion of the full quantity, is relevant to show that the instalments were intended to be separately appropriated.<sup>4</sup>

*See also notes under section 38 of the Act.*

Where, by the terms of the contract for unascertained goods, the seller agrees to deliver the goods at a particular place and no intention appears in the contract that the property shall pass previously to such delivery, the property does not pass unless and until delivery is made accordingly.<sup>5</sup>

*More miscellaneous cases*

**(i) Section 23 (1)—Identity of goods—Necessity for passing of title.**

When there is a contract for the sale of unascertained goods it is well settled that before property in the goods passes to the buyer the individuality and identity of the goods to be delivered under the contract should be established.<sup>6</sup>

**(ii) Section 23 (I)—Applicability—Sale of unascertained goods—Appropriation by seller—Passing of title to buyer.**

Where there is a contract for the sale of unascertained goods and the goods are deliverable to the buyer ex-godown at place A, then if the buyer at B instructs the seller by letter to send the goods by lorry, the buyer must be held to have impliedly assented to the appropriation made by the seller when he removed the goods from his godown and took them

1. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 65.

2. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 66.

3. See *Anderson v. Morice*, (1875) L.R. 10 C.P. 609, Ex. Ch.

4. Colonial Insurance Co. of New Zea-

land v. Adelaide Marine Insurance Co., (1866) 12 App. Cas. 123 P.C.

5. See Halsbury, Laws of England, 3rd Edn. Vol. 34, p. 67.

6. *Paharia Mal Ram Sahai v. Birdhi Chand Jain & Sons*, A.I.R. 1956 Punj. 217.



to the lorry. At the time when the goods were removed from the godown there was irrecoverable and unconditional appropriation of the goods to the contract and if later on the seller had changed the bales then it would have been in breach of the contract and if the goods had been destroyed after they had left the godown, then the buyer's goods would have been destroyed and not the seller's goods.

Section 23 (2) has no application to such a case because the goods were not sent by the seller to B in pursuance of any contract but under subsequent instruction given by the buyer.<sup>1</sup>

**(iii) Section 23 (2)—Passing of title—Sale of goods through post office—delivery by V.P.P.—Property in goods when passes.**

In a sale of goods through the agency of the Post Office, the question whether the title to the goods remains with the seller until the parcel is delivered to the addressee is a question which depends upon the facts and circumstances of each case. In the absence of anything else, the property in the goods is transferred when the goods are appropriated towards the particular contract and delivered to the post office pursuant to the order received from the buyer for being transmitted to him. The mere fact that the goods remained with the carrier until delivery or even against payment, cannot be sufficient to hold that the seller had a right to dispose them of in any other manner he liked.<sup>2</sup>

It was further held in the case : A plain reading of R. 133 of the Rules framed under the Post Office Act, 1898, shows that the V.P. System was introduced to serve the convenience of either party and from the rule itself it cannot be said the Post Office is an agent of the trade or the buyer when the goods are sent by V.P.P. The Post Office is in the position of a carrier in respect of parcels delivered for transmission and must be deemed to be the agent of the party at whose instance or on whose order the parcels were delivered to it. In commercial dealing it is not necessary to name the carrier, if according to the ordinary course the carrier would be the person to receive the goods. No difficulty, however, arises when the carrier is named, for goods are then deemed to have been received by him as the agent of the party naming him. Where, therefore, the goods are supplied to the buyers in pursuance of orders placed by them either directly or through the assessee's travelling agents and the goods are delivered to the Post office at Ratlam according to the special directions of the buyers, it must be held that the Post Office was acting as the buyer's agent in collecting the value of the parcels.

**(iv) Delivery of goods to railway—Railway receipt endorsed in favour of endorsee—Purchaser becomes owner.**

A railway receipt is a mercantile document of title to goods and it is possible to transfer the title in the goods to the endorsee by mere endorsement. A mere endorsement of a railway receipt may by itself be enough to transfer the property in the goods represented by the receipt.

1. *Paharia Mal Ram Sahai v. Birdhi Chand Jain & Sons*, A.I.R. 1956 Punj. 217.

2. *Commissioner of I.T., Delhi v. P.M. Rathod and Co., Ratlam*, A.I.R. 1957 M.B. 64.



The presumption, thus, in the title to goods sent by railway, is in favour of the endorsee. Hence when there is nothing to rebut the presumption, the assessee, a dealer in tobacco at Trivandrum, becomes the owner of the goods (tobacco) as and when the railway receipts are endorsed in his favour at Coimbatore, where the purchase of goods is made, and posted to his address at Trivandrum.<sup>1</sup>

**(v) Sections 23, 25—Passing of property in goods—Property in goods not to pass to buyer until payment was made.**

The requirement of S. 23 of the Act is not only that there shall be appropriation of the goods to the contract but that such appropriation must be made unconditionally. This is further elaborated by section 25. *Prima facie* delivery of the goods to the buyer and the passing of the risk in respect of the goods from the seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer but they are not decisive and may be negatived, for under S. 25 the seller may yet reserve to himself the right of disposal of goods until the fulfilment of certain conditions and thereby prevent the passing of property in the goods from him to the buyer.

Where, therefore, the documents relating to the goods were not to be delivered to the buyer till payments were made by him, the sellers reserved to himself the right of disposal of the goods until the conditions were fulfilled.<sup>2</sup>

**(vi) Sections 23, 25—Passing of property—Intention—Delivery to railway—Railway receipt in the name of the consignee—Railway receipt and a bill for 65% of the price sent to a bank—Consignee to retire bill and obtain railway receipt—Property does not pass until payment of 65% of the price.**

In the present case the consignee obtained delivery of the goods from the railway not by retiring the bill and producing the railway receipt but by giving a letter of indemnity to the railway. The property had not thus passed to the buyer and it was really by a tortious act that he came into possession of the goods. The fact that the railway receipt was taken in the name of the consignee did not show that the property in the goods passed as soon as the goods were appropriated and handed over to the railway.<sup>3</sup>

**(vii) Sections 23, 54—Contract Act, 1872, S. 73—Contract of sale of goods—Breach by buyer—Measure of damages—Seller's right of re-sale when arises—No right of re-sale—Quantum of damages is difference between contract price and market price on date of breach.**

Where the breach of a contract to sell goods is committed by the buyer, and the seller resells the goods, the seller is entitled to damages for the breach. The question whether he is entitled to get the difference between the contract price and the price realised on re-sale or only that between the contract price and the market price on the date of the breach, depends on whether the seller has power to re-sell the goods. This power to re-

1. Mathew v. T.C. Board of Revenue, A.I.R. 1937 Trav. Co. 300.

2. Gambhirmul Mahabirprasad v. Indian

Bank, Ltd., A.I.R. 1963 Cal. 163.

3. M. Mohammed Serif v. Official Liquidator, A.I.R. 1964 Kerala 135.



sell may be either statutory or it may be conferred on the seller by the terms of the contract of sale. Where no such right is conferred by the contract, the question is whether he has a statutory right. This right is available only if the property in the goods has passed to the buyer. This question does not arise where the right of resale is conferred by the contract. Mere putting of goods on the railway wagons does not necessarily amount to delivery of goods to the buyer, unless the goods are delivered to the carrier for transmission to the buyer. Where the goods are transmitted to the seller himself by entrustment to the carrier, the seller has no right of re-sale and the quantum of damages can only be the difference between the contract price and the market price on the date of the breach.<sup>1</sup>

*See also the following cases relating to sales-tax and income-tax :*

- (a) *M/s. Anwar Khan Mehboob v. Commissioner of Sales Tax, M.P.* 1966 M.P.L.J. 1164 : 1966 Jab. L.J. 1159.
- (b) *Mewar Bone Mill, Gosunda v. Commr. of I.T. Rajasthan, I.L.R.* (1964) 14 Raj. 55.
- (c) *Pushalal Manringhka (Pvt.) Ltd. v. Commr. of I.T.,* 1964 Raj L.W. 450.
- (d) *Dhiraj Lal Mehta v. Commr. of Commercial Taxes, A.I.R.* 1963 Cal. 442.
- (e) *M.M. Mohideen Thumbay & Co., Madras v. State of Madras,* A.I.R. 1962 Mad. 323.
- (f) *Indian Wood Products Co. Ltd. v. Sales Tax Officer, New Delhi.* A.I.R. 1968 Delhi 211.

**24.** When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time and, if no time has been fixed, on the expiration of a reasonable time.

### Synopsis

- |   |   |
|---|---|
| (1) Goods delivered on approval, "sale or return" or other similar terms. | (4) Reasonable time.                                      |
| (2) Act adopting the transaction.   | (5) Effect of words "without giving notice of rejection." |
| (3) "Similar terms."  | (6) Trade usage.  |

1. *Natarajan Ramalingam Chettiar v. Parasuram Parumal & Co., A.I.R.*

1963 Ker. 13.



This section follows rule 4 of section 18 of the English Sale of Goods Act, 1893. The Indian Contract Act, 1872, did not contain any similar rule although the principle involved herein was referred to in the illustration (b) to section 78—See Appendix A and Appendix B.

**(1) Goods delivered on approval, "sale or return" or other similar terms.**

When goods are sold under a contract of 'sale or return' or on approval or on other similar terms, the sale is a conditional sale. The property in the goods does not pass to the purchaser until he has done some act adopting the transactions or has signified his approval or acceptance to the seller, if the goods are returned or tendered back to the vendor within a reasonable time, the sale is annulled, and the latter cannot recover the price of them ; but if the purchaser, having got possession of the goods, fails to exercise his option of returning them within a reasonable time, the contract is discharged of the condition, the sale stands as an absolute sale, and the price of the goods may be recovered in an action for goods sold and delivered.<sup>1</sup>

In order to determine whether the delivery of the goods is made "Sale or return", "sale or return" or to an agent, the whole agreement must be looked to. The use of the words "sale or return" or "agent" is not conclusive. There may be only an agency to sell for the bailor.<sup>2</sup> On the other hand, a so-called "agency" may be really a transaction of sale or return.<sup>3</sup> Thus in *Weiner v. Harris*,<sup>4</sup> the goods were received on terms of the following memorandum, addressed to the bailor : "The goods mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not to keep as my own stock. The goods I received from you are to be entered at cost price, and my remuneration for selling them is agreed at one-half the profit." Fisher, the author of the memorandum, pledged the goods with the defendant, a pawnbroker. *Held*, that the plaintiff could not recover the goods pledged, as the terms of the bailment, particularly the terms as to remuneration, and the provision that the goods were not to be kept as Fisher's own stock, showed that Fisher was an agent, and not a buyer ; and, as he was a "mercantile agent" under the Factors Act, he could pass a good title to the defendant.

On the other hand, in *Kronprinsessan Cecilie, The*,<sup>5</sup> where goods were consigned to a company, who were appointed sole "selling agents" for the sellers on the terms that the sellers received, not the sub-buyer's money less the agent's commission, but a sum calculated according to the average price of all sales under a pool, which sum might be more or less than what their goods sold for, the sellers receiving on consignment at provisional price, after which they had nothing more to do with the goods, it was *held* by the Privy Council that the transaction was not an agency but a sale to the "agents", and a resale by them to the sub-buyer.

1. (1851) *Moss v. Sweet*, 16 Q.B. 493 ; *Wingfield, Ex-parte*, 10 Ch. D. 591, 593. See also *Roy v. Barker*, 4 Ex. D. 279, 48 L.J. Ex. 569.

2. *Weiner v. Harris*, (1919) 1 K.B. 285 C.A.

3. *Michelin Tyre Co. v. Macfarlane*,

(1917) 55 Sc. L.R. 35 H.L. ; *Ex-parte, Bright*, (1879) 10 Ch. 566, C.A. ; *Re Nevill, Ex-parte White*, (1871) 6 Ch. App. 397.

4. (1910) 1 K.B. 285 C.A.

5. (1917) 38 T.L.R. 292 (P.C.).



In *re Ferrier : Ex-parte The Trustee v. Donald*,<sup>1</sup> D delivered certain articles of furniture to F "on sale cash or return within a week." The articles were seized in execution by a creditor of F within three days of delivery. D claimed and obtained delivery of the articles and on the adjudication of F as bankrupt the trustee in bankruptcy claimed the articles as property vested in him. It was *held* that the property in the goods did not pass to F in the circumstances of the case and the trustee was not entitled to them.

It is to be observed that in cases falling within this section the person called a buyer is really only a bailee as he has not bought or agreed to buy but has merely an option to buy.<sup>2</sup> The position of the seller is that he has made an irrevocable offer to sell<sup>3</sup> and he cannot require return of the goods unless for example a course of dealing allows him to do so.<sup>4</sup> Whether a delivery is made under a contract for sale or return etc. depends upon the effect of the transaction as a whole and the fact that it is called 'sale or return' is not conclusive as it may be an agency to sell for the bailor.<sup>5</sup> Again, the fact that the transaction is called an 'agency' does not show that it may be really one of 'sale or return.'<sup>6</sup> Also, the fact that the agent is remunerated by the profit on a resale does not make him the buyer.<sup>7</sup>

In *Nirmalabai v. State*,<sup>8</sup> certain ornaments were taken by A on approval from B. A promised to return them in the evening but neither returned the ornaments nor paid for them. It was *held*: The context of section 24 shows that the word "buyer" is not there used in the sense of the definition of that word as given in S. 2(1), as the person there called the buyer is in law a bailee in possession of goods with an option to purchase. A was, therefore, not a buyer as defined in S. 2(1); and under S. 24(b) the property which had been delivered to A on approval, passed to her if she failed to signify her approval or acceptance to the seller and retained the property without giving notice of rejection. If a time for the return of the goods was fixed, the property passed to her on the expiration of that time; and if no time was fixed, the property passed to her on the expiration of a reasonable time. As the time fixed was the evening of 1-12-1949 and A had not by then signed her approval or acceptance to the seller but retained the ornaments without giving a notice of rejection, property in them had passed to her.

In *Poole v. Smith's Car Sales (Balham), Ltd.*,<sup>9</sup> at the end of August, 1960, a car dealer supplied two second-hand cars, one of 1956, to a second car dealer "on sale or return", during a period of absence on holiday, the arrangement being that if the second dealer did not sell them they should be returned to the first dealer. One car was sold and paid for on Sept. 21. The 1956 car not being returned by October in spite of repeated requests from the first dealer, on Nov. 7, the first dealer wrote a letter to the second dealer stating that, if it was not returned by

1. (1944) Ch. 295.

2. *Helby v. Matthews*, (1895) A.C. 471; *Nirmalabai v. State*, A.I.R. 1953 Nag. 301.

3. *Kirkham v. Attenborough*, (1897) 1 Q.B. 201, C.A.

4. *Halsbury*, Vol. 34, 3rd Edn., p. 71 (i).

5. *Weiner v. Harris*, (1910) 1 K.B. 285, C.A.

6. *Re Nevill Ex-p. White*, (1871) 6 Ch. App. 397 affirmed in *Towle & Co. v. White*, (1873) 29 L.T. 78 H.L.

7. *Ibid.* See also *Author's Law of Agency*, pp. 21 to 28.

8. A.I.R. 1953 Nag. 301; 1943 Nag. 1 & J. 347.

9. (1962) 2 All E.R. 482.



Nov. 10, the car would be deemed to have been sold to the second dealer. The car was not returned until a considerable time later and, being in a bad condition (through damage by two employees of the second dealer) was rejected by the first dealer. It was *held*: The first car dealer was entitled to judgment for the agreed price, because (i) the contract was one of delivery "on sale or return" within the meaning of S. 18, r. 4 of the English Sale of Goods Act, 1893 (corresponding to S. 24 of the Indian Act), and in the absence of rejection the property therefore passed to the second dealer on the expiration of a reasonable time under r. 4(b) [sub-section (2) of S. 24 of the Indian Act] and (ii) from the facts of the case the proper inference was that a reasonable time had expired without the car being returned.

## (2) Act adopting the transaction.

An 'act adopting the transaction' means an act indicating an election on the part of the bailee to become the buyer of the goods, or otherwise inconsistent with his being otherwise than the buyer thereof,<sup>1</sup> as for example, a sale or pledge of them, or any other unauthorised act in relation thereto which is inconsistent with a free power to return them according to the express or implied terms of the bailment.<sup>2</sup> It is to be noticed that to bring a case under this section, the circumstances must show that the buyer has an *option* to become the owner of the goods *on the statutory terms*, that is to say, in the events mentioned. If the contract specifies any other event as essential to the passing of the property, the covering words of section 19(3) apply, and "a different intention appears". This fact is of particular importance if the goods get into the hands of a third person who claims them.

Where goods delivered "on sale or return" are pledged by the buyer, pledging of the goods by him is "an act adopting the transaction" within the meaning of this section, so as to pass the property in the goods to him.<sup>3</sup>

But in *Weiner v. Gill*,<sup>4</sup> the plaintiff, a manufacturing jeweller, had delivered to Huhn some jewellery on the terms of the following memorandum: "On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or discharged." Huhn delivered the jewellery to Longman on his representation that he had a customer and Longman pledged it with the defendant, who received the articles in good faith. *Held*, that the plaintiff could recover as the goods were not delivered to Huhn on statutory terms, but only on the terms that the property should pass if he paid cash or was charged with the goods, and he could therefore pass no title to the defendant.

In *R. v. David Warren Eaton*, (1966) 50 Cr. App. Rep. 189, A, a jeweller, had obtained jewellery from B, another jeweller, on an appro-

1. *Weiner v. Gill*, *Weiner v. Smith* (1905) 2 K.B. 172 (179) on appeal (1906) 2 K.B. 574 C.A.  
2. *Kirkham v. Attenborough*, *supra*; per Jessel M.R. in *Re Florence Ex-p. Wingfield*, (1879) 10 Ch. D. 591 (593)

C.A.  
3. *Kirkham v. Attenborough*, (1897) 1 Q.B. 201, C.A. See also *London Jewellers Ltd. v. Attenborough*, (1934) 2 K.B. 206, C.A.  
4. (1906) 2 K.B. 574, (C.A.).



bation note implying that the goods were to remain B's property till paid for or invoiced. A lent the jewellery on approval to C who was aware of the conditions under which A had obtained the jewellery. C pledged the jewellery representing that he was the owner and had the authority to pledge. C was convicted for falsely representing that he was the owner. In appeal C contended that he became the owner by having adopted the transaction in regard to sale or return terms. It was held : On the terms of the approbation note, an inroad was made on the ordinary sale or return terms by the provision that the property was to remain in the seller until payment was made, and accordingly there was a contrary intention ousting the provisions of rule 4 of S. 18 of the (English) Sale of Goods Act, 1893 (corresponding to S. 24 of the Indian Act) and C was rightly convicted.

If goods are delivered on the terms that the *bailor* should have the option of treating the transaction a sale if the goods are not returned, the option is with him, and not with the buyer, and the case is not within the section. The property will then pass when the option is exercised.<sup>1</sup> Again, a *sale* subject to a right of the buyer to rescind it, if the goods are not approved, is equally outside this section.<sup>2</sup>

In *Genn v. Winkel*<sup>3</sup>, the plaintiff on January 4 delivered to the defendant a parcel of diamonds on sale or return, no time being mentioned for return. The same day the defendant delivered them to one Gutwirth on the same terms. Gutwirth, on January 6, delivered them to a fourth person, but there was no evidence to show on what terms. The goods were lost in the possession of fourth person. In an action for the price of the goods, *held* that the defendant had adopted the transaction and was liable.

Where the goods are sent to the customer on approval until the transaction is adopted by the customer, the property remains in the seller. Consequently, if the goods are lost in transit, the seller is the person entitled to sue the carrier.<sup>4</sup> Where goods sent on approval, or delivered on sale return, are lost or damaged while in the bailee's possession, the bailment, unless it be otherwise agreed, is not converted into sale by reason of such loss or damage, if the bailee is not responsible for it. Thus in *Elphick v. Barnes*,<sup>5</sup> the buyer of a horse on sale or return had eight days in which to return the horse, and it died within that time, but without his fault. It was *held* that the seller could not recover the price of the horse in an action for goods sold and delivered, the death of the horse not having deprived the buyer of his option.

It would seem that the buyer would be liable if his inability to return the goods was caused by the fraud of a third person to whom he had delivered them.<sup>6</sup> A delivery, however, of the goods to a third person for a special purpose consistent with the terms of the original bailment is

1. *Manders v. Williams*, (1849) 4 Ex. 399 ; 18 L.J. Ex. 437 ; 80 R.R. 588.  
2. *Head v. Tattersal*, (1871) L.R. 7 Exch. 7 ; *Cranston v. Mallow and Lien*, (1912) Sess. Cas. 112.  
3. (1912) 107 L.T. 34 (C.A.).

4. *Swain v. Shepherd*, (1832) 1 Mood. & Rob. 223 ; 42 R.R. 782.  
5. (1880) 5 C.P.D. 321.  
6. *Ray v. Barker*, (1879) 4 Ex. D. 279 ; 48 L.J. Ex. 569, C.A. ; see also *Elphick v. Barnes & Genn v. Winkel*, *supra*.



not an act adopting the transaction, even although the bailee is thereby unable to return the goods; nor does the bailee in such circumstances retain them.<sup>1</sup> But a bailee may be responsible for the price by custom of trade,<sup>2</sup> or by express agreement,<sup>3</sup> where the goods are destroyed without his fault.

### (3) "Similar terms."

The phrase 'similar terms' means terms *ejusdem generis* with those in 'sale on approval' or 'sale or return'. So a delivery of goods is not made on terms similar to a delivery on approval or 'sale or return' unless the effect of the transaction is that the bailee has the option of becoming the owner of the goods, and on terms substantially the same as those already mentioned. For instance, a delivery of goods to bailee on the terms that if they are not returned within a fixed or reasonable time, the bailor shall have the option of treating them as sold is not a delivery on similar terms as those of a delivery on approval or on sale or return, inasmuch as if the goods are not returned it rests with the bailor only to treat the transaction as sale or not and the property in the goods delivered does not pass to the bailee unless and until the bailor exercises the option.<sup>4</sup> Similarly, a delivery of goods to a bailee on the terms that the bailee shall have the option of becoming the owner of the goods on, for example, payment in cash,<sup>5</sup> or his being charged for the goods in account,<sup>6</sup> or the goods being invoiced to him<sup>7</sup> or on payment in full of instalments of rent for the hire of the goods<sup>8</sup> is not a delivery on the terms as required by this rule. Even sale of goods on the terms that the buyer shall have the power of rejecting the goods, and revesting the property in them in the seller, if the goods are not approved, has been held to be not covered by the rule contained in this section.<sup>9</sup>

Instances of sales "on other similar terms," are sales on trial, or on approbation. Where a person is entitled to make trial of goods, and the trial involves the consumption or destruction of that which is tried, it is a question of fact in each case whether the quantity consumed was more than necessary for trial. If so, the sale will have become absolute by reason of the approval implied from thus accepting a part of the goods.<sup>10</sup>

1. *Weiner v. Gill*, supra; *Genn v. Winkel*, supra.

2. *Bevington v. Dale*, (1902) 7 Com. Cas. 112.

3. *Bianchi v. Nash*, (1836) 1 M. & W. 545.

4. *Manders v. Williams*, (1849) 4 Exch. 339.

5. *Weiner v. Gill*, (1905) 2 K.B. 172; approved in (1906) 2 K.B. 574 C.A. See also *Kempler v. Bravingtons, Ltd.*, (1925), 133 L.T. 680 C.A. cited *post*.

6. *Edwards v. Vaughan*, (1910) 26 T.L.R. 545 C.A. Per Cozens-Hardy, M.R. at p. 546: "A transaction on sale or return was not a case where a person was in possession under an agreement to buy within S. 25 of the Sale of Goods Act, 1893" (corresponding to S. 30 of the Indian Act).

7. *Truman v. Attenborough*. (1910) 36 T.L.R. 60.

8. *Helby v. Matthews*, (1895) A.C. 471; *Belsize Motor Supply Co. v. Cox*, (1914) 1 K.B. 244—If the bailee binds himself to pay all the instalments of "rent" there is an agreement to buy and the case falls under this section.

9. *Head v. Tattersall*, C.R., 7 East 7; *Neale v. Ball*, 2 East 117; *Cranston v. Mallow & Lien*, (1912) S.C. 112.

10. Per Parke B. in *Elliott v. Thomas* (1838) 3 M. & W. 170; 49 R.R. 558. See *Lucy v. Mouflet*, (1860) 5 H. & N. 229; 120 R.R. 555, cf. *Okell v. Smith*, (1815) 1 Stark. 107; 18 R.R. 752, (1910) 26 T.L.R. 545 C.A.; Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 71.



There is no reason to assume that goods entrusted *jangad* are goods to be sold on approval, rather than goods to be shown for approval. By delivery of goods to a broker even on *jangad terms*, no property can pass to him under S. 24 of the Act. Goods or jewellery may be delivered by the owner to the buyer, with the intention that he may inspect the same and ultimately purchase them. The goods in such cases are stated to be delivered for approval *i.e. jangad*. S. 24 covers such a situation.<sup>1</sup>

A refusal to agree to the price is a rejection, and the bailee's option of purchase is thereupon determined, and he becomes a bailee for custody only. He has then no option of becoming the owner, unless what amounts to a re-delivery is made to him.<sup>2</sup>

When goods are delivered on approval, or similar terms, the bailee may reject the goods for any reason if he *bona fide* does not approve of them, and is not compelled to base his rejection on defects in the goods themselves.<sup>3</sup> In this case there was a sale of a machine on approval to be rejected within 21 days, the buyer to pay the carriage hire both ways. It was *held* that the buyer's right to reject was not confined to defects in the machine only and that he could reject on account of trouble with his workmen regarding its use.

It is to be noticed that like others contained in the foregoing sections of this chapter, the rule laid down in this section is also a *prima facie* rule being subject to the covering words of section 19, sub-section (3), namely, 'unless a different intention appears.' Where goods are sent on trial or on approval, or on sale or return, the clear general rule is that the property remains in the seller till the buyer adopts the transaction but it is quite competent to the parties to agree that the property shall pass to the buyer on delivery, but, that if he does not approve the goods, property shall then revest in the seller.<sup>4</sup>

#### (4) Reasonable time.

What is a reasonable time is a question of fact. Where the seller specifies the time within which the goods are to be returned if not approved or accepted, on the expiration of such time without any intimation from the bailee that he has not approved or accepted the goods the property therein passes to the bailee and the sale is completed.<sup>5</sup>

In sales "on trial" the mere failure to return the goods within the time specified for trial, makes the sale absolute,<sup>6</sup> but the buyer is entitled to the full time agreed on for trial, as he is at liberty to change his mind during the whole term and his right is not affected by his telling the seller in the interval that the price does not suit him, if he still retains possession of the thing.<sup>7</sup>

1. *Amritlal v. Bhagwandas*, A.I.R. 1939 Bom 495 cited in notes under S. 27 of the Act, post.

2. *Bradley & Cohn Ltd. v. Ramsay & Co.* (1911) 28 T.L.R. 338 C.A.

3. *Berry & Son v. Star Brush Co.*, (1915) 31 T.L.R. 603 C.A.

4. See *Head v. Tattersall*, *supra*.

5. *Ellis v. Mortimer*, (1805) 1 B. & P.

(N.R.) 257; *Elphick v. Barnes*, cited at p. 234 *ante*. *Blanckensee v. Blaiberg*, (1885) 2 T.L.R. 36 C.A.; *Marsh v. Hughes-Hallet*, (1900) 16 T.L.R. 376.

6. *Humphries v. Carvalho*, (1812) 16 East 45; 14 R.R. 280.

7. *Ellis v. Mortimer*, (1805) 1 B. & P.N.R. 257. See also per Cur, in *Elphick v. Barnes*, *supra*.



Where no time is specified, the law implies that the parties contemplate a reasonable time for the performance of the condition.<sup>1</sup> Time runs from the actual receipt of the goods by the buyer.<sup>2</sup>

**(5) Effect of words “without giving notice of rejection.”**

It seems that under the Act the buyer may prevent the passing of the property by merely giving notice of rejection without sending the goods back. An actual return may of course be provided for by agreement.<sup>3</sup>

**(6) Trade usage.**

Sir Mackenzie Chalmers observes as follows<sup>4</sup> :

When goods are sent on trial, or on approval or on sale or return, the clear general rule is that the property remains in the seller till the buyer adopts the transaction, but it is quite competent to the parties to agree that the property shall pass to the buyer on delivery, and that, if he does not approve the goods, the property shall then revert in the seller. To use the language of continental lawyers, the condition on which the goods are delivered may be either suspensive or resolute.

In some trades the usage is that when goods are delivered on fourteen days' approval, the property does not pass to the buyer on the expiration of that time, but the seller at any time after the fourteen days can call on the buyer, either to take or to return goods at once.

**\*25.** (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose or transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

<sup>5</sup>[(2) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

1. Moss v. Sweet, (1851) 16 Q.B. 493 ; 83 R.R. 560 ; Re Florence, Ex-parte Wingfield, (1879) 10 Ch. D. 591, C.A. per Jessel M.R. at p. 593.
2. Jacobs v. Harbach, (1886) 2 T.L.R. 419.
3. Benjamin on Sale, 8th Edn., p. 321 ; Ornstein v. Alexandra Furnishing Co., (1895) 12 T.L.R. 128.
4. Sale of Goods Act, 16th Edn., p. 120.

**\*Analogous law**

- Section 19 of the English Sale of Goods Act, 1893, which is the same as section 25 of the Indian Act, with the words “or custodian” after “bailee” in sub-section (1) omitted.
5. Sub-sections (2) and (3) substituted by the Indian Sale of Goods (Amendment) Act, 1963, S. 4.



(3) Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt to secure acceptance or payment of the bill of exchange, the buyer is bound to return bill of lading or the railway receipt if he does not honour the bill of exchange ; and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

*Explanation.*—In this section, the expressions “railway” and “railway administration” shall have the meanings respectively assigned to them under the Indian Railways Act, 1890 ]

### Synopsis

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|--|--|
| (1) <i>Legislative changes.</i>  | <i>intention to reserve right of disposal when rebutted.</i>                     |
| (2) <i>Reservation of right of disposal—scope of the section.</i>  | (5) <i>Seller retaining lien only.</i>   |
| (3) <i>Bills of lading—sub-section (2)—applies only to bill of lading—seller taking the bill of lading to his own order.</i> | (6) <i>Sub-section (3)—delivery in exchange for payment or security.</i>         |
| (4) <i>Shipment without reservation of right of disposal—presumption of</i>  | (7) <i>Summary of the provisions of section 25 and cases decided thereunder.</i> |

#### (1) Legislative changes

Sub-sections (2) and (3) originally stood as follows :

“(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of the goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.”

These sub-sections applied where goods are transported by sea. The Law Commission of India recommended that since goods are frequently transported by rail, these sub-sections should be made applicable to railway receipts as well. Hence this substitution in India by the Amending Act of 1963.

Carriage by railway, already falls within the ambit of sub-section (2) of section 23 of the Act, which relates to delivery of goods to any carrier or other bailee for the purpose of transmission to the buyer.

#### (2) Reservation of right of disposal—scope of the section.

It has already been stated that the rules for determining whether the property in goods has passed from seller to the buyer, are general rules



of *construction* for ascertaining the real intention of the parties, when they have failed to express it. Such rules cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the seller, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership notwithstanding such appropriation.<sup>1</sup>

The present section deals with the case of a conditional sale and conditional appropriation. Sub-section (1) is of general application and is not confined to the case of carriage by sea or railway, while sub-sections (2) and (3) relate to carriage by sea or railway. Sub section (1) applies to contracts for the sale of specific goods, as well as to the subsequent appropriation of goods to a contract for the sale of unascertained goods, and to contracts which do not involve sea transit, as well as those which do. It would appear, therefore, that a seller who consigns goods by rail may, under this sub-section, effectively reserve to himself the right of disposal of the goods by taking a railway receipt making the goods deliverable to his own order and retaining it : and the opinion expressed to the contrary in *Deoraj v. Munhsi Ram*<sup>2</sup> decided under the Indian Contract Act is no longer law.

The case upon which section 19 of the English Act is principally founded is *Mirabita v. The Imperial Ottoman Bank*.<sup>3</sup> The principles as to *just disponendi* underlying the section before its amendment in 1963, have been elaborately discussed and laid down in *Ford Automobiles v. Delhi Motor Co.*<sup>4</sup> as follows :

(1) In the case of such a contract (*i.e.*, a contract for the sale of unascertained goods), the delivery by the vendor to a common carrier or, unless the effect of the shipment is restricted by the terms of the bill of lading, a shipment on board a ship of, or charged for, the purchaser, is an appropriation sufficient to pass the property.

(2) If, however, the vendor when shipping the articles which he intends to deliver under the contract takes the bill of lading *to his own order*, and does so not as agent or on behalf of the purchaser but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation and the property does not on shipment pass to the purchaser.

(3) If the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional

1. See Benjamin on Sale, 8th Edn., p.358.

2. A.I.R. 1926 All. 679 : 48 All. 622 : 95 I.C. 130.

3. 3 Ex. D. 164, at p. 172 ; 47 L.J. Ex. 418 (C.A.).

4. A.I.R. 1923 Bom. 125 : 24 Bom. L.R. 1140 ; 70 I.C. 138 ; See also Balkishan

v. Fazl Elahi, A.I.R. 1927 Lah. 391 : 8 Lah. 173 : 102 I.C. 807 ; Gulab Rai v. Nirbhe Ram, A.I.R. 1924 Lah. 239 : 4 Lah. 423 : 79 I.C. 194 ; Ramniwas v. Commr. of Taxes, A.I.R. 1952 Assam 178.



only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser.

(4) If the seller discounts a draft upon the buyer with a bank and authorises the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the seller intends to transfer the ownership when the draft is accepted, but intends also to remain the owner until this has been done.

Sub-sections (1) and (2) previously did not relate to carriage by railway or to railway receipts, but by the amending Act of 1963, carriage by railway and railway receipts stand on the same footing as before the amendment, carriage by shipment and bill of lading. This is to be clearly kept in view while referring to notes under this section.

The question of reserving the right of disposal is material only where parties living at a distance contract by correspondence. In such cases, the seller is anxious to protect himself against the default or insolvency of the buyer, and the buyer would naturally like not to part with his money before he is sure of the goods being delivered. What is then done is, that the seller ships the goods but takes the bill of lading in his own name or in the name of his agent at the buyer's place, and sends the bill to his agent with instructions to part with the bill of lading only on payment of the price.<sup>1</sup> Or he may draw a bill of exchange for the price on A, and send the bill to a banker, transferring to the banker the bill of lading. In both cases, there is no idea of passing the property in the goods to the buyer, though the goods have been ascertained and appropriated and in fact earmarked. Yet another course is to draw on the buyer a bill of exchange for the price and send it to the buyer himself with the bill of lading. This is to be found in sub-section (3) of the present section, but as observed by Jenkins C.J. in *Re Gargo ex. S.S. Ruppenfels*<sup>2</sup> where the bill is drawn on the buyer himself, the question whether the *jus disponendi* is reserved is difficult to answer.

Where in spite of appropriation or delivery, the control of the goods remains with the seller there is a presumption that the seller has reserved the right of disposal. So where goods are shipped and by the bill of lading they are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.<sup>3</sup> Where the right of disposal is reserved by the seller, the property in the goods does not pass to the buyer, notwithstanding the fact that the goods are made over to a carrier for the purpose of transmission to the buyer.<sup>4</sup>

In *Nippon Yusen Kaisha v. Ramjibhan Serogee*<sup>5</sup>, where one clause of the contract of sale precluding the passing of property until payment of

1. *The Prinz Adelbert*, (1917) A.C. 586, P.C.

2. (1914) 42 Cal. 334 : 30 I.C. 174. (cf.) *Walley v. Montgomery*, (1803) 102 E.R. 721 : 7 R.R. 526 ; *The Sarfareren* (1915) 32 T.L.R. 108 ; *Shepherd v. Harrison*, (1871) 5 H.L. 116. See *The Vesta*, (1921) A.C. 774, 783 cited at p. 156 ante (property passed, but goods

to be taken back by seller in a certain event).

3. *Folk v. Fletcher*, 18 C.B.N.S. 403.

4. *Ramniwas v. Commr. of Taxes*, A.I.R. 1952 Assam 178. For Facts of the case see p. 415 ante.

5. A.I.R. 1938 P.C. 152 : (1938) 2 Cal. 381 : 174 I.C. 564.



the price was followed up by a clause providing for a lien of the seller as unpaid vendor on the mate's receipt or other documents and on the goods, the Judicial Committee held that reading the contract as a whole the property in the goods passed when the goods were delivered to the ship-owners.

Reservation of the right of disposal or *jus disponendi* may be effected by the terms of the contract or by subsequent conditional appropriation; in the latter case it is a question of intention as to whether the appropriation was conditional. But the intention if any must be clearly expressed.<sup>1</sup> The seller may reserve the right of disposal in breach of the terms of the contract; in such a case the property would not pass though the seller may be liable in damages for breach of contract.<sup>2</sup> Where there is a conditional appropriation or delivery with a reservation of right of disposal until certain conditions are fulfilled, the property in the goods does not pass until such conditions are satisfied<sup>3</sup>, and the fact that by reserving the right of disposal by the terms of the appropriation the seller is committing a breach of the original contract of sale which did not authorise any such reservation is, in relation to the passing of property, immaterial.<sup>4</sup> Where, however, the fulfilment of any such condition or the performance of any obligation arising therefrom by the buyer is not made a condition precedent to the passing of the property, the property in the goods appropriated or delivered passes to the buyer in spite of such condition or obligation, and it is not re-vested in the seller even if the buyer subsequently fails to fulfil such condition or to discharge such obligation, unless there is an agreement to the effect.<sup>5</sup>

### Illustrations.

Some illustrations of the reservation of the right of disposal in cases which would fall under sub-section (1) have already been given under section 23 and may be referred to. Some more are given below :

(1) Certain iron, part of a larger quantity, was delivered under contract provided that certain bills outstanding against the plaintiff should be taken out of circulation by the defendant. The defendant failed to withdraw the bills. The plaintiff therefore stopped further deliveries and brought trover for the iron already delivered. It was held that, as the contract and delivery were conditional on the withdrawal of the bills, the property in the iron had not passed to the defendant and consequently the action lay.<sup>6</sup>

(2) In *Laeschman v. Williams*<sup>7</sup>, a manufacturer of pianos brought trover for a piano which he had sold to a third person, to be delivered to the house of the defendant, a packer, and to be paid for in ready money. The plaintiff's servant had delivered the piano at the defendant's premises

1. *Juggernath v. Smith*, (1907) 34 Cal. 173, 180; *Godts v. Rose*, (1855) 17 C.B. 229.  
2. See *Wait v. Baker*, (1848) 2 Exch. 1.  
3. *Godts v. Rose*, *supra*; *Cohen v. Foster* 61 L.J.Q.B. 643.

4. *Wait v. Baker*, *supra*.

5. *Key v. Cotesworth*, 7 Exch. 595; *Newington v. Levy*, L.R. 6 C.P. 180.

6. *Bishop v. Shillito*, (1819) 2 B. & Ald. 329 (n); 20 R.R. 457 (n).

7. 4 Camp. 181; 16 R.R. 772.



and had asked for payment, but the defendant was stated to be away from home, and the piano was left on the undertaking that it was to be paid for before it was delivered to the buyer. The defendant afterwards shipped it to the buyer without payment. *Held*, that the delivery was conditional and that the action would lie.

(3) In *Barrow v. Coles*<sup>1</sup>, there was a sale of 100 bags of coffee. The sellers drew a bill of exchange upon the buyer, payable to their order and endorsed it to the plaintiff and annexed to it the bill of lading with an endorsement upon it making the coffee deliverable to the buyer if he accepted the bill of exchange and paid it, and if not, to the holder of the latter. The buyer accepted the bill of exchange and detached it from the bill of lading, which he endorsed for value to the defendant, but did not pay the bill of exchange. The property did not pass to the buyer, and the endorsee of the bill of exchange successfully maintained trover for the coffee against the endorsee of the bill of lading, to whom the coffee had been delivered.

(4) There was a sale of a cargo of umber shipped by the seller on board a ship chartered by the buyer. The sellers took bills of lading making the cargo deliverable to order or assigns, and drew a bill of exchange on the buyer for the price which they discounted with their bankers, handing over to them the bills of lading to be given up to the buyer upon his accepting and paying the bill of exchange. The buyer at first declined to meet the bill, but subsequently tendered the amount for which it was drawn and demanded the bills of lading. The bank refused to accept the tender and sold the cargo. *Held*, that the property passed to the buyer on tender of the amount of the bill and that he could maintain trover against the bank for the wrongful sale of the cargo.<sup>2</sup>

(5) A consigns goods to B by ship, and draws on him for the price. He discounts the bill with a bank, endorses the bill of lading in blank, and authorises the bank to hand the bill of lading to B when he accepts the bill of exchange. Apart from any special terms in the contract, the property in the goods is transferred to B as soon as he accepts the bill of exchange.<sup>3</sup>

(6) In the *Miramichi*<sup>4</sup> some American shippers sold a quantity of wheat *c.i.f.* to German buyers payment to be made by cheque against documents. The seller drew a bill for the price which they discounted with their bankers and handed to them the bill of lading generally endorsed and the certificate of insurance, to be delivered to the buyers on their payment through a Berlin bank of the bill of exchange. Before the documents were tendered to the buyers, and before payment of the bill of exchange, the ship was seized as enemy property. *Held*: that the wheat remained the property of the American sellers.

(7) In *Brandt v. Bowlby*<sup>5</sup> it was *held* that the property in a cargo ordered by one Berkeley did not pass to him, because by the terms of the

1. (1811) 3 Camp. 92 : 13 R.R. 763.

2. *Mirabita v. The Imperial Ottoman Bank*, (1878) 3 Ex. Div. 164, C.A. Compare *The Prinz Adalbert*, (1917) A.C. 586, P.C.

3. *The Prinz Adalbert*, (1917) A.C. 586, P.C. ; cf. *The Derfinger No. 2*, (1918).

87 L.J. P.C. 195, where the bill was not accepted till after the goods had been seized as prize, and the property was held not to have been transferred.

4. (1915) P. 71.

5. (1831) 2 B. & Ad. 932 ; 1 L.J. (N.S.) D.B. 14 : 36 R.R. 796.



bargain he was to accept bills for the price as a condition concurrent with the delivery and had refused to perform this condition.

(8) In *Shepherd v. Harrison*<sup>1</sup>, there was a sale of a quantity of cotton. The invoice was made out as shipped on account of and at the risk of the buyer, but the bill of lading was taken deliverable to the order of the seller. The bill of lading, endorsed in blank, with a bill of exchange attached, was sent to the buyer by the seller's agent, who requested the buyer's protection to the draft. The buyer retained the bill of lading but returned the bill of exchange unaccepted on the ground that the buyer's orders had not been complied with. *Held*, that the property in the cotton had not passed to the buyer.

A provision in a contract of sale for postponement of delivery until payment of the entire price will not *per se* stay the passing of the property in the goods sold. The fact that the seller is also given a right to resell after notice on default to payment, does not reserve to the seller the right to sell the goods pending the fulfilment of a condition precedent.<sup>2</sup>

Where goods are sent by Railway the consignment being made to self, the property in the goods does not pass to the buyer on delivery of the goods to the Railway Company as carrier. The seller, therefore, when he enters into the contract with the railway company, is not, in such a case, acting as the buyer's agent and the buyer cannot be considered to be the original party to the contract with the railway company.<sup>3</sup>

Where the contract related to sale of unascertained goods and the property in the goods was not to pass to the buyer until he had paid the purchase money and obtained the railway receipt; and the goods were carried at owner's risk, the consignor is responsible for loss of the goods in the transit unless there was a contract that the carrier should make good the loss. The ownership in the property would pass to the buyer at the place of delivery and the court at that place would have jurisdiction.<sup>4</sup>

In *Majety Balakrishna Rao v. M/s. Mooke Devassy*<sup>5</sup>, it was held: Where the seller delivers his goods to railway company, obtains the railway receipt in respect of the goods in his own name, endorses the railway receipt in favour of the Bank and delivers a hundi with a direction that the railway receipt should be delivered to the buyer only when the hundi is honoured and the price of the goods is paid, the title in the goods does not pass to the buyer. There is no distinction in principle in regard to reservation of title in respect of a bill of lading and a railway receipt. The seller in such a case is not entitled to resell the goods under the terms

1. (1869) L.R. 4 Q.B. 196; 36 L.J. Q.B. 105, 177. Compare *Cahn v. Pockett's Bristol Channel Steam Pocket Co.*, (1899) 1 Q.B. 643, C.A.  
2. *Shanker Lal Kundan Lal v. Jamna Das Piyare Lal*, 39 P.L.R. 778.  
3. *Governor General in Council v. Joy-narain Ritolia*, A.I.R. 1948 Pat. 36; *Ugar Chand v. Motiram*, A.I.R. 1938 Sind 18; *Ford Automobiles*

(India) Ltd v. Delhi Motor and Engineering Co., A.I.R. 1923 Bom. 125 and *Sundar Singh v. Gulab Singh*, A.I.R. 1927 Lah 269 relied on.  
4. *Ram. Karan Dass Jwala Sahai v. Kumar Sardar Singh*, (1950) All. L.J. 145. See also *Ramanlal Ratilal & Co. v. Abdulla Basha*, 54 Mys. H.C. 186.  
5. A.I.R. 1959 Andhra Pradesh 30.



of S. 54 (2) of the Act. And in such a case if the buyer fails to take delivery and the seller sells the goods, the seller is only entitled to claim the difference between the contract rate and the rate prevailing on the date of the breach by way of damages.

In *Dhanraj Agarwalla v. Union of India*<sup>1</sup>, it was held : In order to constitute bailment under S. 149 of the Contract Act, 1872, all that the court has to find is whether there had been delivery to the bailee. That section requires that the delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf. It is not therefore necessary that certain formalities must have been gone through before, in the eye of law, the delivery could be regarded as legal delivery. If actual delivery had been made and the employee concerned of the railway administration had assented to take delivery, that would be enough to constitute bailment in the eye of law.

**(3) Bills of lading and railway receipts—Sub-section (2)—Applies only to bill of lading and railway receipts—Seller taking the bill of lading to his own order.**

A bill of lading is included in the definition of "document of title of goods".<sup>2</sup> It is a symbol of the goods it represents,<sup>3</sup> or to use the language of section 2 (4) of the Act, a document used in the ordinary course of business as proof of the possession, or control of goods, or authorising or purporting to authorise its possessor either by endorsement or by delivery to transfer or receive goods thereby represented. A bill of lading is not necessarily a symbol of the right of property ; whether it represents such a right depends on the contract. Thus, for example, a bill of lading issued by the master of a ship without the seller's contract will not pass the property.<sup>4</sup> Where endorsed in blank, the bill is transferable by delivery.<sup>5</sup> If the seller sends an unendorsed bill of lading, he in effect sends none.<sup>6</sup> The transfer of a bill of lading may be made with the intention of passing the property in the goods unconditionally,<sup>7</sup> or it may be made with the intention of passing the property conditionally, or for a specific purpose only, and not for the purpose of passing the property in the goods.<sup>8</sup> Bills of lading are generally drawn in sets of three, and the property passes to the *bona fide* transferee who is first in point of time.<sup>9</sup> Sometimes the following words are added in the bill : "One of these bills of lading being accomplished, the other shall stand void."

It has been held in *Ugarchand v. Motiram*<sup>10</sup> that where the seller sends the goods to the buyer by rail, but takes the railway receipt in his

1. A.I.R. 1958 Assam 5. See also *Amrit Banaspati Co. Ltd. v. State of Punjab*, (1974) 76 P.L.R. 410 cited at p. 433 ante.

2. See section 2 (4) ante.

3. Per Bowen L.J. in *Burdick v. Sewell*, (1884) 13 Q.B.D. 159, C.A. at p. 171 ; see also *Sanders v. Maclean*, (1883) 11 Q.B.D. 327, C.A. at p. 341.

4. *Craven v. Ryder*, (1816) 121 E.R. 1103 ; 16 R.R. 644.

5. See section 11 of the English Factors Act, 1889 ; see also the Indian Bills of Lading Act, 1856, Appendix.

6. *Shepherd v. Harrison*, (1869) L.R. 4

Q.B. 196, at p. 204.

7. *Sewell v. Burdick*, (1884) 10 App. Cas. 74.

8. Sub-sections (2) and (3) above; *Bristol Bank v. Midland Rail Co.*, (1891) 2 Q.B. 953 C.A. ; *Hibbert v. Carter*, (1787) 1 Term. Rep. 745 : 1 R.R. 388 ; *Patten v. Thompson*, (1816) 5 M. & S. 350 : 17 R.R. 350 ; *Bruce v. Wait*, (1837) 3 M. & W. 15.

9. *Barber v. Myerstein*, (1870) 5 H.L. 317.

10. A.I.R. 1938 Sind 18. See also *Kishan Das v. Ganesh Ram*, A.I.R. 1959 Pat. 481.



own name, and despatches it to his banker with instructions to deliver it to the buyer only on receiving payment, the circumstances bring this case within this section and the mere fact of the buyer accepting a bill drawn on the seller has not the effect of passing the property in the goods.

In *Ramnivas v Commr. of Taxes*<sup>1</sup>, it was held : Sub-section (2) of S. 25 applies only to a ship's bill of lading, and not to a steamer receipt or a railway receipt. A steamer or railway receipt may be a document of title, but sub-section (2) of S. 25 does not contemplate all documents of title, but only one kind, namely, a bill of lading. Unlike a bill of lading which does not require to be endorsed, before delivery can be taken, a railway or steamer receipt has to be endorsed by the carrier or his agents or servants before delivery can be taken. It is, therefore, not correct to say that if a railway or steamer receipt is made out in the name of a buyer, property in the goods passes to the buyer.

This decision, however, was given before the amendment of sub-sections (2) and (3) of S. 25 of the Act by the Indian Sale of Goods (Amendment) Act, 1963, S. 4, and obviously does not hold good after the said amendment of S. 25 of the Act.

In *J. S. Basappa v. Provincial Government of Madras*<sup>2</sup>, it was held : What determines the *situs* of sale is a place where the property in the goods passes to the buyer. The principles for deciding whether and when the property in the goods is transferred to the buyer are laid down in Ss. 19 to 25 of the Act. In the absence of any specific agreement or of intention, the buyer becomes the owner of the goods the moment the goods are delivered to him or to the railway which is deemed to be the agent of the buyer for purposes of carrying it to the buyer. The fact that the seller had taken back the railway receipt for the purpose of giving it to their Bankers for collection of the price is not decisive of the *locus* of the sale. This circumstance does not in any way give an indication as to his intention to reserve the *jus disponendi*. It might only give him the right of lien over the goods.

Under S. 25 (2) of the Act when the bills of the lading are deliverable to the order of the seller or his agent, the seller is presumed to reserve the *jus disponendi*. When the railway receipt is made out to the buyer it becomes the document of title and vests the right of ownership in the goods in the buyer while in transit.

When once the goods started on the journey to a foreign destination they are protected by Art. 286 (1) of the Constitution.

The difference in the legal effect of delivering goods to a carrier on the one hand, and on board a ship to be carried under a bill of lading on the other, on which sub-section (2) is based, has thus been pointed out by Mr. Benjamin :<sup>3</sup>

Seller taking the bill of lading to his own order.

“Where goods are delivered by the seller in pursuance of an order to common carrier for delivery to the buyer, the delivery to the carrier

1. A.I.R. 1952 Assam 178. For facts of the case, see p. 415 ante.  
2. (1958) 2 Andh. W.R. 393.  
3. Benjamin on Sale, 8th Edn., p. 384. adopted by Lord Chelmsford in

*Shepherd v. Harrison*, supra. It may be profitable to consult the whole series of rules propounded in the continuation of the passage.



passes the property, he being the agent of the buyer to receive it and the delivery to him being equivalent to delivery to the buyer.

“When goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried.”

The seller, therefore, may take the bill of lading to his own order. In that case, the seller keeps to himself the right of dealing with property shipped and also the right of demanding possession from the captain and this is consistent even with a special term that the goods are shipped on account of and at the risk of the buyer.<sup>1</sup>

It may be that the seller commits a breach of contract by thus reserving the right of disposal, but this will not cause the property to pass; for the failure on the seller's part to satisfy the condition required for ascertaining and appropriating the goods contracted for cannot be remedied in the buyer's favour by construction of law on the ground that the seller ought to have what he did not. Where a seller in effect refuses to appropriate particular cargo on the contract by taking bills of lading to the order of a real or fictitious nominee of his own, his conduct may be a breach of contract in the circumstances, but property in that cargo will none the more be transferred for that reason.<sup>2</sup> An unsuccessful attempt by a seller to appropriate a cargo to the contract will not prevent him from appropriating another cargo and insisting upon the buyer accepting it, if he can do so in accordance with the terms of the contract as to time and otherwise.<sup>3</sup> In this case, the plaintiffs, the sellers, tendered a cargo of maize which was rejected by the defendants as not being in accordance with the contract and afterwards, and within the contract time, the plaintiffs rendered a cargo which was in accordance with the contract, and the second tender was held to be good.

The treatment of a **railway receipt as a document of title** within the meaning of S. 2 (4) of the Act and the consequences which follow from it in commercial transactions are dealt with at pages 39 to 54 and may be referred to.

**(4) Shipment without reservation of right of disposal—presumption of intention to reserve right of disposal when rebutted.**

If the seller takes out bills of lading which make the goods deliverable to the buyer's order, the normal presumption would be that delivery to a carrier, and especially a shipmaster, passes the property. It was observed in *ex-parte Banner* :<sup>4</sup>

“We conceive it is perfectly settled that if a consignor in such a case wishes to prevent property in the goods and the right to deal with the goods whilst at sea from passing to the consignee, he must, by the bill of lading, make the goods deliverable to his own order and forward the bill of lading to an agent of his own. If he

1. *Shepherd v. Harrison*, supra per Lord Westbury at p. 128.

2. *Gabarron v. Kreeft*, (1875) L.R. 10 Ex. 274.

3. *Borrowman v. Free*, (1878) 4 Q.B.D. 500.

4. (1876) 2 Ch. Div. 278, 288, 289.



does not do that, he still retains the right of stopping the goods *in transitu*,<sup>1</sup> but subject to that right the property in the goods and the right to the possession of the goods is in the consignee.

In this case *Christiansen & Co.*, who carried on business at Para, acted as commission agents in the purchase and consignment of goods for Tappenbeck & Co at Liverpool. By the course of dealing, Christiansen & Co. drew bills of exchange on Tappenbeck & Co. which they discounted at Para. They then purchased goods with the proceeds and shipped them for Liverpool, and sent the bills of lading making the goods *deliverable to Tappenbeck & Co* and the invoices by post direct to that firm, advising them of the bills drawn upon them. Both firms stopped payment. At the time of Tappenbeck & Co.'s failure, goods were in transit to Liverpool, and on their arrival were taken possession of by the trustee in their liquidation. Some of the bills were accepted, and others refused acceptance by Tappenbeck & Co. but none of them were paid at maturity. *Held*, that on the shipment of the goods and the posting of the bill of lading, the property in the goods had passed unconditionally to Tappenbeck & Co., and that therefore the creditors of Christiansen & Co. were not entitled to have the goods or their proceeds appropriated to meet the bills drawn in respect of them. *Shepherd v. Harison* was distinguished on the ground that there the consignor had taken the precaution to make the goods deliverable to his own order, and to forward the endorsed bill of lading, together with the bill of exchange *to an agent* of his own.

The presumption that the seller intended to reserve the right of disposal may be rebutted by facts to the contrary. In *Ogle v. Atkinson*<sup>2</sup>, the plaintiff ordered goods from Smidt & Co. at Riga, in return for wine consigned to them for sale the pervious year, and sent his own ship for the goods, which were delivered to the captain, who received them on behalf of the plaintiff and as being the plaintiff's own goods, according to the statement of Smidt & Co. themselves. They afterwards, by fraudulently misrepresenting that the form of the bills was immaterial, as the goods were to be delivered to the owner, obtained from the captain bills of lading in blank, and sent them to their agent with order to transfer them to a third person unless the plaintiff would accept certain bills of exchange which Smidt & Co. drew in favour of that third person. At the same time they enclosed a letter to the plaintiff advising him of the shipment, and containing invoices stating that the goods were shipped for account and risk of plaintiff, but making no mention of any bills of exchange to be accepted. *Held*, that the shipment being unconditional, the property had passed by the delivery to the plaintiff's agent, the captain, and was not divested nor effected by the subsequent acts of Smidt & Co. The form of the bills of lading was either immaterial, as stated by Smidt & Co., or, if it was material, there was a fraud on the plaintiff.<sup>3</sup>

The transfer of bill of lading to the buyer on the terms that he shall *after* receipt thereof send a draft or pay for the goods, *prima facie* does not amount to the reservation of the right of disposal.<sup>4</sup>

1. As to this, see sections 50-52 below.

2. 5 Taunt. 759; 1 Marsh. 323; 15 R.R. 647.

3. See also *Walley v. Montgomery*, 3

East 585; 7 R.R. 526.

4. See *Wilmshurst v. Bowker*, 2 M. & G. 792; 10 L.J.C.P. 171, 66 R.R. 808



In *Cowasjee v. Thompson*<sup>1</sup>, goods were sold to be paid for by a bill drawn by the seller or cash, at the option of the buyers. The buyers elected to pay bill which was duly drawn and accepted. The goods were shipped on the buyer's vessel, the sellers taking the mate's receipts which they retained in their possession. The master, some days after the shipment and without requiring the delivery of the receipts, signed bills of lading describing the goods as shipped by the buyers. *Held*, that the property in and possession of the goods had passed to the buyers notwithstanding the retention of the receipts, as it was the duty of the sellers when the goods were delivered and paid for to surrender the receipts.

In *Van Casteel v. Booker*<sup>2</sup>, the goods had been placed by the seller on board of a vessel sent for them by the buyers and the bill of lading taken for them deliverable "to order or assigns," and showing that they "were freight free," and the bill of lading was endorsed in blank by the seller and sent to the buyers with an invoice stating the goods to have been shipped "on account and risk" of the buyers. *Held*,

*Firstly*, that the decision in *Ellershaw v. Magniae*<sup>3</sup> and *Wait v. Baker*<sup>4</sup> had been correct in holding that the fact of making the bill of lading deliverable to the order of the consignor, was decisive to show that *no property* passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods *till he did a further act*.

*Secondly*, that notwithstanding the form of the bill of lading, the contract may be really made by the consignor as agent to the buyer, and it was a question for the jury what under all the circumstances—such as the form of the bill of lading on the one hand, and on the other, the words "freight free" the language of the invoice and the immediate transfer of the bill of lading was the real intention of the consignors or sellers. In this case it was found by the jury that goods were put on board for, and on account of, and at the risk of, the buyer and the court refused to set aside a general verdict for the defendants.

#### (5) Sellers retaining lien only.

In an intermediate case, in which the seller intends so to appropriate the goods on shipment as to pass the property and deals with the bill of lading in such a way as to prevent the buyer obtaining possession of the goods without paying, or accepting a bill of exchange in payment of the price, the property will pass, subject to the seller's lien for the price. Thus, in *Browne v. Hare*,<sup>5</sup> a seller shipped goods under a f.o.b. contract by the terms of which the buyer was, on delivery of the bill of lading, to accept a bill of exchange for the price payable three months after date, the date being the date of the shipment of the goods, and on shipment took the bill of lading to shipper's order and specially endorsed it to the buyer and sent it, together with the invoice and bill of exchange duly drawn on the buyer to the seller's broker, through whom the sale had been effected and the latter left the documents with the buyer. It was

1. 5 Moo. P.C. 165 ; 70 R.R. 27.  
 2. 2 Ex. 699 ; 18 L.J. Ex. 9 ; 76 R.R. 729.  
 3. (1843) 2 Ex. 570 ; 86 R.R. 398n.  
 4. (1848) 2 Ex. 1 ; 17 L.J. Ex 307 ; 76 R.R. 469.

5. (1858) 27 L.J. Ex. 372, 117 R.R. 811, affirmed (1859) 4 H. & N. 822, 118 R.R. 786 ; see also *Jenkyns v. Brown*, (1849) 14 B. 496, 80 R.R. 287.



held that the property in the goods passed on shipment, and the buyer was liable for the price, although the goods had been lost on the voyage and before the buyer received the documents, and he refused to accept the bill of exchange on the ground.

**(6) Sub-section (3)—delivery in exchange for payment or security.**

Where the seller draws a bill of exchange on the buyer for the price and sends it to the buyer along with the bill of lading on the understanding that the buyer must honour the bill by acceptance or payment, the buyer has no right to retain the bill of lading if he dishonours the bill of exchange; and, if he nevertheless retains the bill of lading wrongfully, no property passes to him.<sup>1</sup> The buyer who thus wrongfully takes possession of and deals with the goods is liable to the seller in conversion and the seller may recover their value, subject to a deduction of expense incurred such as freight and lading charges.<sup>2</sup> Where, however, a bill of lading is sent to the buyer with advice only of the bill of exchange, the acceptance of the bill of exchange is not a condition precedent to the passing of the property.<sup>3</sup>

Where the delivery of the goods, or of a document of title to goods, is made in exchange for repayment of or as security for the price of the goods, the seller is presumed to reserve the right of disposal and the property in the goods does not pass until the payment is made or security given.<sup>4</sup> In *The Orteric*,<sup>5</sup> A, a British subject in America, before war, consigned goods to B in Germany, and drew on him for the price. A then "sold" the bill of exchange and bill of lading to an American bank. War broke out and the goods were seized as prize. The bill of exchange was not accepted, and the documents were returned to the American bank. It was held that the property in the goods still remained in A.

**(7) Summary of the provisions of section 25 and cases decided thereunder.**

Generally, delivery to a carrier or bailee who receives the goods for transmission to the buyer appropriates those goods to the contract; but the seller may exclude the operation of this rule by reserving the power of disposal. In particular, the appropriation may be and constantly is made conditional on payment or tender of the price,<sup>6</sup> or acceptance of a bill of exchange: this last is quite common practice. In such cases the property

1. *Cahn v. Pockett's Bristol Co.*, (1899) 1 Q.B. 643, C.A.; *Rew v. Payne*, (1885) 53 L.T. 93; *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Ex. D. 164 C.A.

2. *Peruvian Guano Co. v. Dreyfus*, (1892) A.C. 166, 170, 174, 186.

3. *Key v. Cotesworth*, (1852) 7 Exch. 595, 607; 86 R.R. 750, 759, 760; *Re Tappenbeck, Ex-parte Banner*, (1876) 2 Ch. D. 278, 288, C.A.; *Koning v. Brandt*, (1901) 84 L.T. 748 C.A.

4. *Barrow v. Coles*, (1811) 3 Camp. 92, 13 R.R. 763; *Ryan v. Ridley*, (1902) 8 Com. Cas. 105. *The Charlotte*,

(1908) P. 206, C.A. *The Prinz Adalbert*, (1917) A.C. 586, P.C. *The Orteric*, (1920) A.C. 724, 733. P.C.; *Eastwood v. Studer*, (1926) 31 Com. Cas. 251.

5. (1920) A.C. 724, 733 P.C. See *Chalmers*, 16th Edn., p. 123. For a converse case, see, *The Vesta*, (1921) A.C. 774, 783 cited at p. 156 ante. See also *Urquhart, Lendsay & Co. v. Eastern Bank*, (1922) 1 K.B. 318, 323, see under S. 55 *post*.

6. See *Godts v. Rose*, (1855) 17 C.B. 229, 104 R.R. 668.



passes only when the condition is satisfied. Similarly, when goods are delivered to a railway administration for carriage by railway, the railway receipt, as a matter of common commercial practice, is taken by the seller in the name of self and endorsed in the name of the Bank specified by the buyer with the instructions that on receipt of payment of the price of consignment by the buyer, the Bank may endorse it in favour of the buyer. The property passes to the buyer when the railway receipt has been endorsed in favour of the buyer by the Bank. If the case falls within the ambit of S. 23 (2) of the Act, appropriation of goods to the contract will take place accordingly.

The Law Commission of India, on the recommendation of which sub-sections (2) and (3) of section 25 of the Act were amended, observed in its report (para. 20) : "In sub-sections (2) and (3) of section 25, we propose to include the case of railway receipts. Goods are frequently consigned by rail with the railway receipts made out in the name of the consignor or his agent or bank with the clear intention of reserving a right of disposal to the consignor and there is no reason why in these cases the consignor by rail should not have the same rights as the consignor by ship".

A bill of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them or his agent authorised to sign it and stating the terms on which the goods were delivered to and received by the ship. When signed by the carrier or his agent, who is often the master of ship, the bill of lading is handed to the shipper. If the shipper intends the property in the goods to pass to a purchaser as soon as, or before, they are put on board, the bill of lading will naturally state that the goods are deliverable to the purchaser or his assigns. If he does not intend this, the bill of lading will state that the goods are to be delivered to the shipper or his assigns. A vendor may annex term to a bill of lading preserving his control over the cargo and the *jus disponendi* of the goods on arrival at their destination<sup>1</sup> although they may be shipped on board the purchaser's ship, and may be in the hands of the purchaser's ship-master.<sup>2</sup> Where a bill of lading states that goods are consigned to a merchant abroad, and that the goods are shipped by order and on account of the consignee, this is strong evidence that the property was intended to vest in the consignee from the time they are put on board.<sup>3</sup> But if goods are delivered to a ship-master, to be carried under a bill of lading, whereby the latter takes to carry them for and on account of the vendor, and deliver them to the vendor at the port of destination, or to the assignee of the bill of lading, this is evidence of an intention not to transfer the property until the bill of lading has been endorsed to the purchaser.<sup>4</sup> The fact of the seller taking a bill of lading to his own order is strong evidence that the appropriation is conditional, whether he keeps himself or sends it endorsed in blank to his agent, with instructions to the agent not to part

1. *Van Casteel v. Booker*, 2 Exch. 691, 18 L.J. Ex. 9 ; *Jenkyns v. Brown*, 14 Q.B. 496 ; 19 L.J.Q.B. 186 ; *Gabarron v. Kreeft*, L.R. 10 Ex. 274, 44 L.J. Ex. 238.  
2. *Turner v. Liverpool Docks Trustees*, 6 Exch. 543 ; 20 L.J. Ex. 393 ; *Rosevear China Clay Co. Ex. parte*, 11 Ch. D.

560 ; 48 L.J. Banker, 130.  
3. *Brown v. Hodgson*, 1 Camp. 36.  
4. *Wait v. Baker*, 17 L.J. Ex. 307 ; *Jenkyns v. Brown*, supra ; *Joyce v. Swann*, 17 C.B.N.S. 84 ; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. at p. 172 ; 47 L.J. Ex. 418.



with it until the goods are paid for or the bill accepted.<sup>1</sup> Where a shipper keeps in his own or his agent's hand a bill of lading making the goods deliverable to his order until certain conditions have been fulfilled by the consignee, the property in the goods will not pass until such conditions are fulfilled by the consignee or at least until he offers to fulfil the conditions, and demands the bill of lading. The vendor retains not only a lien but a power to dispose of the goods so long as the vendee continues to default.<sup>2</sup> But if the bill of lading is only dealt with to secure the contract price, then, on payment or tender, the goods vest in the purchaser.<sup>3</sup> The incidence of the risk, as between buyer and seller, is a very strong indication as to which of them owns the property.<sup>4</sup>

In *Re Cargo Ex. SS. Rappenfels*<sup>5</sup>, goods were shipped by British subjects under c. i. f. contract of German steamer which was captured after the declaration of war. The bills of lading were made out to the order of the sellers and were endorsed in blank and made over to a bank with the bill of exchange, some of which were discounted with the bank. Some of the buyers were British subjects and others were alien enemies. The bills of exchange were not accepted by the buyers. It was *held* that property in the goods did not pass to the buyer and so the goods could not be condemned (as enemy goods) as the sellers retained the right of disposal over them. In *Bank of Morvi v. Baerlein Bros.*,<sup>6</sup> bills of lading drawn to the order of the seller were endorsed in blank and made over to a bank with instructions not to deliver the same to the purchaser until paid for. The buyer having refused to pay, the property did not pass. In *Mehta & Co. v. Joseph*<sup>7</sup>, a bill of lading was to be delivered on acceptance of the draft. The property did not pass as the draft was not accepted. Similarly, in *Bal Kishan v. Fazl Elahi*,<sup>8</sup> bill of lading was sent to seller's agent to be delivered against payment. It was *held* that the property did not pass on acceptance of draft until the payment of the draft. (Where documents are to be delivered to the buyer on the acceptance of the draft it is called D/A terms; and where they are to be delivered on payment of the draft it is called D/P terms. In the former case, property passes on acceptance of draft; in the latter, on payment of the draft.)

In case of difference, the terms of the bill of lading prevail over those of an invoice, and, in terms, over any inference from ambiguous terms in any other documents evidencing the contract.<sup>9</sup> It is perfectly well settled, that.....the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive but may be

1. See *Bank of Morvi Ltd. v. Baerlein Bros.*, A.I.R. 1924 Bom. 325 : 48 Bom. 374 : 79 I.C. 1012; *Re Cargo ex. SS. Rappenfels* (1915) 42 Cal. 334 : 30 I.C. 174; *Mehta & Co. v. Joseph Heures*, A.I.R. 1924 Bom. 422 : 48 Bom. 531 : 80 I.C. 766; *Bal Kishan-Basheshar Nath v. S.M. Fazl Elahi*, A.I.R. 1927 Lah. 391 : 8 Lah. 173 : 102 I.C. 807.  
2. *Ogg v. Shuter*, 1 C.P.D. 47 : 45 L.J.C.P. 47.  
3. *Mirabita v. Imperial Ottoman Bank*, 3

Ex. D. 164 : 47 L.J. Ex. 418.  
4. *The Parchim*, (1918) A.C. 157. See also *The Kronprinsessan Margareta*, (1921) 1 A.C. 486.  
5. (1914) 42 Cal. 334.  
6. (1924) 48 Bom. 374.  
7. (1924) 48 Bom. 531.  
8. (1927) 8 Lah. 173; see also *Ford Automobiles Ltd. v. Delhi Motor and Engineering Co.*, (1922) 24 Bom. L.R. (1140) (1148), cited at p. 454.  
9. See *Ogg v. Shuter*, supra.



overruled by the circumstance of *jus disponendi*<sup>1</sup> being reserved by the shipper through the medium of the bill of lading.

The following observations of Lord Justice Cotton in *Mirabita v. Imperial Ottoman Bank*<sup>2</sup> would be of interest :

“Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to common carrier or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is *held* that he thereby reserves to himself the power of disposing of the property and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order he has the power of absolutely disposing of the cargo, and may prevent the purchaser from over-asserting any right of property therein, and accordingly *Wait v. Baker*,<sup>3</sup> *Eliershaw v. Magniae*<sup>4</sup> and *Gobarron v. Kreeft*<sup>5</sup> (in each of which cases the vendors had dealt with the bill of lading for their own benefit), the decisions were that the purchaser had no property in the goods though he had offered to accept bills for or had paid the price. So if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance, or payment or tender, the property in the goods does not pass to the purchaser ; and so it was decided in *Turner v. Trustees of Liverpool Docks*,<sup>6</sup> *Shepherd v. Parrison*,<sup>7</sup> *Ogg v. Shuter*.<sup>8</sup> But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs, there is a performance of the condition subject to which appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done ; and in my opinion, under such circumstances the property does on payment or tender of the price pass to the purchaser.”

1. Lord Cairns in *Shepherd v. Harrison*, (1871) L.R. 5 H.L. at p. 131.

2. *Supra*, pp. 172, 173.

3. (1848) 2 Ex. 1, 76 R.R. 469.

4. (1848) 6 Ex. 570 n., 86 R.R. 398 n.

5. (1875) L.R. 10 Ex. 274.

6. (1851) 6 Ex. 543 ; 86 R.R. 377, Ex. Ch.

7. (1869-1871) L.R. 4 Q.B. 196, 5 H.L. 116.

8. (1875) 1 C.P. Div. 47.



In this case, accordingly, where the bills of lading had been handed to the bankers who discounted the bill of exchange drawn against the cargo, and this was done only to secure payment of the bill of exchange at maturity, it was *held* that the buyer was entitled to the goods on offering to pay the bill of exchange, and that his tender constituted a final appropriation vesting in him.

In *The Parchim*<sup>1</sup>, Lord Parker observed :

“The English cases however, on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract : *Wait v. Baker*,<sup>2</sup> *Gabarron v. Kreeft*.<sup>3</sup> This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property and, therefore, the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract : *Mirabita v. Imperial Ottoman Bank*;<sup>4</sup> *Van Casteel v. Broker*;<sup>5</sup> *Browne v. Hare*;<sup>6</sup> *Joyce v. Swann*.<sup>7</sup> The *prima facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak and may be rebutted by the other circumstances of the case.

“Having regard to the doctrine that the Master of a ship who gives to the shipper of goods a bill of lading becomes bailee of goods to the person indicated by the bill of lading, a seller holding bill of lading to his order would have a sufficient possession of the goods to maintain his lien, even if he had on shipment parted with the property. The seller in such a case makes the ship (even if it belongs to the buyer or is chartered by him) his warehouse so far as these goods are concerned, and the case as pointed out by Pollock C.B. in *Browne v. Hare* is to be governed by the same rules as that of a person contracting to buy goods in a warehouse of the seller where they are to remain until paid for, so that the seller retains a lien. They may or may not become the buyer's property before he pays for them, according to the terms of the contract.”

1. (1918) A.C. 157, pp. 170-171.  
 2. (1848) 2 Ex. 1, 76 R.R. 469.  
 3. (1875) L.R. 10 Ex. 274.  
 4. (1878) 3 Ex. Div. 164.

5. (1848) 2 Ex. 691.  
 6. *Supra*, p. 329.  
 7. (1864) 17 C.B.N.S. 84.



The following passage from Mr. Benjamin's treatise<sup>1</sup> indicates at what stage property in goods shipped from one country to another may pass to the firm ordering the goods :

"If A in New York orders goods from B in Liverpool without sending the money for them, B may execute the order in one of two modes, without assuming risk. B may take the bill of lading making the goods deliverable to his own order, or that of his agent in New York and send it to his agent with instructions, not to transfer it to A except on payment for the goods. Or B may draw a bill of exchange for the price of the goods on A, and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods to be delivered to A on due payment of the bill of exchange. Now in both these modes of doing business it is impossible to infer that B had the least idea of passing the property to A, at the time of appropriating the goods to the contract. So that, although he may write to A, and specify the packages and marks identifying the goods and although he may accompany this with an invoice, stating that these specific goods are shipped for A's account, and in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B till the bill of lading has been endorsed and delivered up to A. And a third course now, under the Act, is available to the seller. He may draw upon the buyer a bill of exchange for the price and may send it, together with the bill of lading *direct* to him. In such a case, however, he trusts the buyer. In this class of cases it is often a matter of great nicety to determine whether or not the seller's intention was really to reserve a right of disposal."

*See Appendix for "c.i.f." contracts.*

Where the performance of some obligation is imposed upon the buyer, but is not made a condition of the transfer of the property, the property once passed is not revested in the seller by the buyer's subsequent default.<sup>2</sup>

In *Metal Traders Inc. Ltd. v. The Jeypore Sugar Co. Ltd.*,<sup>3</sup> it was held : If the seller takes the bill of lading in his own name, or to his order, accompanied by a bill of exchange for payment as a condition for delivery of the bill of lading to the buyer, the intention of the seller is not to part with the property in the goods in favour of the buyer. Even if the seller takes the bill of lading in the name of the buyer or to his order, accompanied by bill of exchange for payment as condition precedent for delivery of the bill of lading to the buyer, the intention of the seller is the same, *i.e.* not to part with the property in the goods until payment is made. If the seller takes the bill of lading in the name of the buyer and places it at the absolute disposal of the buyer, the seller intends to part with the property, and the fact that a bill of exchange is sent along with it, merely indicates the seller's intention to retain a lien for his money.

The fact that goods are despatched f.o.b. in a ship chartered by the buyer or that the goods shipped 'on account of buyer' is not necessarily.

1. Benjamin on Sale, 8th Edn., p. 359 ; cited with approval in *Re Cargo Ex. SS. Rappenfels*, (1915) 42 Cal. 334, 342-3 ; 30 I.C. 174.  
2. *Key v. Cotesworth*, (1852) 7 Exch. 595; *Re Tappenbeck, Ex-parte Banner*,

(1876) 2 Ch. D. 278 C.A. ; *Newington v. Levy*, (1870) L.R. 6 C.P. 180, Ex. Ch.  
3. (1970) 1 An. W.R. 107. See *Yearly Digest*, 1970, Colmrs. 2819, 2820.



conclusive of the property passing from the seller, provided the seller by his unequivocal act indicates his intention not to part with title in the goods.

If the purchaser from the buyer refrains from making enquiries which would certainly have revealed the true state of affairs, he cannot plead good faith and want of notice.

### *Additional Notes*

(i) Williston<sup>1</sup> states the law thus:

“It follows from what has been said that if the seller takes a bill of lading in which he is named as consignee as well as consignor, the carrier is a bailee for him, not for the buyer, and the title is retained. The practice of taking bills of lading in this form has been common for centuries in order to preserve to the seller a hold upon the goods during transit, and many cases have sustained the validity of this retention of title. This principle is applicable even though the goods are shipped on the buyer's vessel, for the captain, having authority to sign bills of lading, by so doing constitutes himself as an independent bailee of the goods for shipper. It is commonly said that the seller by taking the bill of lading in his own name reserves the *jus disponendi* or right of disposal of the goods, and the latter expression is used in the section of the English Sale of Goods Act corresponding to that here under discussion. There seems no doubt that the seller who thus consigns the goods to himself has complete control over them, and that the so-called *jus disponendi* is in fact title. The seller may not only retain the goods until the buyer performs his obligation under the contract, but may, even in violation of the contract, dispose of them to third persons. If the seller does this, of course he is liable in damages to the buyer, but the second purchaser from the seller acquires an indefeasible right.

It is not ordinarily material for the seller's protection whether the bill of lading is an order bill or a “straight” bill naming him as consignee without the word “order.” Though, as will be seen, if the bill is in the latter form, the carrier need not require production or surrender of the bill, yet delivery must be made to the seller as consignee, and this enables him to control the goods at their destination.

It is to be observed that though the form in which the bill of lading is taken is indicative of the title to the goods shipped, in the nature of the case it cannot always be conclusive. In the first place if the shipper does not have title himself, or power to transfer title, no disposition of the goods by him can possibly affect the ownership of the goods in the absence of an estoppel against the true owner. In the second place, just as a shipper cannot give to a consignee property in goods which the shipper neither owns nor has power to transfer by virtue of agency or estoppel, so also he cannot transfer to a consignee the property in goods unless the consignee assents to receive it. Accordingly, if shipment is made by a seller of goods which he was not authorized to send, or in manner which he was not authorized to adopt, the property cannot pass to the consignee by the mere fact that his name was inserted in the bill of lading as

1. Williston on Sales (Revised Edition),

Vol. 2, Ss. 283, 284, pp. 151 to 161.



consignee at the request of the consignor. This may, and does, indicate assent by the shipper to transfer the property and the subsequent assent of the buyer may operate as a ratification of the seller's act, but in the meantime, the property in the goods cannot be regarded as having passed.

If it be supposed, however, that the circumstances are such that were it not for the form of the bill of lading the property would have passed, but the seller is named as consignee in the bill, an interesting situation is presented. The object of the seller in reserving the property is, it may safely be assumed, simply to secure himself in regard to the performance by the buyer of the latter's obligations. By shipping the goods the seller has lost all use of them and has definitely appropriated them to his bargain with the buyer. If the shipper could be perfectly sure that the buyer would fulfil his obligation it can hardly be doubted that he would have made a straight consignment to the latter. The effect of naming himself as consignee in the bill of lading should not be greater than is necessary to effectuate the purpose of the parties. This purpose is to reserve the property for security—the same purpose that the seller of goods under a conditional sale has; the same purpose that a purchase money mortgagee has who takes back title from the purchaser under a common-law mortgage.

The importance of distinguishing between a title held merely for the purpose of security, and the ordinary case, where the seller retains the full rights of ownership is, in the main, twofold. In the first place the beneficial owner, not the one who holds for security, will be subject to the risk of loss or deterioration. Reasons will be given in connection with a later section of the Sales Act for believing that the risk of loss should fall upon the buyer. In the second place the buyer has more than a mere contract right in regard to the goods. His right is in its nature an equitable property right, similar, to that of a mortgagor in jurisdictions where the mortgagee is conceived of as having the legal title. If one who makes an executory contract to sell goods wrongfully refuses to carry out the bargain by transferring the property, the buyer has no redress other than an action for breach of contract. He has also no property right in the goods and can avail himself of no action based upon ownership. On the other hand, a property interest in goods gives the buyer a right to claim the goods themselves, on satisfying his obligation. Therefore, if the seller (or a banker representing his interest by assignment or as an agent) refuses to turn over the goods by endorsing the bill of lading or otherwise, when payment of a draft for the price is tendered, the buyer may maintain an action for the goods themselves.

If the seller, as often happens, after retaining a security title by taking a bill of lading to his own order, discounts at a bank a draft on the buyer and endorses the bill of lading to the discounting bank, the bank becomes the assignee of the seller's security title, and subject to the same duty as the seller to turn over the bill of lading to the buyer on receiving the price to assure which the bill of lading is held.

The foregoing argument pre-supposes, however, that the seller shipped the goods for the buyer, making the latter's complete ownership subject only to reservation of title for security, in the nature of a mortgagee's or conditional seller's, to insure payment of the price for which the draft is drawn. If, however, the seller, though in violation of the



contract between the parties, draws on the buyer when the goods are shipped for a greater price than is due, the buyer cannot by tendering the contract price make himself owner of the goods. The seller, though he did so wrongfully, has made the buyer's rights to any ownership or possession of the goods dependent on payment of the larger sum. So, too, if the circumstances are not such that except for the form of the bill of lading, the legal title would have passed, the buyer acquires no beneficial property interest.

**(ii) Section 25 (1)—Construction—Seller when divested of ownership.**

The proper interpretation of S. 25 (1) is that if the parties specifically agree at the time of contract or at time of the appropriation that property in the goods shall not pass till their price is paid, then till such a payment seller remains owner of goods.<sup>1</sup>

**(iii) Section 25 (2), (3)—Shipping of goods sold—Transmission of bill of exchange to buyer—Title when passes.**

Where the goods are shipped and the bill of lading is transmitted to the buyer together with the bill of exchange for acceptance, the moment the transaction takes place there is a transfer of the title in the goods to the buyer, if he honours the bill of exchange. But where the bill of exchange is not honoured and the bill of lading is wrongfully retained, the title in the goods does not pass to the buyer.<sup>2</sup>

**(iv) Section 25 (3)—Assessee merely a buying agent for certain foreign companies—Bill of lading in buyer's name—Property passing on payment in U.S.A. or Canada—No liability to sales-tax in Cochin—Cochin Sales Tax Act, 1922, Ss. (2)c and 2(j).**

See *Liptons Ltd., Calcutta v. Municipal Sales Tax Officer*, (1959) 10 S.T.C. 459.

**(v) Sections 25 (1) and 39—Bilticut transaction—Nature and incidents of.**

"Bilti" is the Hindi word for a railway receipt. A Bilticut rate includes the cost of bagging, weighing, transport to the railway station, loading in wagons, and other station charges till the Bilti is issued. The well-known and usual practice of the trade is to consign the goods to self, to endorse the railway receipt in favour of a bank at the place of the buyer of goods and to present it through the bank to the buyer. The buyer makes payment to the bank which endorses the railway receipt in his favour and delivers it to him. The property in the goods does not pass to the buyer upon the delivery of the goods to the railway under section 39 of the Act as the goods are not delivered for transmission to the buyer within the meaning of that section. For the goods are consigned to self so far as the railway is concerned. Section 25 (1) of the Act becomes applicable in such a case. The seller reserves the right of disposal of goods until delivery of the railway receipt is taken on payment. It is only when the

1. *Paharia Mal Ram Sahai v. Birdhi Chand Jain & Sons*, A.I.R. 1956 Punjab 217.

2. *State of Madras v. Ramalingam & Co.*, A.I.R. 1956 Mad. 695.



buyer makes the payment and takes delivery of the railway receipt that the property in the goods passes to him. The place of payment in transactions of this nature is the place where the buyer resides. For, payment is to be made by him at that place on presentation of the railway receipt.<sup>1</sup>

**26.** Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not :

*Risk prima facie passes with property.*

Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

### Synopsis

- |   |   |
|---|---|
| (1) <i>Analogous law.</i>                               | (4) <i>Proviso (1) to section 26—delivery delayed by fault of either party.</i> |
| (2) <i>Risk prima facie passes with property.</i>       | (5) <i>Liability of either party as bailee—proviso (2) to section 26.</i>       |
| (3) <i>“Unless otherwise agreed”—risk by agreement.</i> | (6) <i>Accretions.</i>  |

#### (1) Analogous law.

This section corresponds to section 20 of the English Sale of Goods Act, 1893. The principle involved in it was enacted in section 86 of the Indian Contract Act, 1872—See Appendix A and Appendix B.

#### (2) Risk prima facie passes with property.

Old section 86 of the Indian Contract Act laid down an inflexible rule that when goods become the property of the buyer he *must* bear any loss arising from their destruction or injury.<sup>2</sup> It was, therefore, not competent for the parties to agree that in spite of the property passing to the buyer, the goods should remain at the seller's risk. Under the present section the parties may provide by their agreement that the risk shall pass at some time or on some condition not necessarily simultaneous with the passing of the property.<sup>3</sup> “As a general rule,” says Blackburn J. in

1. Firm Shah Chandanmal Fatehraj and others v. Hazarilal, A.I.R. 1962 Raj. 122.  
2. Shoshi Mohun v. Nobo Kristo, (1879) 4 Cal. 801.  
3. Martineau v. Kitching, (1872) L.R. 7 Q.B. 436, at pp. 454, 456, per Black-

burn J. (transfer of risk after two months), approved in the Parchim, (1918) A.C. 157, p. 168 P.C. ; Castle v. Playford, (1872) L.R. 7 Exch. 93 Ex. Ch. ; Sterns v. Vickers, (1923) 1 K.B. 78 C.A.



*Martineau v. Kitching*,<sup>1</sup> “*res perit domino*, the old Civil law maxim, is a maxim of our law ; and, when you can show that the property passed, the risk of the loss *prima facie* is in the person in whom the property is. If, on the other hand, you go beyond that and show that the risk attached to one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may very well be that the property shall be in the one and the risk in the other.....By the Civil Law it always was considered that there was any weighing, or anything of the sort which prevented the contract from being *perfecta emptio*, whenever loss was occasioned by one of the parties being in *mora*, and if it was his default...he shall have the risk just as if the *emptio* was *perfecta*.”

In *Sweeting v. Turner*<sup>2</sup>, goods in a house held on lease were sold by auction under conditions expressly providing that all lots should be taken to be delivered at the fall of the hammer, after which time they should remain at the exclusive risk of the purchaser. The rent of the house was in arrear, and after the sale the landlord threatened to distrain on these goods, and to prevent distress the auctioneer paid the rent and paid over the net proceeds of the sale only to original owner of the goods, who was also the tenant of the house. It was *held* that the auctioneer had no right to make this deduction as the property in the goods had passed to the respective buyers and the seller, therefore, had no further interest in them, and the auctioneer had no implied authority from him to pay the rent in order to save the goods from distress. “It is thoroughly established, that by the English law, where a bargain and sale is completed with respect to goods, and everything to be done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser although the vendor still retains his lien, the price of the goods not having been paid,<sup>3</sup> and any accident happening to the things subsequently, unless it is caused by the fault of the vendor...must be borne by the purchaser, and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor.”<sup>4</sup>

Where the defendant purchased 975 bales of rice, being the whole contents of a gola, paid earnest money, and took part delivery of the rice and the rest was destroyed by fire, it was *held* that the property in the whole had passed to him and he was liable to pay the balance of the price.<sup>5</sup>

### (3) “Unless otherwise agreed”—risk by agreement.

The general rule being that the risk attaches to the ownership of the goods, and passes with the property the parties may by agreement evince a different intention to the effect that although property does not pass, the risk passes, and they may fix the point of time when it so passes.<sup>6</sup> And this may be inferred from their course of dealing, or by usage binding

1. *Supra* (f.n. 3 on p. 469).

2. (1871) L.R. 7 Q.B. 310.

3. See sections 46-48 post.

4. *Per Blackburn J.* p. 313 ; cf. *Black v. Homersham*, (1878) 4 Ex. Div. 24 (dividend on shares).

5. *Shoshi Mohun Pal v. Nobo Krishto*

*Poddar*, (1878) 4 Cal. 801. See also *Bachhraj Amolakchand v. Firm Khub Chand Narsingdas*, A.I.R. 1949 Nag. 199.

6. See *Multanmal Champalal, Bellary v. C.P. Shah & Co., Bombay*, A.I.R. 1970 Mys. 106.



on both.<sup>1</sup> Thus ownership may in particular cases be separated from the risk, but that this may be so, it is necessary that there should be some appropriation of the property to the contract.<sup>2</sup> In this case the plaintiff agreed to purchase and the defendant to sell ten bales of cloth of which nine bales were delivered and paid for at Amritsar, and on the 15th November 1920 the Berar Manufacturing Company at Badnera consigned one bale from that place to Amritsar and the railway receipt, which was in favour of the consignors, was endorsed by them to the Chartered Bank of India at Amritsar who were to deliver the receipt to the purchaser on payment of the price by him. It appeared that the bale arrived at Amritsar on 7th January 1921 and was stolen from the goods-shed at Amritsar on 10th January, and on 13th January the plaintiff paid the money to the bank and obtained the railway receipt, but when he went to the railway station he found that the bale had been stolen. It was then contended that by a special agreement the buyer became responsible for the risk as the goods left the premises of the mills at Badnera. *Held*, that on 10th January, 1921, when the goods were lost, they had not become the property of the buyer and he could not, therefore, bear the loss.

In *Anderson v. Morice*,<sup>3</sup> a case of an insurance of an undivided quantity of goods, Lord Hatherley observed:

"It is perfectly conceivable, indeed in many cases it has been so as a matter of fact, that a person selling some goods at a distant place to a person living in this country, may say, 'I am perfectly willing to sell you these goods ; I am perfectly willing to complete the cargo so to be sold, but I do not intend to be at the risk of their loss during the transit or on the voyage, and although you will not be expected to pay for the goods and acquire the property until you have the bills and the documents attached sent to you, still in the meantime there will be a risk in transit and that is a risk which I am not desirous of undertaking, and I must throw that risk upon you as part of our bargain'."

The fact that one party or the other is to insure the goods is material to the determination of the question on whom the risk is to fall. As property and risk are separable, it follows that property and insurable interest, may be separable. If goods are at a person's risk, he has an insurable interest, whether he has any property in the goods or not.<sup>4</sup> A provision that either party shall insure the goods contracted for is strong evidence that the risk of loss was intended to be assumed by him,<sup>5</sup> but it is not conclusive.<sup>6</sup> When the goods

1. See *Martineau v. Kitching*, (1872) L.R. 7 Q.B. 436 ; goods were to be weighed on being taken away by the buyer and they were to be at seller's risk for two months. The goods were destroyed after the lapse of two months but before being weighed. *Held*, the risk fell on the buyer and he was liable for the price ; *Castle v. Playford*, (1872) L.R. 7 Ex. 98, at p. 100 Ex. Ch. where the purchaser took upon himself all risk and dangers of the sea ; *Anderson v. Morice*, (1875) L.R. 10 C.P. 609, at p. 616 ; *Inglis v. Stock*, (1884) 10 App. Cas. 263 (f.o.b. contract).

2. *N.S. Billimoria v. Gauri Mal Narain Das*, A.I.R. 1928 Lah. 411 : 112 I.C. 457, a case under section 80, Indian Contract Act.

3. (1874) L.R. 10 C.P. 609, (1876) 1 App. Cas. 713.

4. See *Chalmers*, 16th Edn., p. 127.

5. See *Fragano v. Long*, (1825) 4 B. & C. 219.

3 L.J. (O.S.) K.B. 117 ; *Anderson v. Morice*, *supra* ; *The Colonial Insurance Co. of New Zealand v. The Adelaide Marine Insurance Co.*, (1886) 12 A.C. 128.

6. *The Annie Johnson*, (1918) P. 154, 161.



contracted for are a quantity, it is a question depending upon the terms of the contract and the circumstances of the case whether the insurance covers and the risk accordingly attaches to the quantity of goods when completed only, or else to each separate instalment when delivered.<sup>1</sup>

Where the price of goods to be shipped includes freight and insurance premium as in a c. i. f. contract (see Appendix), the risk *prima facie* attaches to the buyer on the goods being shipped<sup>2</sup> in terms of the contract provided the necessary documents are tendered in due time. The seller takes the risk if the price is payable only on the goods arriving at their destination.<sup>3</sup> By the custom of a particular trade goods ordered on approval may be at the risk of the person ordering them from the moment they are delivered.<sup>4</sup> Where a motor car is garaged for sale at customer's risk, the garage-keeper is not liable for damage caused by the negligence of his servants.<sup>5</sup> Even unascertained goods may be at the buyer's risk by agreement.<sup>6</sup> Where goods are to be shipped by the seller "f. o. b." the risk, as a rule, attaches to the buyer on shipment being made,<sup>7</sup> whether the goods are at the time specific or unascertained.

In *Kanshi Ram v. Mulchand*,<sup>8</sup> a case under section 86, Indian Contract Act, where a consignment of lime was sold and the price paid in part, the balance to be paid after the lime was weighed, and the goods were delivered in a damaged state, it was *held* that the property had passed and so the risk was with the buyer. In *Ford Automobiles v. Delhi Motor Co.*<sup>9</sup> where the sellers had taken the railway receipt in their own name, and had instructed their agents not to part with the receipt except on payment, it was *held* that the property was with the plaintiffs. But if parties agree that the seller should send the goods to the buyer at the owner's risk, then delivery to the carrier will be tantamount to delivery to the buyer, and in the absence of any indication, the risk will pass also.<sup>10</sup> In *Shanker Das Joti Parshad v. Bhana Ram Sheo Dayal*<sup>11</sup> where the defendants sold 814 tins of kerosene oil to the plaintiffs and received Rs. 1,000 in part payment and defendants had endorsed the railway receipt (while goods were in transit), and it happened that the goods were destroyed by fire during the transit, it was held that the risk was with the plaintiffs and they could not get a refund of the price from the defendant.

1. See Benjamin on Sale, 8th Edn., p. 393.
2. *Wancke v. Wingren*, (1889) 58 L.J. Q.B. 519; *Tregelles v. Sewell*, (1862) 7 H. & N. 574; 126 R.R. 558; *Crozier v. Auerbach*, (1908) 2 K.B. 161, C.A.; *Biddell Bros. v. Clemens & Co.*, (1911) 1 K.B. 934; *Tregelles v. Sewell*, (1862) 7 H. & N. 574.
3. *Calcutta Co. v. De Mattos*, (1863) 32 L.J. Q.B. 322; 139 R.R. 752; *Dupont v. British South Africa Co.*, (1901) 18 T.L.R. 24.
4. *Bevington v. Dale*, (1902) 7 Com. Cas. 112—Furs delivered "on approval" with invoice, stolen by burglars.
5. *Rutter v. Palmer*, (1922) 2 K.B. 87, C.A. but cf. *Producers Meats (North Island) Ltd. v. Thomas Borthwick & Sons, Ltd.* (1965) 1 Lloyd's Rep. 130

- (contract with exemption clause "the wool, meat and skins are uninsured and are held at owner's risk," damage to bailor's meat occurring to bailee's negligence; bailee liable for negligence in spite of the clause).
6. *Inglis v. Stock*, (1885) 10 App. Cas. 263.
7. *Cowasjee v. Thomson*, (1845) 5 Moo. P.C.C. 165, 70 R.R. 27; *Wimble v. Rossenberg*, (1931) 3 K.B. 743; *Inglis v. Stock*, *supra*.
8. A.I.R. 1930 Lah. 469.
9. A.I.R. 1923 Bom. 125; 24 Bom. L.R. 1140; 70 I.C. 138.
10. See *Alagappa v. Roopchand*, A.I.R. 1929 Mad. 685; (1929) 57 M.L.J. 110.
11. A.I.R. 1926 Lah. 606; 7 Lah. 406; 97 I.C. 765; 27 P.L.R. 601.



In *Shepherd v. Harrison*,<sup>1</sup> goods were "shipped on account of and at the risk of the consignee" but it was *held* that by the bill of lading (by which the goods were deliverable to the seller or order) the *jus disponendi* were reserved. In *Sterns Ltd. v. Vickers*,<sup>2</sup> the acceptance of the delivery warrant by the buyer passed the risk to him irrespective of the fact whether the property in the goods which were not separated from the bulk passed to him. The warrant was not acted on for some months, and in the meantime white spirit forming subject of the contract deteriorated. The buyer was responsible for the loss.<sup>3</sup>

A stipulation in the contract that payment is to be made after delivery does not prevent the risk from passing and making the buyer liable for the price if the buyer had taken the risk during the transit. In such cases the stipulation as to time is taken to regulate the time of payment and in case of loss or destruction of the goods, the price to be paid within a reasonable time thereafter.<sup>4</sup> In *Fragano v. Long*,<sup>5</sup> there were "goods to be despatched on insurance being effected : terms to be three months' credit from the time of arrival." *Held*, that though the provision as to payment after arrival would indicate an intention that the seller was to bear the risk during the transit the clause as to insurance indicated that the risk was taken by the buyer.

If it is the intention of the parties that the goods should actually be delivered at their destination before the price is payable, the buyer would not be liable if they are destroyed while in the hands of the carrier.<sup>6</sup> So the seller in such case cannot recover the part contingently payable if the goods do not arrive, nor the buyer can recover back the part absolutely payable and paid by him ; but if not paid, he is liable to the seller for such part in spite of the fact the goods do not reach him.<sup>7</sup> But the mere fact that the price is payable on the delivery of the shipping documents<sup>8</sup> or at a time calculated.....with reference to the arrival of the goods at their destination<sup>9</sup> or their actual delivery to the buyer<sup>10</sup> or is to be ascertained by weighing or the doing of some act or thing in relation to them after their arrival<sup>11</sup> does not throw the risk during transit on the seller<sup>12</sup> inasmuch as provisions may be intended only to regulate the time of payment of the amount of the price, e.g. where the other terms of contract show that the property or the risk was intended to pass to the buyer immediately on the despatch of the goods to him.<sup>13</sup>

1. (1871) L.R. 5 H.L. 116.

2. (1923) 1 K.B. 78.

3. Cf. *J.J. Cunningham Ltd. v. Robert Munro Ltd.*, (1922) 28 Com. Cas. 42 cited post in Appendix under "ex-ship contract". See also *Comptoir etc. du Bocrenbond Belge v. Luis de Ridder*, (1949) 1 All E.R. 269—Despite the designation as "c. i. f." contract, from the terms it was not "c. i. f." ; there was frustration of the adventure and no part performance and the buyers were entitled to recover the amount paid.

4. See *Calcutta Co. v. De Mattos*, (1863) 32 L.J.Q.B. 322.

5. (1825) 4 B. & C. 219.

6. See *Dunlop v. Lambert*, (1838) 6 Cl.

& F. 600, 621 ; *Dupont v. British South Africa Co.*, (1922) 2 K.B. 87 ; *The Miramichi*, 1915, P. 71.

7. *Calcutta & Burmah Steam Navigation Co. v. De Mattos*, 32 L.J.Q.B. 322 ; *Dupont v. British South Africa Co.*, supra.

8. *Anderson v. Morice*, supra.

9. *Fragano v. Long*, supra ; *Hale v. Rawson*, (1858) 4 C.B.N.S. 85.

10. *Houlder Bros. Co. v. Public Works Commissioner*, (1908) A.C. 276 (291) P.C.

11. *Castle v. Playford*, L.R. 7 Exch. 98.

12. *Alexander v. Gardner*, 1 Bing. N.C. 674 ; *Castle v. Playford*, supra.

13. See also *Halsbury*, Vol. 34, 3rd Edn., p. 77 f.n.1.



Where the price of the goods is payable before delivery, and no intention appears in the contract that the price shall be refunded or shall cease to be payable if delivery is not made, and where the seller agreed to deliver the goods only on a contingency which fails without the seller's fault,<sup>1</sup> or the goods being specific, the seller is discharged by law from delivering the goods<sup>2</sup> the buyer must bear the risk if delivery is not made to him.<sup>3</sup> Where, however, under an express power, the buyer is given a right to recover the price of the goods from the seller on the happening of a certain contingency and to revest the property in the goods in him and the goods are damaged without any fault of the buyer while they are in the buyer's possession and before he has an opportunity to exercise the right, the loss must be borne by the seller as contingent owner of the goods.<sup>4</sup>

Where the parties provide that though the property in the goods in transit may not pass till payment of the price the risk should nevertheless be on the buyer, the property in the goods does not pass to the buyer the moment the goods are despatched.<sup>5</sup>

The completion of the sale confers upon the buyer in respect of the goods all the rights and liabilities of an owner. Subject, therefore, as between him and the seller, to any special agreement, he is invested with full powers of using or of dealing with the goods, is entitled to all accretions and benefits attaching to them, and is subject to the risk of loss or damage. The rights and liabilities of the buyer as owner of the goods may, however, as between him and the seller be limited by special agreement.<sup>6</sup> Such an agreement, however, does not run with the property in the goods so as to bind a subsequent purchaser or so as to qualify his right of property in the goods even though he has notice of such agreement.<sup>7</sup> This rule, however, does not apply to patentee who can restrict the user of the goods by the buyer or by his subsequent purchaser even without notice, on the sale of the patented goods, by the term of the licence.<sup>8</sup>

It has been held that a purchaser to whom the property in the goods has not yet passed and who is not entitled to possession of them has no right of action in negligence against a third party who carelessly damages or destroys them even though the risk has passed to him.<sup>9</sup> In this case, the plaintiff entered into four c.i.f. contracts for the purchase of two thousand tons of copra, part of a cargo already afloat on the "Wear Breeze." The plaintiff acquired title to the copra at, or shortly after, the time of discharge from the ship, when their parcels of copra were

1. Whincup v. Hughes, (1871) L.R. 6 C.P. 78; Wheeler v. Fradd, (1898) 14 T.L.R. 302 C.A.; Oppert v. Beaumont, (1887) 3 T.L.R. 674 C.A.

2. See sec. 20, supra.

3. See Halsbury, Vol. 34. (3rd Edn.) p. 78.

4. Head v. Tattersall, (1871) L.R. 7 Exch. 7(14).

5. Bomathayamma v. Channaverpa, 54 Mys. H.C.R. 161.

6. Elliman Sons & Co. v. Carrington & Sons, (1901) 2 Ch. 275; Dodsley v.

Varley, 12 Ad. & El. 632.

7. Spencer's case, Coke's Rep. 161 (3rd Re.) Splidt v. Bowles, 10 East 279; Thompson v. Daning, 14 M. & W. 103; see also Halsbury, Vol. 34 (3rd Edn.) pp. 75, 76.

8. Incandescent Gas Light Co. v. Cantelo, 11 T.L.R. 381; British Motor Syndicate v. Taylor & Son, (1901) 1 Ch. 122, C.A.

9. Margarine Union G.m.b.H. v. Cambay Prince S.S. Co. Ltd., (1967) 3 All E.R. 775.



separated from bulk. The copra was then found to have been damaged from cockroaches, this damage being attributable to the defendant ship-owners' admitted negligence in failing to fumigate the vessel adequately before her loading in the Far East. The damage was foreseeable. There was no priority of contract between the plaintiffs and the defendants. It was held that the plaintiffs had no cause of action in negligence against the defendants, as the plaintiffs did not acquire title to the goods until after they were discharged from the ship and the negligence was committed not later than the time of loading the goods.

Citing *President of India v. Metcalfe Shipping Co. Ltd.*<sup>1</sup>, Chalmers<sup>2</sup> observes: A provision in a contract that the risk shall not pass until a time necessarily later than the time when property would normally pass, provides a powerful indication that the property in the goods was not intended by the parties to pass until the later date.

**(4) Proviso (1) to section 26—delivery delayed by fault of either party.**

The *proviso* to section 26 lays down that where delivery has been delayed through the fault of either buyer or seller (and not by an agreement between the parties), the other party should be placed in the same position as if the delivery was made or taken in time and the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. The expression "might not have occurred" appearing in the proviso, would seem to throw on the party in fault the onus of proving that even without his fault the loss would have occurred.<sup>3</sup> The first requirement of the first proviso to the section is that delivery is delayed through the fault of the buyer or seller, 'that, I think, is essentially a matter for the jury—a question of fact—having regard to all the circumstances': the second requirement is that 'the loss which has accrued was brought about by the delay in delivery,' and in that respect regard must be had to the goods 'assembled by the seller for the purpose of fulfilling his contract and making delivery': but there is 'an obligation on a seller to act reasonably, and, if possible, to avoid any loss', e.g. by sale of goods to another person.<sup>4</sup>

"Fault" has been defined in section 2(5) as meaning wrongful act or default. The term 'default', like 'negligence', is purely a relative term.<sup>5</sup> The fault may consist of failure to deliver the goods as required by the contract or of any other act or omission which the party was bound, under the terms of the contract, to obtain from or to do in performance of such term. Such wrongful act or omission may constitute a tort or a breach of contract; in either case the general rule relating to contracts or torts makes the wrong-doer responsible for the loss caused thereby to the other party. The first proviso to section 26 above enacts only a special case where delivery has been delayed through the fault of either seller or buyer.

1. (1969) 1 All E.R. 861 affirmed in (1967) 3 All E.R. 1549 cited at p. 389 *ante*.

2. Sale of Goods Act, 16th Edn., p. 128.

3. See Chalmers, Sale of Goods Act, 1893, 16th Edn., p. 126.

4. Per Sellers J. in *Demby Hamilton & Co. Ltd. v. Barden*, (1949) 1 All E.R. 435, 437, 438.

5. *Re. Young and Harston's Contract*, (1885) 31 Ch. D. 168, C.A. at p. 174.



Under this proviso it is not necessary to hold the party in fault responsible for the loss, that there shall be any direct connection between the delay and the loss.<sup>1</sup>

In *Demby Hamilton & Co. Ltd. v. Barden*<sup>2</sup>, defendant bought approximately 30 tons of apple juice as per sample from plaintiff and instructed them to despatch to the first truck, on his behalf, to one of his customers. Plaintiff crushed 30 tons of cider apples, put the liquid into casks, and sent the first consignment to defendant's customer: despite of plaintiff's repeated requests for delivery instructions, no further deliveries were accepted. The contents of the casks became putrid and had to be thrown away. It was *held* that by virtue of the first proviso to the section the apple juice was at the risk of the defendant, and the plaintiffs were entitled to damages.

In *Multanmal Chempalal, Bellary, v. C. P. Shah & Co.*, A.I.R. 1970 Mys. 106, the plaintiff agreed to purchase from the defendant some quantity of cloth pieces towards which he paid some advance. The goods were despatched from Bombay to Bellary in a public carrier on March 7, 1957, but the balance of the price payable by the plaintiff was paid only in May through a bank draft. Until then, there was a controversy with respect to a small sum of money which represented bank charges, the payment of which was insisted upon by the defendant but was refused by the plaintiff. Eventually the plaintiff paid that amount only in May, and the defendant then on May 20, 1957 forwarded the necessary receipt on the presentation of which the plaintiff could collect the goods from the carrier, but the plaintiff could not obtain delivery of those goods, which by then, were missing. The plaintiff filed a suit for the recovery of the price from the defendant. Clause 7 of the contract provided that risk passed to the buyer on despatch of goods and the buyer was not entitled to make claim in respect of loss or damage. Clause 8 provided for passing of title only on payment of full price. It was held : (i) Condition in Clause 7 was absolute and not controlled by Clause 8. Clause 7 was in truth an agreement to the contrary which controlled the operation of the general rule which section 26 of the Act incorporates. (ii) The facts of the case show clearly that the loss would not have occurred if plaintiff had not unreasonably delayed the payment due to dispute about Bank charges. Hence, the first proviso to Section 26 was attracted and the loss must be borne by the plaintiff quite apart from the provisions of Clause 7 of the contract.

#### **(5) Liability of either party as bailee—proviso (2) to section 26.**

The second proviso to the section declares that the liability of either party as a bailee of the goods of the other party is not affected by the section. It presupposes that party in possession is not the owner of the goods. Thus, the seller may be in the possession of the goods after the property has passed until the time for delivery has arrived; or the buyer may be in possession under a contract which postpones the transfer of the property, e.g., till the price is paid. The case of a bailee on sale or return

1. *McConihe v. New York & Erie Railroad Co.*, 20 New York State Reports, 495 : see also Halsbury, Vol.

34, 3rd Edn., p. 78, f.n.u.  
2. (1949) 1 All E.R. 435.



or on approval is not affected by this proviso, as the bailee not having 'agreed to buy', is not a "buyer."<sup>1</sup>

When the seller remains in possession of the goods after the property in them has passed to the buyer, or when the buyer gets possession of the goods before the property passes to him as in the case of goods on trial, the party in possession of the goods is, in either case, a bailee of the other.<sup>2</sup> In the former case, until the expiration of the time fixed, expressly or by implication, for the buyer to take delivery, the position of the seller in possession of the goods is that of a bailee for reward; but after the expiration of such time, it changes into that of a gratuitous bailee.<sup>3</sup> Similarly, in the latter case, until the expiration of the time fixed, expressly or by implication, for the passing of property, the buyer in possession of the seller's goods is a bailee for reward, but after a rightful rejection of the goods and the expiration of a reasonable time for the seller to remove them, the buyer becomes a gratuitous bailee.<sup>4</sup> But where delivery is wrongfully delayed the position of the party in fault is not exactly that of a bailee in fault, but, as pointed out above, is governed by the first proviso to this section making the party in fault liable even in a case where he would have been exempt from such liability if he had been only a bailee for other party.<sup>5</sup>

In *Hanutmall Bhutoria v. Dominion of India*,<sup>6</sup> it was held :

The Explanation to S. 148, Contract Act, makes it clear that a seller can become a bailee if he contracts to hold the goods as a bailee. In the absence of such a contract, he cannot be regarded as a bailee.

The second proviso to S. 26 of the Sale of Goods Act applies to a case where the seller or the buyer holds the goods in the capacity of bailee either under a contract of bailment or under circumstances which give rise to the relationship of bailor and bailee. The second proviso means that the operation of the provisions of S. 26 is excluded when the buyer or the seller happens to hold the goods in the character of a bailee. There is no automatic bailment created by operation of law.

Thus, where the conditions of auction-sale provided that the lots would be at the risk and expense of the purchaser from the moment the sale is declared and the cash in full was to be paid on the fall of the hammer and delivery was to be taken within fifteen days, it was held ; The conditions of sale were inconsistent with the position of there being any relationship of bailor and bailee between the seller and the purchaser after the sale was effected. The seller had no liability from the moment of the sale except perhaps the duty of affording facilities to the purchaser for taking delivery of the goods within a period of fifteen days from the date of sale.

The term "bailee" used in the proviso has the same meaning as in section 148 of the Indian Contract Act. The rights and liabilities of bailees are dealt with in sections 148-181 of the Indian Contract Act.

1. See Benjamin on Sale, 8th Edn., p. 400.

2. *Koon v. Brinkerhoff*, 29 Hun. 130 ; *Wiehe v. Dennis Brothers*, (1913) 29 T.L.R. 250 ; *Story*, Ss. 300 (A. & B.) and 303.

3. See Halsbury, 3rd Edn., Vol. 34, p. 79.

4. See Halsbury, 3rd Edn., Vol. 34, p. 79.

5. *Sweeting v. Turner*, (1871) L.R. 7 Q.B. 310, at p. 313, per Blackburn J.

6. A.I.R. 1961 Cal. 54. See also under S. 62 post.



**(6) Accretions.**

The converse of the rule *res perit domino* also holds good, and any fruits or increase of the thing sold belong *prima facie* to the party who has the property in it. Any calamity befalling the goods after the sale is completed must be borne by the purchaser and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor.<sup>1</sup>

*Miscellaneous cases***(i) Sections 27 to 30—Object.**

Rigidity of rule which laid down that a person without a title cannot give any title to the transferee is relaxed by Ss. 27 to 30 of the Act. The sections lay down circumstances and limitations under which a person will be deemed capable to transfer good title to the buyer without himself having title or authority from owner to pass title.

[*Pramatha Nath v. Maharaja Probirendra*, A.I.R. 1966 Cal. 405].

**(ii) Sections 27 to 33—Companies Act, 1956, Ss. 81, 82, 108 and 111.**

Sharescrips were entrusted with father by the plaintiff with full authority for disposal. Father kept them with D. Father acted as mercantile agent of the plaintiff. D was neither servant nor agent of the father or the plaintiff. The sharescrips were missing from D. It was held that D could not be charged with theft. Plaintiff was estopped by negligence and representation from asserting her title against *bona fide* purchasers of sharescrips with blank transfer deeds from D, without notice of defect in D's title.

[*Sm. Sumitra Devi Jalan v. Satya Narain Prahladoka*, A.I.R. 1965 Cal. 355].

**Transfer of title**

**27.** Subject to the provisions of this Act and of any other law for the time being in force, where  
Sale by person  
not the owner.
 goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell :

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document

1. See Chalmers, p. 128 citing Sweeting v. Turner, (1871), L.R. 7 Q.B. 310,

at p. 313 cited at p. 470 ante.



of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

### Synopsis

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|--|---|
| (1) <i>Analogous law—applicability.</i>  | <i>applicable to India.</i>   |
| (2) <i>Sale by person not the owner—history of legislation of section 27.</i>  | (6) <i>Principle of estoppel—“unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”</i> |
| (3) <i>General principle laid down in section 27—nemo dat quod non habet (no one can give a better title than he himself possesses).</i> | (7) <i>Sale by a mercantile agent—proviso to section 27.</i>  |
| (4) <i>Exceptions to the rule—where a man may confer a better title than he possesses.</i>   | (8) <i>Essential conditions for the application of the proviso to section 27.</i>   |
| (5) <i>English law of market overt not</i>   | (9) <i>Miscellaneous.</i>   |

#### (1) Analogous law—applicability.

This section with the exception of the proviso corresponds to section 21 of the English Sale of Goods Act, 1893. The proviso of this section is borrowed from the English Factors Act, 1889, section 2(1). The principles involved in this section and the next two sections were recognised in India in section 108 of the Indian Contract Act, 1872, since repealed (See Appendix A and Appendix B).

It has been held in *Parshotam Das Banarsi Das v. Union of India*<sup>1</sup> that Section 27 of the Sale of Goods Act is a provision relating to sale and not a provision relating to a transaction of pledge.

#### (2) Sale by person not the owner—history of legislation of section 27.

The Latin maxim *nemo dat quod non habet* expresses the general rule that no man can pass a better title than he has. It is specifically stated in this section that a person buying goods from one who is not the owner thereof and who does not sell them with his consent acquires no better title to the goods than the seller had except in the two cases mentioned therein, one being the case of estoppel, and the other the case of a sale by a mercantile agent in possession of goods with the consent of the owner and having authority either to sell goods, or to consign for the purpose of sale, etc. “It is a fundamental doctrine of the law of property that no one can give what he has not. One who has title, which in his hands is voidable or subject to a right of rescission by another, may transfer a title to a purchaser for value without notice, free from the possibility of avoidance or rescission, but one who has no title at all can transfer none, and that a buyer from him pays value in good faith without notice makes no difference.”<sup>2</sup>

1. A.I.R. 1967 All. 549.

2. Williston on Sales (Revised Edition).

S. 311, p 241.



As a rule, the owner by himself or his agent alone can sell and give a good title. In *Bishopsgate Motor Finance Corpn. Ltd. v. Transport Brakes Ltd.*,<sup>1</sup> Denning L.J. expressed the principle thus :

“In the development of our law, two principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by common law itself and by statute so as to meet the needs of our times.”

In England, before the passing of the Factors Acts of 1823, 1825 and 1842, a person in possession of goods, or documents of title could not dispose of these goods in contravention of his instruments with respect to them except where—

- (1) the sale was in market overt ;
- (2) the owner of the goods was by his conduct precluded from denying the seller's authority to sell ; and
- (3) the goods were sold under a statutory power of sale.

The Factors Acts referred to above dealt with the powers of factors and mercantile agents entrusted with the possession of goods or documents of title of goods. The joint effect of these Acts was summed up by Blackburn L.J. in *Cole v. North Western Bank*<sup>2</sup> in the following words :

“We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in the market overt.....The general rule of law is that where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seems to us to have wished to make it the law that where a third person has entrusted goods or the documents of the goods to an agent who in the course of such agency, sells or pledges the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent, and makes a purchase from or advance to him without notice that he was not authorised to sell or to procure the advance.”

The provisions of the Factors Acts referred to above were thus really an extension of the common law rule of estoppel. Under these Acts, the terms used were simply “person” or “agent” entrusted with the possession of goods, but it was held that the Act only applied to mercantile transactions, and that the term “person” or “agent” did not include a mere servant or one who had possession of goods for carriage, safe custody or otherwise, as an independent contracting party, but only persons whose employment corresponded to that of some known kind of commercial agent like factors.

1. (1949) 1 All E.R. 37, at p. 46 : (1949) 1 K.B. 322.      2. (1875) L.R. 10 C P. 354, at p. 372.



When the Contract Bill was drafted by the Indian Law Commissioners, there were then in force in India two Factors Acts, one of 1840, and the other of 1844. The Indian Factors Act of 1840 was a reproduction of the English Factors Acts of 1823 and 1825. The Indian Factors Act, 1844 was a reproduction of the English Factors Act of 1842. Both the Indian Acts, like the English Acts on which they were based related only to pledge. The Acts contained no power of sale. The Acts were subsequently repealed by the Indian Contract Act, 1872, although sections 108 and 178 of the latter Act covered the same ground as the provisions of Indian Act XX of 1844.<sup>1</sup>

Referring to the above clauses, Sir Henry Maine observed :

“It cannot be denied that the subject is difficult. We have to consider on the one hand the hardship suffered by an innocent person who loses in this way his right to recover what was his undoubted property. But on the other hand, still greater weight appears to us to be due to the hardship which a *bona fide* purchaser would suffer, were he to be deprived of what he bought. The former is very often justly chargeable with remissness or negligence in the loss. The balance of equitable consideration is, therefore, on the side of a rule favourable to the purchaser, and we think that sound policy with respect to the interests of commerce points to the same conclusion.

“We have, therefore, provided that ownership of goods may be acquired by buying them from any person who is in the possession of them, if the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them. Similar provisions have been inserted in accordance, we may observe, with the spirit of the Factors Act to meet the cases of those who have purchased goods or taken them by way of pledge from persons in possession of any documentary title to the goods where the circumstances are not such as to raise a reasonable presumption that the person in possession of the document has no right to sell or pledge the goods.”

By some courts the word “possession” both in sections 108 and 178 of the Indian Contract Act was interpreted as meaning “juridical possession”, while by others it has been held to have been used in its literal meaning.<sup>2</sup> The general trend, however, of the decisions had been to confine the operation of both the sections to judicial possession and to sales or pledges by persons whose employment corresponded to that of commercial agents like factors.

It was thus both necessary and desirable to make clear the law both of sales and pledges by apparent owners. Section 108 of the Contract Act has, therefore, been repealed and been replaced by Sections 27 to 30

1. See *Ramdas v. Amarchand*, (1926) L.R. 43 I.A. 164, 168, 169 ; 40 Bom. 630, 634.

2. See *Haji Rahimbux v. Central Bank*, I.L.R. 56 Cal. 367, where all the cases on the point are reviewed.



of the Indian Sale of Goods Act, 1930. For this purpose, certain provisions of the English Factors Acts 1889, which repeals the previous Factors Acts have been borrowed. The scope of old section 108 has thus been much narrowed from 'any person in possession of goods' to 'a mercantile agent in possession'. The law laid down now is in general conformity with the English law.

The modification of section 108 necessitated an alteration in the companion section 178 of the Contract Act. Accordingly, the Indian Contract (Amendment) Act IV of 1930 has modified old section 178 and added another section 178-A, so as to make the sections correspond in principle to the newly enacted sections.<sup>1</sup>

Section 27 relates to the sale by a person who is not the owner ; section 28 to the sale by one of several joint owners ; and section 30 to the sale by the seller or buyer who continues in or obtains possession of the goods with consent of the other party, after having parted with the property, or before acquiring the property in them, as the case may be. Section 29 deals with the effect of a sale by a person who has obtained possession of goods under a contract liable to be avoided by the person from whom he has bought them.

**(3) General principle laid down in section 27—*nemo dat quod non habet* (No one can give a better title than he himself possesses)**

The basic rule as to transfer of title to goods is that no one can give a better title than his own ; he can give possession but not a title which is not vested in him, *Nemo dat quod non habet*. The classic illustration is *Hollins v. Fowler*.<sup>2</sup> In that case, a fraudulent Liverpool broker, Bayley, obtained a delivery note for cotton by pretending that he was purchasing it for S of Bolton. Armed with the note he sold the cotton to another broker, Hollins, who purchased on behalf of M of Stockport. When the owner of the cotton, Fowler, discovered that it had not gone to S but to M, he sued Hollins for conversion of his property. It was held that Hollins was liable to Fowler in conversion.

Section 27 lays down the general rule that no one can give what he has not got ; and if one deals with the goods of another without his authority, the transaction is as against that other nugatory in law.<sup>3</sup> The mere fact of an innocent and *bona fide* purchase from a person with no title is no answer to the claim of the true owner. If such a buyer sells goods to a third person in good faith, and it turns out that the goods were lost or stolen, he would be liable to the original owner in trover.<sup>4</sup> The seller who purports to sell as owner is estopped from denying that he was not the owner at the time of the sale.<sup>5</sup> If he subsequently acquires the title to the goods, such title goes to "feed" the contract, and the property thereupon vests in the buyer.<sup>6</sup>

In *Rameshwar v. Tara Singh*,<sup>7</sup> A purchased a motor lorry from B who had previously mortgaged the same along with his house to C, by a

1. See Report of the Special Committee.

2. (1875) L.R. 7 H.L. 757.

3. See *Hollins v. Fowler*, (1875) L.R. 7 H.L. 757.

4. *Stone v. Marsh*, (1827) 108 E.R. 554 ; 30 R.R. 420 ; *Lee v. Bayes*, (1858) 18

C.B. 599 ; 197 R.R. 424.

5. *Edmonds v. Best*, (1862) 7 L.T. 279.

6. *Whitchorn v. Davison*, (1911) 1 K.B. 463, C.A. at p. 475 ; *Bradley v. Ramsay*, (1912) 106 L.T. 771, C.A.

7. A.I.R. 1958 Raj. 269,



registered deed. C kept the lorry with B upon a registered rent note, possibly to enable B to run it on hire and thus pay off C's mortgage, and it was in evidence that C in no way encouraged the sale either by his presence or otherwise and there was no evidence that C was aware of the sale and it was not the case of A that he was a purchaser for value without notice of the mortgage but there was evidence that A was cognizant of C's mortgage or at least there was evidence which should have put A on an enquiry. It was *held*: The case is not covered by any of the exceptions to the principle of S. 27 and therefore the maxim '*nemo dat quod non habet*' must prevail in this case. Plea of 'market overt' is also not available to A, firstly because the principle is not introduced in the Indian law, and secondly because the plea is available only to innocent purchaser.

It was observed in the above case : Section 27 in the first place gives effect to the general principle of law that no man can pass a better title than he possesses '*nemo dat quod non habet*'. In other words, a person buying goods from another who is not the owner thereof and who does not sell them with the consent of the owner acquires no better title to the goods than the seller himself had.

This rule, however, in the interest of trade and commerce, is subject to certain well-known exceptions provided in the section itself : that the owner of the goods is precluded by his conduct from denying the seller's authority to sell ; this exception is based on a branch of the rules of estoppel. The second exception arises where a mercantile agent with the consent of the owner being in possession of the goods or of documents of title with respect to them makes a sale in the ordinary course of business. Then a buyer from such a mercantile agent acting in good faith and not having notice that the seller has no authority to sell acquires a good title. The second exception has no bearing where the sale is not by a mercantile agent.

### Illustrations

(1) A finds a ring, and after making reasonable efforts to discover the owner, sells it to B, who buys without knowledge that A was merely a finder. The true owner may recover the ring from B.

But as regards goods voluntarily abandoned, Chalmers<sup>2</sup> observes : 'Presumably if goods are voluntarily abandoned, anyone taking possession becomes the owner in the full sense of the term, as was the case in the Civil Law.'

(2) A assigned goods to the plaintiff by bill of sale, but was allowed to keep possession of them upon payment of a weekly rent and an undertaking to deliver them upon demand. He subsequently sold them to the defendant. The defendant, though he bought in good faith, acquired no title against the plaintiff.

1. *Farquharson Bros. v. King & Co.* (1902) A.C. 325; at pp. 335-336 (cf. *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1899) 1 Q.B. 643 at p. 658, C.A. But a finder has a good title against everyone except the true owner : *Armory v. Delamirie* (1721) 1 Str. 505. See also *Hannah v. Peel*

(1945) 2 All E.R. 288 where the law is fully discussed.  
2. *Sale of Goods Act*, 16th Edn., p. 132.  
3. *Inst.* II, 1, 47; but see *Hibbert v. McKiernan* (1948) 1 All E.R. 860. (C.D.)  
4. *Coburn v. Waller*, (1849) 1 C.B. 602, 68 R.R. 798; 2 H.L. (1881)



(3) Where the hirer of goods under a hire-purchase agreement sells them, the buyer from him, though acting in good faith, does not acquire the property in the goods, as against the owner, but, at the most, such interest as the hirer had.<sup>1</sup>

(4) A delivers goods on sale or return to B, the condition being that they are to remain the property of A, till paid for. B sells them to C without paying A for them. C buys in good faith and without notice of A's title. A can recover the goods or their value from C.<sup>2</sup>

(5) B, falsely representing himself to be T & Co., an *existing* firm, sends a written order for goods to S, who thereupon forwards the goods. The property in them does not pass to B, for there is no contract with anybody, since S intended to contract with T & Co. and not with B, and T & Co., obviously made no contract with S.<sup>3</sup>

(6) If in the above illustration, B falsely represents that he is acting as the agent of T & Co., the result is the same.<sup>4</sup>

(7) There was a sale of a horse at public auction. Unknown to the auctioneer and the buyer, the horse had been stolen. *Held*, that the buyer obtains no title against the true owner.<sup>5</sup>

(8) In *Kingsford v. Merry*<sup>6</sup>, it was *held* that the defendant, as innocent third person, who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case, the party obtaining the advances had procured the delivery of the goods by the original seller to himself by falsely representing that a sale had been made to him by the buyer, the court saying on these facts that the original seller and the fraudulent party "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might affirm or disaffirm."

(9) In *Folkes v. King*<sup>7</sup>, the owner of a motor car delivered it to a mercantile agent to sell on commission subject to a reserve price. The agent sold it to a *bona fide* purchaser below the reserve price and misappropriated the proceeds. The purchaser subsequently sold the car to defendant. The plaintiff (owner of the motor car) failed in his action to recover the car from the defendant.

(10) A consigned a quantity of cocoa to B by railway, and sent the consignment notes to him. The price, at the time, had not been agreed. Before any agreement was arrived at as to the price, B sold the cocoa to C and handed to him the consignment notes. A was held to be precluded from disputing B's title to the cocoa.<sup>8</sup>

1. *Helby v. Matthews*, (1895) A.C. 471 ; *Belsize Motor Supply Co. v. Cox*, (1914) 1 K.B. 244 ; *Whiteley & Co. v. Hilt*, (1918) 2 K.B. 808, C.A. ; *Greenwood v. Holquette*, (1873) 12 B.L.R. 42.  
2. *Edwards v. Vaughan*, (1929) 26 T.L.R. 545, C.A. ; cf. *Khitish Chandra v. Inpctor*, A.I.R. 1924 Cal. 816 ; 51 Cal. 796, 801 ; 82 I.C. 163.  
3. *Cundy v. Lindsay*, (1818) 3 A.C. 459, 47 L.J.Q.B. 481 ; *Hardman v. Booth*, (1863) 1 H. & C. 803 ; *Hollins v.*

*Fowler*, (1875) L.R. 7 H.L. 757, 44 L.J.Q.B. 169.  
4. *Higgins v. Burton*, (1857) 26 L.J. Ex. 342, 112 R.R. 938.  
5. *Lee v. Bayes*, (1855) 18 C.B. 59, 107 R.R. 424.  
6. 1 H. & N. 503 ; 26 L.J. Ex. 83 ; 108 R.R. 694.  
7. (1923) 1 K.B. 282 (C.A.), 92 L.J.K.B. 125.  
8. *Commonwealth Trust Ltd. v. Akotey*, (1926) A.C. 72 P.C.



(11) An owner of a bus engaged A his agent to ply the bus for hire and left a letter addressed to the District Magistrate and signed by himself requesting the Magistrate to grant "G" permit to A. The registration certificate of the bus was also left with A who fraudulently altered the letter into one addressed to the D.S.P. requesting him to transfer the registration in his name, which having been done, he sold the bus to a stranger who was ignorant about A's real title. The owner thereupon challenged the buyer's title in legal proceedings. It was *held* that the owner could not have contemplated the possibility of fraud on the part of A, and that on the true construction of section 27, he was not precluded from challenging the title acquired by the buyer.<sup>1</sup>

**(4) Exceptions to the rule—Where a man may confer a better title than he possesses.**

The rule that the buyer acquires no better title than the seller had is, however, subject to various exceptions.<sup>2</sup> The words "subject to the provisions of this Act, and of any other law for the time being in force" refer not only to the provisions of this Act e.g. provisions of section 27 and sections 28, 29, 30 and 54 (3) of the Act, but to those provided by other enactments also. Thus section 176 of the Contract Act gives the pawnee the power of sale under certain conditions, and the competency to pass a better title than he has. Again, under Order 40 of the Code of Civil Procedure, a receiver appointed by court has power to sell and pass all the property in the subject-matter sold. Similarly, executors in whom legal title vests, (as distinguished from beneficial interest), the official assignee in whom the property of an insolvent vests, liquidators of companies—are all persons who can pass a good title though they do not sell as owners or with the consent of owners; and a mortgagor of goods remaining in possession can give a good title to a buyer from him who acts in good faith and without notice of the encumbrance.<sup>3</sup> Section 169 of the Indian Contract Act gives a power of sale to the finder of lost goods.

Another instance is that of an agent of necessity, a master of a ship, who may in cases of necessity sell the ship or cargo,<sup>4</sup> and this has been extended to the case of a carrier by land: but a real necessity must exist for the sale and there must be a practical impossibility of obtaining the owner's instructions in time as to what shall be done.<sup>5</sup>

The following are some of the more important cases under the Act where a man may confer a better title than he possesses:

(1) Where the owner of the goods is by his conduct precluded from denying the seller's authority to sell—principle of *Estoppel* (S. 27, last para., *infra*).

1. Mohambaram v. Ram Narayan, A.I.R. 1935 Mad. 850 : 158 I.C. 535. See also Warman v. Southern Counties Car Finance Corporation Ltd., W.J. Ameris Car Sales (Third Party) (1949) All E.R. 711 cited at p. 276 *ante*.
2. Henderson & Co. v. Williams, (1895) 1 Q.B. 521 C.A. ; 64 L.J.Q.B. 308 ; (goods in seller's name with owner's consent).
3. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 80 ; Narasiah v. Venkataramiah, (1918) 42 Mad. 59 ;

- 47 I.C. 976 ; Backer Khorasanee v. Ahmed Esmail Jamal, A.I.R. 1928 Rang. 28 : (1927) 5 Rang. 633 : 106 I.C. 335.
4. See Pollock and Mulla, Commentary on the Indian Contract Act, 6th Edn., 1931, pp. 570-574.
5. Sims & Co. v. Midland Ry., (1913) 1 K.B. 103, 112 ; Springer v. Great Western Railway Co., (1921) 1 K.B. 257, C.A. See Pollock and Mulla, Sale of Goods Act, p. 156.



(2) Where a mercantile agent is with the consent of the owner in possession of the goods or of a document of title to the goods, and the sale is made by him when acting in the ordinary course of business of a mercantile agent : provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell (S. 27, proviso, *infra*).

(3) Where one of several joint owners of goods has the sole possession of them by permission of the co-owners, and sells to a buyer who purchases in good faith and has not at the time of contract of sale notice that the seller has not the authority to sell (S. 28, *post*).

(4) Where there is a sale by a person in possession of goods under a voidable contract, and the contract has not been rescinded at the time of sale, and the buyer buys them in good faith and without notice of seller's defect of title (S. 29, *post*).

(5) Where the goods sold, or the documents of title symbolising them, are in the possession of seller or buyer when the property is vested in the other party, and the party in possession disposes of the goods or documents of title to a person who receives them in good faith and without notice of the previous sale (S. 30, *post*).

(6) Where an unpaid seller who has exercised his right of lien or stoppage in transit, resells the goods [S. 54(3), *post*].

### **(5) English law of market overt not applicable to India.**

Under the English law, an important exception to the rule that a person cannot make a valid sale of goods that do not belong to him is to be found in the case of sales made in what is known as "market overt". Section 22 of the English Sale of Goods Act deals with this, and runs as follows :

"(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of seller."

Market overt is held in England by Charter or prescription on special days.<sup>1</sup> In the city of London, every day except Sunday is market day ; and every shop in which goods are exposed publicly for sale is a market overt for such goods as the owner openly professes to trade in. The goods must be openly sold in the presence and sight of any person entering the shop. The shop is not a market overt except for goods usually sold e.g. a scrivener's shop is no market overt for plate, Smithfield no market overt for clothes but only for horses and cattle.

It must also be remembered that the privilege protects only innocent buyer ; the seller, however innocent, is not protected from liability.

The framers of the Indian Act rejected the rule relating to market overt as being unsuitable to Indian conditions.<sup>2</sup> Even at the time of passing of the Indian Contract Act in 1872 it was observed that to do so

1. See *Benjamin v. Andrews*, (1858) 5 C.B. (N.S.) 299 ; 116 R.R. 677.

2. See also Report of the Special Committee.



would make British India an asylum for cattle stealers from Indian States.<sup>1</sup>

**(6) Principle of estoppel—“unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”**

The first exception to the rule of *nemo dat* embodied in S. 27 of the Act is based on the principle of personal estoppel. It is well established that “where one man by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on this belief, *so as to alter his previous position*, the former is concluded from averring against the latter a different state of things as existing at the same time.”<sup>2</sup> *Wilfully* means that he must intend his representation to be acted upon but such intention may of course be presumed from his conduct including his negligent acts or omissions in the light of what is reasonable.<sup>3</sup> Thus, the lessee of a public house who allowed another to sell the fixtures and fittings as if they were his own, whereby a third person was induced to purchase them *bona fide*, cannot recover them from the purchaser.<sup>4</sup> “A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.”<sup>5</sup>

Estoppel may also arise by the owner assisting the sale,<sup>6</sup> or by permitting “goods to go into the possession of another with all the insignia of possession thereof and apparent title.”<sup>7</sup>

As put in succinctly by Chalmers,<sup>8</sup> applying this rule to the circumstances envisaged by the present sub-section, the question to be asked is :

“Whether the true owner of the goods has so invested the person dealing with them with the indicia of property as that when an innocent person enters into a negotiation with the person to whom these things have been entrusted with the indicia of property the true owner of the goods cannot afterwards complain that there was no authority to make such a bargain.”<sup>9</sup>

In *Eastern Distributors Ltd. v. Goldring (Murphy Third Party)*,<sup>10</sup> it was observed : Section 21(1) of the English Sale of Goods Act, 1893, expresses the old principle that apparent authority to sell is an exception to the maxim *nemo dat quod non habet* ; and it is plain from the wording that if the owner of the goods is precluded from denying authority, the buyer will in fact acquire a better title than the seller. It is doubtful

1. See also Report of the Select Committee.

2. Per Lord Denman in *Pickard v. Sears*, (1837) 6 Ad. & El. 469, 474.

3. Parke B. in *Freeman v. Cooke*, (1848) 2 Exch. 654. See also *Cornish v. Abington*, (1859) 4 H. & N. 549 cited at p. 173 *ante*.

4. *Gregg v. Wells*, (1839) 10 A. & E. 90 ; 50 R.R. 347.

5. *Ibid* ; per Lord Denman.

6. *Waller v. Drakeford*, (1853) 1 E. & B-

748 ; 93 R.R. 377.

7. *Commonwealth Trust v. Akotey*, *supra*.

8. *Sale of Goods Act*, 16th Edn., p. 132.

9. *Henderson & Co. v. Williams*, (1895) 1 Q.B. 521, at p. 525, per Lord Halsbury.

10. (1957) 2 All E.R. 525, applied in *Stoneleigh Finance Ltd. v. Phillips* (1965) 1 All E.R. 513. (ostensible authority from the seller to sell the goods).



whether this principle ought really to be regarded as part of the law of estoppel. At any rate it differs from what is sometimes called "equitable estoppel" in this vital respect, that the effect of its application is to transfer a real title and not merely a metaphorical title by estoppel. Whatever the limits of the doctrine, it clearly applies to a case where A is armed by B with documents which enable A to represent to C that he is the owner of the goods which really belong to B, and has the right to sell them with the result that B is, in the words of the section precluded from denying A's authority to sell, and consequently A acquires the title to the goods which B himself had and B has no title left to pass to D to whom he purports to sell.

In *Mercantile Credit Co. Ltd. v. Hamblin*, (1964) 3 All E.R. 592, it was, however, held on the facts of the case : Where an owner of a car gives seller documents enabling the seller to represent himself as owner, but no authority to sell and the seller is an apparently reputable motor-dealer, the owner is not precluded by negligence from denying seller's authority to sell, and that in any event the seller's fraud was not a reasonable foreseeable consequence of her acts.<sup>1</sup> The title to the car remained in the defendant car-owner. All the same, apart from the facts of this case, the Court of Appeal held that in certain circumstances the owner of goods may owe a duty to at least some potential buyers not to put the seller into a position where he can hold himself out as having authority to sell.

Chalmers<sup>2</sup> observes : "It is a question of fact whether the true owner has so invested the seller with the indicia of property. It is not enough that the true owner has carelessly followed them to come into the hands of the seller. There must normally be a representation by the owner either that the seller has authority to sell the goods on his behalf in the manner in which he purports to, or that the seller is the owner of the goods or is otherwise entitled to dispose of them, and that representation must be acted upon by the buyer to his detriment."

In *Woodley v. Coventry*<sup>3</sup>, the defendants sold corn to a third party who, having got advances from the plaintiff on the security of the goods, gave plaintiff a delivery on the defendants. The plaintiff lodged the delivery order on the defendants and sold the goods to different persons. After a party had been delivered, the third party absconded, and defendants refused further delivery to the plaintiff. In plaintiff's action for trover, the court held that the defendants were estopped from denying that property had passed to the third party. In a latter case, on similar facts it was held that there was an estoppel even where the second buyer had paid the price before presenting the delivery order, on the ground that his position was altered through the defendant's conduct, because he was induced to rest satisfied that the property had passed and to take no steps for his own protection.<sup>4</sup>

1. But see *General & Finance Facilities v. Hughes*, (1966), 110 Sol. Jo. 847 ; Chalmers, 16th Edn., p. 133.

2. *Sale of Goods Act*, 16th Edn., p. 133, and the authorities cited therein.

3. (1863) 2 H. & C. 164 ; 32 L.J. Ex. 185.

4. *Knights v. Wiffen*, (1870) L.R. 5 Q.B. 660 ; *Dixon v. Kennaway*, (1900)

1 Ch. 833 ; see also *Pickard v. Sears*, (1837) 6 A. & E. 469, 45 R.R. 538 ; *Seton v. Lafone*, (1887) 19 Q.B.D. 69 C.A. ; *Weiner v. Gill*, (1906) 2 K.B. 574 App. 582 C.A. ; *Simm v. Anglo-American Telegraph Co.*, (1879) 5 Q.B.D. 188, pp. 215, 216 C.A.



In *Stoneleigh Finance, Ltd. v. Phillips*, (1965) 1 All E.R. 513, A, being in need of finance and owning motor cars approached B, a car dealer, with a view to finance being provided to A secured on the basis of A's vehicles. B regularly introduced motor vehicle hire-purchase business to the plaintiffs, a finance company. A signed a form by which he made an application to the finance company to hire on hire-purchase terms one of the cars for which B had provided finance to A. The form contained a statement that the car was the sole unencumbered property of the car dealer. The car dealer then sold the car to the finance company. It was held that A was estopped from denying the car dealer's title to sell the car as its owner.<sup>1</sup>

In *Motor Credits (Hire Finance) Ltd. v. Pacific Motors Pty. Ltd.*,<sup>2</sup> M, a car dealer, displayed a number of cars for sale. To the knowledge of P, another car dealer, some of these cars were the property of a finance company which had authorised to sell them. Unknown to P this authority was withdrawn. M sold cars to P otherwise than in the ordinary course of business, representing them to be his own unencumbered property. It was held that they were in fact the property of the finance company and the finance company was not estopped from denying M's title to the cars.<sup>3</sup>

The rule as to estoppel contained in section 27 is only an application of the general rule of estoppel in section 115 of the Indian Evidence Act, 1872. It was laid down by Ashurst J. in *Lickbarrow v. Mason*,<sup>4</sup> decided so long ago as in 1787, that whenever one of two innocent persons must suffer by the acts of a third, he who has *enabled* such third person to occasion the loss must sustain it. This rule, though generally followed,<sup>5</sup> has lately been qualified by limitations put on the word "enabled" so as to import some act of the owner which has *misled* the innocent purchaser *i.e.* "an act amounting to a disregard of his obligations towards the person who relies on the negligence as creating an estoppel."<sup>6</sup> In *Mercantile Bank v. Central Bank*,<sup>7</sup> the Central Bank which used to advance money to a merchant on the pledge of railway receipts was accustomed in the usual course of business to hand back the receipts to the merchant for clearing the goods. The merchant, instead of doing so, repledged the receipts with the Mercantile Bank. On the merchant's failure, a question of priority arose between the two banks with regard to some railway receipts which had been fraudulently pledged in succession with both banks. An estoppel by conduct or negligence was sought to be raised against the Central Bank on the authority of *Lickbarrow v. Mason* as applied in *Commonwealth Trust Company v. Akotey*. It was held by the Judicial Committee that the Central Bank owed no duty to the Mercantile Bank in the matter there being no relationship of contract or agency between them and that estoppel by representation did not exist in the case inasmuch as the railway receipt was in form merely an authority to take delivery of goods

1. See Chalmers, *Sale of Goods Act*, 16th Edn., p. 130.

2. (1963), 109 C.L.R. 87, reversed on another ground in *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.*, (1965) 2 All E.R. 105 P.C.

3. Chalmers, 16th Edn., p. 130. See also

S. 30 of the Act post.

4. (1787) 2 T.R. 63 at p. 70.

5. See *Commonwealth Trust v. Akotey*, (1926) A.C. 72.

6. See *Mercantile Bank v. Central Bank*, A.I.R., 1938 P.C. 52.

7. *Supra*.



and possession of it contained no representation as to any authority in the holder.

Similarly, a registered owner of shares by merely handing over the share certificates and blank transfers signed by him to another person has been held not to make a representation to the world that such person is entitled to deal with the shares.<sup>1</sup>

Mere carelessness on the part of the owner of the goods in guarding them will not create an estoppel; it is necessary that the owner should have done some act on which the buyer relied and misled him by that act or, as it is also put, that the owner should have done some act amounting to a disregard of his obligations towards the person who relies on the negligence as creating an estoppel. Thus, where a firm of timber merchants kept stocks of timber warehoused in their own name with a dock company, to whom they gave instructions to accept all delivery orders signed by their clerk, and the clerk who had authority from the timber merchants to sign delivery order in relation to sales to their customers fraudulently gave delivery orders in favour of himself under an assumed name, and having procured timber from the dock company sold it to strangers, it was *held* that the clerk could give no better title than he had himself, and that no question arose of the timber merchants being estopped from denying him authority to dispose of the timber.<sup>2</sup>

In the case of *estoppel by negligence*, "the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect of the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy."<sup>3</sup>

Thus, if a person represents by conduct, words or otherwise, that another person is the owner or has a right to sell the former's goods, then the former cannot set up his own title to the goods and sue the purchaser in detinue or conversion. In *Commonwealth Trust v. Akotey*,<sup>4</sup> the respondent, a grower of cocoa in the Gold Coast Colony, there consigned by Rly. 1050 bags of cocoa to L, to whom he had previously sold cocoa. Before a difference as to the price had been settled, L sold the cocoa to the appellants and handed the consignment notes to their agents, who re-consigned the cocoa to the appellants. The appellants bought in good faith and for the full price. The respondent sued the appellants in the colony for damage for conversion. It was *held* that the respondent by his conduct was precluded from setting up his title against the appellants and accordingly that the action failed. "To permit goods to go

1. *Abdul v. Hasanali*, A.I.R. 1926 Bom. 333; 50 Bom. 229; 96 I.C. 305; see also *Mohambaram v. Ram Narayan*, A.I.R. 1935 Mad. 850; 158 I.C. 535, *supra*.

2. *Farquharson v. King*, (1902) A.C. 325. See also *Heap v. Motorists Advisory Agency*, (1923) 1 K.B. 577, 587; *Union Credit Bank v. Mersey Docks*

and Harbour Board (1889), 2 Q.B. 205 C.A.; *Henderson v. Williams*, (1895) 1 Q.B. 521, C.A.; *Laurie & Morewood v. Dudin*, (1926) 1 K.B. 223 C.A.

3. *Blackburn J. in Swan v. North British Australasian Co.*, (1863) 2 H & C. 175.

4. (1926) A.C. 72.



into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, with the principles so frequently affirmed, following *Lickbarrow v. Mason*.”<sup>1</sup>

Williston<sup>2</sup> cites the following cases: Where a hemp merchant allowed a broker who had purchased hemp for him to transfer the hemp on the books of the warehouse, where it was stored, to the broker's name, it was held that a purchaser from the broker obtained valid title.<sup>3</sup> Where the owner of goods was induced by misrepresentation to direct the warehouse-man with whom goods were stored to transfer them to the order of the fraudulent person, a purchaser from the latter was held entitled to recover from the warehouse-man who, at the request of the seller, refused to deliver the goods.<sup>4</sup> Where owners of goods gave a dock company authority to accept all transfer orders signed by a specified clerk who thereupon transferred goods to himself under a fictitious name, and then under that name sold them to the defendants and gave delivery orders signed in his fictitious name, it was held that the original owner could recover from the defendants.<sup>5</sup> Where the plaintiff ordered a steamboat built under the supervision of an agent and gave the agent directions to hold himself out as owner, and to have the vessel enrolled in the agent's name a purchaser from the agent was protected.<sup>6</sup> Where a purchaser of goods allowed a bill of sale for the goods to be made out in the name of his agent, who was also entrusted with the possession of the goods, the principal was held estopped to claim the goods against a purchaser from the agent.<sup>7</sup> Where the owner of a wagon allowed one of his employees to have his name painted on it for the purpose of inducing the public to believe the property belonged to the latter, an innocent purchaser was protected.<sup>8</sup>

In *Snook v. London and West Riding Investments Ltd.*, (1967)1 All E.R. 518, the defendants were allowed to rely on an estoppel although it was not expressly pleaded, all necessary facts being proved.

#### (7) Sale by a mercantile agent —proviso to section 27.

The important proviso to this section is based on section 2 (1) of the English Factors Act, 1899, but deals only with the power of a mercantile agent to sell the goods; his power to pledge them (which is also dealt with by the above section in the English Factors Act) being the subject-matter of section 178 of the Indian Contract Act. The point to be noted is that while the wording of the Factors Act and section 178 of the Indian Contract Act is “where a mercantile agent is with the consent of the owner in

1. (1787) 2 Term Rep. 63. See also *Pickard v. Sears*, (1837) 6 Ad. & Ed. 469 (discussion with buyer of goods wrongfully seized and failure to mention claim); *Woodley v. Coventry*, (1863) 2 H. & C. 164 (statement that everything all right).  
2. Williston on Sales, Revised Edition, S. 316. pp. 250, 251.

3. *Pickering v. Busk*, 15 East 38.  
4. *Henderson v. Williams*, (1895) 1 Q.B. 521 C.A.  
5. *Farquharson Bros. v. King*, (1902) A.C. 325.  
6. *Calais Steamboat Co. v. Van Patt's Admr.*, 2 Black 372, 17 L. ed. 282.  
7. *Nixon v. Brown*, 57 N.H. 34.  
8. *O'Connor v. Clark*, 170 Pa St. 318.



possession of goods or *documents of title to goods*," in this section the wording is "*a document of title to the goods*." The difference between the two, however, is not clear.

The term "mercantile agent" is defined in section 2(9) of the Act and may be referred to. It means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.

**(8) Essential conditions for the application of the proviso to section 27.**

In order that the proviso may apply, several conditions are necessary:

(1) *The agent effecting the sale must be a mercantile agent.*

The expression "mercantile agent" has been defined in section 2(9) of the Act and may be referred to.<sup>1</sup> The agent effecting the sale must be a mercantile agent; a sale by mere clerk or shopman, for instance, would not be within the proviso.<sup>2</sup> The relation of a dealer and a broker is that of a principal and agent and not of a seller and buyer. The extent of the authority of the agent is to be found in the document under which the goods are delivered to him. Where the owner of certain diamonds gives them to a broker to be shown to intending purchasers for approval only, it cannot be held that the broker is a mercantile agent within the meaning of the Sale of Goods Act having general authority to sell.<sup>3</sup>

It was held in *Emperor v. Phirozshah Manerji Gandhi*<sup>4</sup> that a *jangad* transaction (usually occurring in Bombay) is a "sale or return" and involves a representation that the purchaser will (a) signify his approval or acceptance of the goods and pay for it; and (b) if not, return the same within the period fixed, or where no time is fixed on the expiration of a reasonable period. But until one or the other condition is fulfilled, no property passes to the buyer. In such a transaction the owner of the goods gives credit to the deliverer though it is subject to certain conditions.

In another case reported as *Amritlal v. Bhagwandas*<sup>5</sup>, it has been held that the goods entrusted *jangad* are not goods to be sold on approval but rather goods to be shown for approval and the term "*jangad*" does not mean "sale or return." In this case, certain goods were delivered '*jangad*' by the owner to a broker. According to the printed terms the broker admitted that he received the goods only for the purpose of showing them to intending purchasers; that he had no authority whatsoever to sell; mortgage or pledge the goods; that the ownership of the goods remained all along in the owner and he had no right to or interest in them; and that till the goods were returned in the condition in which they were received or if they were not returned, he was liable and responsible for the same. *Held*, that the broker was not a mercantile agent within the meaning of section 27.

1. See pages 16 and 70 to 73.

2. Cf. *Heap v. Motorists Advisory Agency Ltd.*, (1923) 1 K.B. 577; *Shankar v. Mohanlal*, (1887) 11 Bom. 794; *Ramaswami Gupta v. Kamalammal*,

A.I.R. 1922 Mad. 44 : 45 Mad. 173.

3. *Amritlal v. Bhagwandas* A.I.R. 1939 Bom. 435.

4. A.I.R. 1934 Bom. 360 : 38 Bom. 646.

5. A.I.R. 1939 Bom. 435.



*Held further,*

(1) The relation of a dealer and a broker is that of a principal and agent and not a seller and a buyer.

(2) When in one document there are printed as well as written conditions, the Court's duty so far as possible is to reconcile all the terms ; but, when that is not found possible, the written conditions are to be given greater weight than the printed ones.

(3) Even if the goods [are delivered to a broker on *jangad* terms, no property can pass to him under section 24.

(4) Goods or jewellery may be delivered by the owner to the buyer, with the intention that he may inspect the same and ultimately purchase it. The goods in such cases are stated to be delivered for approval *i.e.* *jangad*. Section 24 covers that situation. Goods may be handed over to a mercantile agent also "jangad" meaning to be shown for approval to his customers. Under those circumstances, if the mercantile agent effects a sale, the purchaser is protected under section 27 of the Act provided there is no want of good faith. The mercantile agent who receives goods on *jangad* acquires no property by reason of section 24 because he is not a buyer. He has therefore no title to pass on the property by reason of section 24. The third contingency is whether the owner delivers goods to an agent (who is not a mercantile agent falling within the definition of that expression as given in the Sale of Goods Act) on terms arranged between the owner and the agent. As one of the terms of delivery, the goods may be given *jangad i.e.* for approval by a prospective customer or to be shown for approval. To such a case neither section 24 nor section 27, Sale of Goods Act, applies and the extent of the authority of the agent depends on terms of his agency, and the provisions governing relations of principal and agent as found in the Contract Act. It is clear that in that case also no property passes from the owner to the agent under section 24 nor is sale by him protected under section 27. If this authority enables him to sell the goods, the sale is authorized and binding on the owner. If the authority is exceeded, the question will have to be considered in the light of sections 227 and 228, Contract Act.

(2) *The mercantile agent must be in possession of the goods or of a document of title to the goods.*

As has already been observed, the meaning of the word "possession" occurring in sections 108 and 178 of the Indian Contract Act was not clear and was interpreted in different ways by the Courts. Under the present section it is clear that the possession should be the possession of a mercantile agent who in customary course of his business as such agent has authority to sell, consign for sale, buy or raise money on the security of goods, and does not refer to the possession of "any person". The "possession" is, therefore, one "which is unqualified and not be restricted otherwise than by the owner giving instructions to the person who has it."<sup>1</sup>

1. See *Greenwood v. Holquette*, (1873) 12 B.L.R. 42, 46 ; *Roop Chand Janki Das v. The National Bank of India*, (1918) 46 Cal. 342 : 48 I.C. 975 ; *Singer Manufacturing Co., Lahore v. Niaz Ali*, 54 P.R. 1919 : 46 I.C. 181 ; *Ahmad Jan v. Singer Sewing Machine*

*Co.*, A.I.R. 1921 Lah. 223 : 67 I.C. 638 ; *Shankar v. Lakshmibai*, A.I.R. 1928 Bom. 225 : 109 I.C. 773 ; see also *Haji Karim v. Central Bank of India*, A.I.R. 1929 Cal. 497 : 56 Cal. 357 for a different view.



The possession of the agent must, however, be *qua* mercantile agent. If he receives the goods, not as a mercantile agent but in a different capacity, the section does not apply. Thus where goods were in the possession of a warehouse-man who also happened to be a broker it was held that he could not validly pledge them in his capacity as a broker.<sup>1</sup>

Does "possession" mean actual physical custody? Section 1, clause (2) of the English Factors Act, 1889, states:

"A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his *actual* custody or are held by any other person subject to his control or for him or on his behalf."

(3) *Such possession must be with the consent of the owner.*

The mercantile agent must have obtained possession of the goods or of a document of title to the goods with the *consent* of the owner. The owner is the person whose authority to sell is necessary. The pledger and pledgee may in certain circumstances become the joint owners and then their consent to the sale would be sufficient.<sup>2</sup> Section 27 of the Act, which deals with the transfer of title incorporates the well-known rule that a person who is not the owner of goods and who does not sell them under the authority or with the assent of the owner cannot give the buyer a better title than the seller himself has. Even in the case of a mercantile agent, it must be shown that he was in possession of the goods with the consent of the owner; if that is not shown, the words of the proviso to S. 27 will not apply even apart from the question of good faith and notice.<sup>3</sup>

It was held in England under the earlier Factors Act, that where the agent by fraud induces the principal to "entrust" him with the goods or documents of title, the agent could nonetheless give a good title to a *bona fide* purchaser;<sup>4</sup> and these cases are still good law, so that the consent of the owner to the agent's possession is void though it may have been obtained by fraud.<sup>5</sup> However fraudulent the person in actual custody may have been in obtaining the possession, *provided it did not amount to larceny by a trick*, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser.<sup>6</sup>

In this case (*Cahn v. Pockett's Bristol, etc. Co. Ltd.*<sup>7</sup>) the seller of goods forwarded to the buyer a bill of lading endorsed in blank together with a draft for the price for acceptance. The buyer did not accept the draft but transferred the bill of lading to the plaintiffs, who took it in good faith and for value. The seller stopped the goods *in transitu*. The Court of Appeal held that the plaintiffs had acquired a good title to the goods, as, although it was not intended that any property should pass to

1. *Cole v. North Western Bank*, (1875) L.R. 10 C.P. 354, Ex. Ch. at p. 373.  
2. See *Lloyds Bank Ltd. v. Bank of America National Trust and Savings Association*, (1938) 3 K.B. 147.  
3. *Amrit Lal v. Bhagwan Das*, 1939 Bom. 435.  
4. See *Baines v. Swainson*, (1863) 4 B. &

S. 270; 120 R.R. 741; *Vickers v. Hertz*, 109 R.R. 509.  
5. *Robt. v. Harris*, (1927) 1 K.B. 593.  
6. *Robt. v. Harris*, (1927) 1 K.B. 593.  
7. *Cahn v. Pockett's Bristol, etc. Co. Ltd.*, 11 Q.B. 264 (1939).  
8. *Robt. v. Harris*, (1927) 1 K.B. 593.  
9. *Robt. v. Harris*, (1927) 1 K.B. 593.



the original buyers until acceptance of the draft, they had nevertheless obtained possession of the documents of title with the consent of the seller.

Previously distinction was made between 'fraud' and 'larceny by trick' and it was observed in *Cole v. North Western Bank* ;<sup>1</sup> "If the fraud amounts to larceny by a trick, it is a very doubtful question whether the mercantile agent can be said to be in possession of the goods with the consent of the owner." But this distinction has been objected to in later decision and Channel J. pointed out in *Oppenheimer v. Attenborough* :<sup>2</sup>

"If the consent exists in fact, it is no answer to say that it has been obtained by fraud. It is difficult to understand why a different rule should apply, if fraud amounts to larceny. There is no case which is direct authority that larceny by a trick takes a case out of the Factors Act.

Thus, a *bona fide* purchaser from a motor-car agent, who is entrusted by the owner with the sale of a motor-car on commission, subject to a reserve price, gets a good title to the car, even if the agent sells it below the reserve price and misappropriates the money.<sup>3</sup>

In India such consent by fraud would probably be not valid, in view of sections 14 and 19 of the Indian Contract Act, though it is arguable that there is nothing in the present Act to compel interpretation of consent as "free consent."

Where consent subsequently revoked.

In English law, section 2, clause (2) of the Factors Act, 1889 provides as follows :

"Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent : provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined."

In *Moody v. Pall Mall Deposit Co.*,<sup>4</sup> where a lot of pictures were sent to a dealer in pictures for sale and he pledged them after the authority to sell had been revoked, it was held that the buyer who had no notice of revocation got a good title.

The Indian Act is silent with regard to the case where the consent originally given is subsequently revoked, as to whether the seller would be competent to transfer title to the *bona fide* purchaser after such revocation though the principle of *Moody v. Pall Mall Deposit Co.* seems to be applicable in India also.

1. (1875) 10 C.P. 354.

2. (1807) 1 K.B. 510 (affirmed on appeal in (1902) 1 K.B. 221 ; see also *Staff Motor Guarantee Ltd. v. British Waggon Co. Ltd.*, (1934) 2 K.B. 305 which was disapproved by the Privy Council in *Pacific Motor etc. v. Motor*

*Gredits*, (1965) 2 All E.R. 105 ; *Folkes v. King*. (1923) 1 K.B. 282 ; *London Jewellers v. Sutton*, (1934) 50 T.L.R. 193.

3. *Folkes v. King*, *supra*.

4. (1917) 38 T.L.R. 306.



(4) *The mercantile agent must be acting in the ordinary course of business of a mercantile agent.*

For application of the proviso to section 27 the mercantile agent must be acting in the ordinary course of business of a mercantile agent. It is to be observed that in the definition of "mercantile agent" in section 2 (9) of the Act, the words "as such agent" occur while the proviso to section 27 refers only to "a mercantile agent". These words were interpreted in *Oppenheimer v. Attenborough*.<sup>1</sup> In that case a broker obtained some diamonds falsely pretending that he had a customer for them. He did not dispose of them to a customer but pledged them with the defendant, who acted in good faith. The evidence was that by the custom of the diamond trade, brokers have no authority to pledge. It was, however, held by the trial Judge that the words "a mercantile agent" gave the agent a general authority which could not be cut down by any particular trade custom and he accordingly gave judgment for the defendant. The decision was affirmed by the Court of Appeal, Lord Alverstone C.J. expressing the opinion that "acting in the ordinary course of business as a mercantile agent" meant that he "must act in the transaction as a mercantile agent would act as if he were carrying out a transaction which he was authorized by his master to carry out" (at page 227); while Buckley L.J. (at pp. 230, 231) interpreted those words as meaning "acting in such a way as a mercantile agent in the ordinary course of business of a mercantile agent would act; that is to say, within business hours at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the person (dealing with him) to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make." When he is so acting, therefore, he has an ostensible authority given by the Act, which cannot be limited by private instructions or a particular trade custom.

In *Heap v. Motorists' Advisory Agency Ltd.*,<sup>2</sup> a person by falsely representing that he knew of a possible purchaser for a car belonging to the plaintiff obtained possession of the car and subsequently secured an appointment as car salesman to a firm of motor car engineers and in this capacity, effected a sale of the car. It was *held* that the sale was not in the ordinary course of business of a mercantile agent, and it was for *the party claiming the benefit of the section to prove that the sale was in the ordinary course of business.*

In *Lloyds Finance v. Williamson* (1965) 1 All E.R. 641 C.A., it was held: If a principal not only puts an agent in possession of his goods and the indicia of title but also expressly authorises the agent to sell as principal, and the agent makes an unauthorised sale, the question whether the agent sold in the ordinary course of business can be relevant only in so far as it throws light on the *bona fides* of the buyer; and if the buyer buys in good faith from the agent as apparent owner the buyer gets good title to the goods at common law and so has no need to rely on the Factors Act or on the doctrine of estoppel.

If, on the other hand, the true owner has only represented that the seller had authority to sell the goods as his agent then he will be able

1. (1908) 1 K.B. 221 (230).

2. (1921) 1 K.B. 577.



to recover them if they are sold in a manner not covered by the seller's ostensible authority as agent.<sup>1</sup>

(5) *The buyer must act in good faith and without notice of the want of authority.*

It is also essential under this proviso that the buyer acts in good faith and has at the time of the contract of sale notice that the seller has not authority to sell. In order that the buyer may be absolved of his liability for having purchased goods from person not owner thereof and in order that the plea of purchase in good faith may be available to him, he must bring his case within the proviso to section 27.<sup>2</sup> Section 3, clause (20) of the General Clauses Act, 1897, defines "good faith" as follows ;<sup>3</sup>

"A thing is deemed to be done in good faith when it is in fact done honestly whether it be done negligently or not."

Gross negligence may be evidence of bad faith, but it is not the same thing and does not entail the same consequences.<sup>4</sup>

If the buyer has notice that seller's title is defective, he cannot be said to be acting in good faith. The notice required by this section need not necessarily be actual notice. It may be constructive. Therefore, where the buyer's agent has had notice or where the buyer desists from making an enquiry suspecting some defect in the title, he may not be entitled to the benefit of this proviso. It has, however, been held that mere suspicion is not enough and will amount to notice.<sup>5</sup> Where there are two or more joint buyers, a notice to one of them would be tantamount to notice to all.<sup>6</sup>

Although a party may have acted in good faith yet if his agent knows that the pledger was warehouse-man and a merchant and was thus put on enquiry, the principal is affected thereby and is guilty of conversion if he refuses to return goods pledged to him, to their owner.<sup>7</sup> Either knowledge or means of knowledge to which the party wilfully shuts his eyes is enough,<sup>8</sup> but not mere suspicion. To establish notice it is sufficient to show that the circumstances attending the transaction were such as a reasonable man of business,<sup>9</sup> applying his understanding to them would certainly know that the agent had not authority to sell although he was not acting *mala fide* towards his principal.<sup>10</sup> So where a seller drew a bill of lading in six parts and endorsed and transferred three to B and A, to secure an advance, and advertently sent one endorsed bill to his agent

1. See Chalmers, Sale of Goods Act, 16th Edn., p. 133 citing Motor Credit (Hire Finance) Ltd. v. Pacific Motors Pty. Ltd. (1963) 109 C.L.R. 87 ; reversed on another ground, *sub nom*, Pacific Motor Auctions Proprietary, Ltd. v. Motor Credits (Hire Finance), Ltd., (1965) 2 All E.R. 105, P.C.

2. Ma Sein v. Maung Ba Hmu, A.I.R. 1935 Rang. 383 : 164 I.C. 1100.

3. See also section 62 (2) of the English Act.

4. Jones v. Gordon, (1877) 2 App. Cas. 616, at p. 629.

5. Navulshaw v. Brownrigg, (1852) 42 E.R. 943, 95 R.R. 156.

6. Oppenheimer v. Frazer, (1907) 2 K.B. 50 ; Ramaswami Gupta v. Kamalamal; A.I.R. 1922 Mad. 44 : 70 I.C. 448.

7. May v. Chapman, (1847) 16 M. & W., p. 361.

8. Navulshaw v. Brownrigg, (1852) 21 L.J. Ch. p. 914 ; Govind Chunder v. Ryan, 9 Moo. I.A. 140 ; Lord Sheffield v. London Joint Stock, 13 App. Cas. 383 H.L.

9. This standard of reasonable man is good as regards notice but not as regards good faith ; Whitehorn Brothers v. Davison, 80 L.J.K.B. p. 437.

10. Ibid.



who pledged it with Bank B, in a suit with Bank B, against Bank A, for the goods it was *held* that though the pledge to Bank B, was prior to that with Bank A, yet as Bank B must have known that there were six bills, and were not deceived by the buyer's possession of one bill only, they had no right of priority.<sup>1</sup> The doctrine of constructive notice should, however, be very sparingly applied to mercantile transactions.<sup>2</sup> But if one of two or more partners has notice of the fact that the seller has no power to sell or that the transaction is improper, the other partner or partners acquire no title under a disposition by a factor, even if the partnership is merely for that individual transaction.<sup>3</sup> Similarly, if an agent obtains information in the course of his employment as such for the principal that the seller has no authority to sell, a purchase made by the principal does not convey any title to him.

The burden of proof that the purchaser had notice of the want of authority, however, lies on the person who seeks to avoid the transaction on that ground.<sup>5</sup> Proof of circumstances which ought to put the agent or principal having notice of them on enquiry is sufficient,<sup>6</sup> but the proof of mere suspicion is not enough.<sup>7</sup> Notice of the existence of a power of attorney is notice of its contents.<sup>8</sup>

The delivery of share certificates with the transfers executed in blank, passes not the property in the shares but a title legal and equitable, which enables the holder to vest himself with shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered owner. Thus, where the mercantile agent delivered the documents of title and also the transfer deed signed by the registered owner, there was nothing in the papers which indicated any reason for suspicion and so far as the buyer could make out the title was in order, and the buyer being satisfied with the correctness of the transaction, paid the money and took the shares, it was *held* that he was a *bona fide* purchaser of the shares for value without notice of any fraud or of anything defective in the transaction and that he had acted in a good faith.<sup>9</sup> It was observed in this case : Where in a sale of shares through a broker the evidence given by the purchaser shows that there was nothing which could make the purchaser suspect the *bona fide* of the broker and he had satisfied himself before purchasing that the broker had full authority to sell, the evidence adduced by him shifts the burden on the owner.

#### Other illustrations

(1) Hiring at rental and the acquisition of goods upon payment of price by instalments have different legal consequences. One of such consequences is that where the transaction is sale, and notwithstanding the proviso about the property in the goods remaining with the original owner

Hire-purchase agreement.

1. Gilbert v. Guignon, 8 Ch. A. 16.  
2. Kellenback v. Lewis, 24 Ch. D. 54.  
3. Oppenheimer v. Frazer, (1907) 2 K.B. 50 C.A.  
4. Section 229, Indian Contract Act ; Dresser v. Norwood, 14 C.B.N.S. 574. As to when and how far notice to the agent is notice to the principal, see author's Law of Agency, p. 510.

5. See Whitehorn v. Davison, (1911) 1 K.B. 463 C.A.  
6. Nandlal v. Bank of Bombay, 12 Bom. L.R. 316.  
7. Whitehorn v. Davison, supra.  
8. Jonmenjoy v. Watson, 10 Cal. 901, P.C.  
9. Rama Rao v. Dasarathy Rao, A.I.R. 1955 Mys. 43.



until the entire purchase price has been paid, a third party can obtain title to the goods against the owner provided he is a *bona fide* purchaser for value. The courts have construed seizure clauses or those forfeiting earlier payments in hire-purchase agreements as not being penal, or provisions imposing fresh burden on the normal incidents of the contract. Where goods under the hire-purchase agreements are let on periodic rentals with the proviso, that when the payments reach a certain sum the property in them will pass absolutely to the hirer, the legal position of the hirer until these payments are made and option to purchase exercised is that of a bailee with all the liabilities of such person towards his bailor for the return of the things and for damages in case of wrongful detentions.<sup>1</sup>

(2) Where a large quantity of earth from land belonging to the plaintiff was removed and placed on the railway track under construction, it was *held* that the Union of India was liable in conversion for the value of the earth belonging to the plaintiff even if the latter had made no demand for the return of the earth. Assuming that the Railway had engaged a contractor for the supply of the earth and paid the price of the earth so supplied to the contractor, even so the Union of India would be liable, for, as between the innocent plaintiff and the innocent Union of India, the right of the former must prevail in view of S. 27 of the Sale of Goods Act. It was observed :

If in a given case, there is evidence that the defendant has dealt with goods in a manner adverse to the plaintiff and inconsistent with his right to the use and possession of them, such dealing with the goods amounts to conversion, notwithstanding the fact that no demand for the return of the goods was made.

In *Clayton v. L. Roy*,<sup>2</sup> A had bought her husband an antique watch at Roy et Fils, and the watch had been stolen from him. It had been pledged with a London pawnbroker and eventually with other unredeemed pledges was sold by auction in a regular auction room. Shortly afterwards one B bought it at a professional jeweller for £40, and sent it to Le Roy for opinion as to its genuineness. Le Roy recognised the watch and wrote to A to say that it was the stolen watch and perhaps she could care to purchase it from B and what were her wishes? As solicitors treated the letter as a refusal to return the watch (because of its suggestion of payment for the recovery of the watch) with the result that their clerk called at Le Roy's shop and demanded that the watch be handed over to him. On refusal he at once served a writ of detinue. It was *held* upon the facts that there had been no wrongful refusal on the part of the defendant to return the watch before the date of issue of the writ and that the plaintiff had no cause of action either in detinue or trover.

#### (9) Miscellaneous.

##### Section 27—Bihar Land Reforms Act, 1950.

There was notification under S. 3 of the Bihar Land Reforms Act, 1950, in respect of A's estate in Bihar. Possession was not taken immediately. There was grant of lease by A and B during interval to collect

1. *K. Narayan v. Laxmi Narsingham*, A.I.R. 1955 Hyd. 104.

2. (1911) 2 K.B. 1031.



biri leaves from jungles in the estate. Premium was paid by B again to State of Bihar on demand. There was suit by B for recovery of premium paid twice against A and State of Bihar. It was *held*: B was not entitled to get refund from State of Bihar as A had no authority to grant lease in favour of B from 1952. B was entitled to get the same from A under S. 65 of the Contract Act, 1872. The lease was void from its inception. The State of Bihar was not estopped from denying A's title as there could be no estoppel against a statute. S. 65 of the Contract Act was attracted to A's liability. The contention that the possession of A before it was taken over by Government as that of agent or constructive trustee is without substance. Section 27 of the Sale of Goods Act and S. 41 of the Transfer of Property Act are not attracted.<sup>1</sup>

**28.** If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

**Sale by one of several joint owners.**

This section reproduces in substance S. 108, Exception 2, of the Indian Contract Act, 1872. There is no corresponding section in the English Sale of Goods Act, 1893.

The rule laid down in this section constitutes the fourth exception to the general rule that no one can give a better title to his transferee than he himself has. Generally the possession of one co-owner is the possession of all and every co-owner who is in possession of a chattel owned jointly by several co-owners holds it generally as an agent for his other co-owners. If he is in possession with the *permission* of his co-owners and not against their wish or with a claim of adverse title so as to negative the idea of agency a person dealing with him in good faith without notice of the want of authority is protected by this section. If, on the other hand, possession is not permissive but against the wish of the other co-owners, the mere fact that buyer acts in good faith without notice of the want of authority will not give him a good title to the goods purchased.

Permission, however, need not be express in every case but can be presumed from or implied in the circumstances of particular case where such presumption or implication can be reasonably made or such inference is reasonably possible. The use of the word 'permission' in this section does not appear to be intended to carry any other meaning than 'consent' in the proviso to section 27 *supra*.

Where a Burman husband and wife are joint owners of property, a *bona fide* purchaser of the property from the husband who is in possession of the property, acquires a good title thereto.<sup>2</sup> So also where one member of a joint Hindu family is found to be in possession of any property, the family being presumed to be joint in estate, the presumption is not that he

1. State of Bihar v. Dukhulal Das, A.I.R. 1962 Pat. 140. 2. (1892-96) U.B.R. 808.



was in possession of it as separate property acquired by him but as a member of a joint family, and if a person buys goods *bona fide* from such a member, he acquires the property in the goods, even though the seller had no authority to sell.<sup>1</sup> One of several co-owners who holds a jewel in his safe custody is a person in such possession as is contemplated by this rule.<sup>2</sup>

Explaining the position of co-owner under the English law, it is observed in Chalmers' Sale of Goods Act:<sup>3</sup>

"The law relating to co-owners, who are not partners, is rather obscure. Probably, a co-owner, in the absence of estoppel or authority from the other co-owner, could only transfer his own share. If one co-owner sells and retains the whole price, the remedy of the other at law against him is doubtful, unless the sale confers a good title to the whole. If co-owners cannot agree as to the possession or use of the goods owned in common, the only remedy was to apply in equity for an injunction or for a receiver and sale, but now by section 188 of the Law of Property Act, 1925, the court has power on the application of persons interested in a moiety or upwards of such chattels to order a division. In a case in 1892, A sold half a share in a gold snuff box to B on the terms that A was to retain possession till sale on joint account, and afterwards handed the box to B to sell it at Christie's. B, instead of selling, deposited the box with H, to whom he owed money. It was held that A could recover the box from H."<sup>4</sup>

"It seems that if two or more persons agree to purchase goods on joint account, notice to the one who effects the purchase of any defect in title of the seller affects the others also."<sup>5</sup>

In *Seth Pushalal Mansinghka Private Ltd v. Commissioner of I.T., Delhi, Rajasthan and Madhya Pradesh*<sup>6</sup>, the Supreme Court observed: Where the business of the assessee consists of sale of goods the problem is to determine where the property in goods sold passes to the purchasers. In the case of a contract for sales of unascertained goods the property does not pass to the purchaser unless there is an unconditional appropriation of the goods in a deliverable state to the contract. In the present case, the assessee has reserved the right of disposal over the goods at the time of despatch. The consignment was sent 'self', railway receipt was taken by him in his own name and the railway receipt along with the bill of exchange was presented by him to the Bank for collection after endorsing it in favour of the Bank. What is more the goods were delivered to the buyers only when they paid the price to the Bank and obtained the railway receipt endorsed in their favour. The fact that the goods were, by the bill of lading, made deliverable to the order of the seller or his agent was a *prima facie* reservation of the right of disposal so as to prevent the property from passing to the purchaser.

1. Taruck Chander Poddar v. Poddar Jodeshur Chunder Kondoo, (1873) 11 B.L.R. 193.

2. Shadi Ram v. Mahtab Chand, 1 P.R. 1895.

3. 16th Edn., pp. 134, 135.

4. Nyberg v. Handelaar, (1892) 2 Q.B. 202 C.A.

5. Oppenheimer v. Frazer, (1907) 2 K.B. 50, 76, C.A.

6. A.I.R. 1967 S.C. 1626.



Even assuming that the Bank gave credit of part of the amount of some of the bills to the assessee, it was apparent from the condition specified in the discount form of the Bank that the responsibility of the assessee did not cease till the Bank realised payment from the purchaser. The provisions of the discount form of the Bank made it clear that when the assessee negotiated the hundi with the banker, the latter did so only as a part of its banking business. Hence even if there was a purchase of the hundi by the banker it did not mean that there was a sale of the goods to the banker.

**29.** When the seller of goods has obtained possession thereof under a contract voidable under *Sale by person in possession under voidable contract.* section 19 or section 19-A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

### Synopsis

- (1) *Sale by person in possession under voidable contract.* (3) *Contract not avoided at the time of sale.*  
 (2) *There must be a de facto contract.* (4) *Onus of proof.*

#### (1) **Sale by person in possession under voidable contract.**

This section is based on section 23 of the English Sale of Goods Act, 1893, and on Exception 3 to section 108 of the Indian Contract Act, 1872, with the omission in the latter of the clause relating to offences at the end of the first paragraph and of the whole of the second paragraph.<sup>1</sup>

The Legislature has confined the application of the rule contained in this section only to those cases in which the contract is voidable under section 19 or 19-A of the Indian Contract Act, 1872. The last words of Exception 3 of section 108 of that Act having become redundant have been left out. The phraseology of section 23 of the English Act, which applies to persons holding voidable titles in general, has also been changed. The Indian Act uses the words 'where the seller has obtained *possession* under a voidable *contract*' and **this makes possession of the goods on the part of the seller absolutely necessary.** The English Act uses the words 'when the seller of goods has a *voidable* title thereto'. This distinction between the English Act and the Indian Act must be clearly understood and kept in view when applying decisions under the English Act to cases arising under the Indian Act.

Sections 19 and 19-A of the Indian Contract Act, 1872, read as follows :

**"19. Voidability of agreement without free consent.**—When consent to an agreement is caused by coercion, fraud or misrepresentation, the

1. See Appendix A and Appendix B.



agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

**Exception.**—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

**Explanation**—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

**19-A.**—*Power to set aside contract induced by undue influence.*—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder upon such terms and conditions as to the court may seem just".

If the contract was originally **void**, either for want of consent or for any other cause, then no ownership would pass to the seller who will, therefore, be incompetent to transfer title to the buyer, though acting in good faith.<sup>1</sup> The effect of fraud is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance the property passes in the subject-matter<sup>2</sup>. A title, therefore, acquired for valuable consideration and in good faith by a third party during the time while the contract stands and is not avoided will not be interfered with.<sup>3</sup>

## (2) **There must be a *de facto* contract.**

There must be a *de facto* contract though induced by fraud, etc. No title could be transferred if the goods are obtained by fraud or extortion as defined in the Indian Penal Code without any contract. Thus a thief cannot transfer a good title.<sup>4</sup>

## *Illustrations*

(i) *In Cundy v. Lindsay*<sup>5</sup>, the seller being misled by C supplied him with goods thinking him to be B with whom seller had dealings. It was

1. See section 20, Indian Contract Act; *Higsons v. Burton*, (1837) 26 L.J. Ex. 342, 112 R.R. 938; *Hardman v. Booth*, (1863) 1 H. & C. 803 : 130 R.R. 784; *Cundy v. Lindsay*, (1878) 3 App. Cas. 459—cases relating to fraud.  
2. *Stevenson v. Newham*, (1853) 13 C.B. 285, 302, 93 R.R. 532 Ex. Ch.

3. See *Clough v. L. & N.W. Ry.*, (1871) L.R. 7 Ex. 26, Ex. Ch.; *Ex parte Ward*, (1905) 1 K.B. 465; *Tilley v. Bowman*, (1910) 1 K.B. 745.  
4. See *Khitish Chandra v. Emperor*, (1924) 51 Cal. 796, 801. See also Report of the Select Committee.  
5. (1878) 3 A.C. 459.



held that there was no contract with C as there was no consensus of mind which could lead to any agreement or any contract whatsoever, and C could not transfer any title to a sub-purchaser from him. It was observed by Lord Cairns: "If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has supposed to pass the property to him from the owner of the property, then the purchaser will obtain a good title even although afterwards it should appear that there were circumstances connected with the contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances... will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."<sup>1</sup>

(ii) B induces A to send his jewellery on approval by falsely representing that he has a good customer for it. He then pledges the goods with C. B then induces A to invoice the goods to him, representing that C requires credit. In an action by the plaintiff to recover the goods from the defendant, who had taken them in good faith, it was *held* that—

(a) A having obtained the right to transfer the property in the goods, had obtained them under a contract, which though voidable by the plaintiff, had not been avoided at the time of the pledge to the defendant, and

(b) in any event the title of A was perfected by the sale to him, at any rate for the time being, and that went to make the title of the defendant; and consequently the plaintiff's action failed.<sup>2</sup>

(iii) Where goods had been obtained on false pretences, and the guilty party had been convicted, it was *held* that the title of the original owner could not prevail against the right of a pawn-broker, who had made *bona fide* advances on them to the fraudulent possessor.<sup>3</sup>

(iv) A, trading under the name of B & Co., ordered goods from the plaintiffs, and having obtained delivery of them resold them to the defendants. There was no such firm, as B & Co., and A adopted the name fraudulently for the purpose of representing that he was doing a large business. The plaintiffs, not having been paid for the goods, brought trover against the defendants. It was *held* that the plaintiffs had made a contract with A, and the defendants had obtained a good title to the goods.<sup>4</sup>

(v) In *Hardman v. Booth*,<sup>5</sup> goods were sold to G. & Co. through the fraud of their clerk, G. & Co. having no knowledge of the sale and the seller believing he was dealing with G. & Co. The clerk then pledged the goods against advances made to him. It was *held* that there was no contract and the seller could recover the value of the goods from the pledgee.

(vi) A *bona fide* purchaser from the person obtaining it by fraud can transfer a good title to another having notice of the fraud to which he is not a party.<sup>6</sup>

1. (1878) 3 A.C. 459. See also *Nanka Bruce v. Commonwealth Trust*, (1926) A.C. 77.

2. *Whitehorn Bros. v. Davison*, (1911) 1 K.B. 463 C.A.; *Folkes v. King*, (1923) 1 K.B. 282, C.A. cited at p. 484 *ante*; see also *Tilley v. Bowman*, (1910) 1 K.B. 745.

3. *Parker v. Patrick*, [(1793) 5 T.R. 175.

4. *King's Norton Metal Co. v. Edridge Merrett and Co.* (1897) 14 T.L.R. 98 C.A.

5. (1862) 23 L.J. Ex. 105.

6. *Peirce v. London Horse, etc.*, (1922) W.N. 170 C.A.



(vii) Where no contract has come into existence, for example, where the seller or pledger has received the goods on "sale or return" approval, or similar terms, and at the time of the sale or pledge the property has not passed to him,<sup>1</sup> or where A by falsely pretending that he is buying for B has obtained goods from C as the owner's rights are not divested, this section has no application.<sup>2</sup>

(viii) In *Ingram v. Little*, (1960) 3 All E.R. 332, the plaintiffs sold a car to X and allowed him to pay by cheque only after he had given a name and address which they had checked in the telephone directory. The defendant in good faith bought the car from X. X was not the person he said he was, the cheque was not met, and X could not be traced. It was held that there was no contract between the plaintiffs and X, and they could therefore recover the car from the defendant.

(ix) In *Car and Universal Finance Co. Ltd. v. Caldwell*, (1964) 1 All E.R. 290, it was held : Although in the ordinary course an election to rescind a contract must be communicated to the other party to the contract, yet, where a fraudulent rogue by absconding renders communication with himself impracticable, communication with him by the party seeking to rescind the contract is not essential to its rescission. In such circumstances a seller of goods sufficiently exercises his election to rescind if he at once, on discovering the fraud, takes all possible steps to regain the goods, even though he cannot find the rogue nor communicate with him. (In this case the cheque of the fraudulent rogue given in part payment of the price was dishonoured by the bank).

This case was distinguished in *Newtons of Wembley, Ltd. v. Williams*, (1964) 3 All E.R. 532 C.A. in which it was held : A buyer of goods, being a person who in fact is not a mercantile agent, who has obtained possession of the goods or documents of title with the consent of the seller, and who on re-sale delivers the goods or transfers the documents to a person receiving the same in good faith without notice of any lien or other right of the original seller, gives the person to whom he so delivers or transfers a good title by virtue of S. 9 and S. 2 of the Factors Act, 1889, if the buyer, in his transaction of re-sale, is doing something which would constitute acting in the ordinary course of business if he were a mercantile agent.<sup>3</sup> (In this case the car sold by the plaintiffs to A, accepting a cheque which it was learnt would not be met, was sold by A to B in a place where there was an established street market for dealing in used cars. The plaintiffs had failed to repossess the car from the defendant).

Person identified by sight and hearing. (x) Lord Haldane observed in *Lake v. Simmons*<sup>4</sup> as follows :

"Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being

1. See section 24 ; *Truman v. Attenborough*, (1910) 26 T.L.R. 601 ; *Whitehorn Bros. v. Davison*, *supra* ; *Folkes v. King* (1923) 1 K.B. 282, C.A.

2. *Higgins v. Burton*, (1857) 26 L.J. Ex.

342, 122, R.R. 938 ; *Morrison v. Robertson*, (1907) 10 F. (Ct. of Sess.) 332.

3. *Oppenheimer v. Attenborough & Sons* (1908) 1 K.B. 221 applied.

4. (1927) A.C. at p. 501.



any contract at all or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (*Traite des obligations*, section 19) lays down the principle thus in a passage adopted by Fry J. in *Smith v. Wheatcroft*:<sup>1</sup> Does error in regard to person with whom I contract destroy the consent and annul agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract.....On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand. In the careful judgment delivered by him in *Phillips v. Brooks*,<sup>2</sup> Harridge J. decided that the alternative view secondly stated by Pothier applied to the case he was dealing with. A fraudulent person had entered a jeweller's shop and looked at and selected certain jewels, which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that remained to be subsequently arranged was payment of the price. The unknown customer who drew a cheque pretending to be someone else and signing it in a well-known name, was allowed in exchange for the cheque to take away one of the jewels, which he disposed of subsequently. Harridge J. found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation. In the other type of case referred to by Pothier, where the belief of the contracting seller depends wholly on identity of character or capacity, there is, as Mr. Justice Holmes says at the beginning of the ninth lecture in his book on the Common Law, no contract, because there is really only one party."

(xi) On Jan. 5, 1946, B entered into a hire-purchase agreement with W to purchase a Hillman motor car for £686. On April 4, 1946, after paying a deposit of £200 and one instalment of £40, 10s. 6d. he purported to sell the car in return for £275 and a Jaguar motor car, to the plaintiffs. On April 10, 1946, B purported to sell the Jaguar car to the defendant for £525, and subsequently the defendant sold to F for £550. W repudiated the hire-purchase agreement on the ground that B had ceased to pay the instalment, and, having claimed the car back from the plaintiffs, agreed to sell it to them for £455, 10s. 6d. (being the balance of the purchase price plus their costs). The plaintiffs then claimed from the defendant the return of the Jaguar car or damages for its conversion or detention. It was *held* that B's contract with the plaintiffs was induced by the fraudulent misrepresentation of B and was voidable at the instance of the

Hire-purchase of motor car—hirer selling car for cash and another car—resale of second car—title to second car.

1. (1878) 9 Ch. Div. 223, 230.

2. (1919) 2 K.B. 243.



plaintiffs, but not void, and, as it was not avoided before the transaction between B and the defendant, and as the defendant bought in good faith, the property in the Jaguar car passed to the defendant.<sup>1</sup>

### (3) Contract not avoided at the time of sale.

A person may elect to avoid or affirm a contract at any time after he knows about its being voidable and until, either expressly or by implication, he affirms the contract. So long as he does not affirm it, he may keep the matter open, subject to any intervening rights of third persons. Where the contract was induced by fraud which was discovered after action commenced but before any election to treat the contract as subsisting and before any *bona fide* purchaser acquired title, it was *held* that the party induced was entitled to rescind the contract.<sup>2</sup>

He may avoid the contract even after notice of an act of bankruptcy committed by the other party, and whether before or after receiving order inasmuch as the trustee takes only the voidable title.<sup>3</sup> After avoidance, the person who has acquired such voidable title cannot bring detinue against the seller, but the seller must return the purchase money paid, or set it off against the redemption moneys, where the goods have been pledged.<sup>4</sup>

The seller may by his pleading elect to avoid the contract, and is not bound to do any act *in pais*.<sup>5</sup> The avoidance takes place when the election is made and communicated to the other party.<sup>6</sup> Right to avoidance of the contract may be waived by the party to it either by express affirmation,<sup>7</sup> or impliedly by proceeding with the contract as a binding contract after full knowledge of the circumstances entitling him to disaffirm.<sup>8</sup> So where the seller from whom goods were obtained by false pretences amounting to the offence of cheating has sued and obtained a decree against the vendee for the price of the goods he cannot afterwards elect to avoid the contract which was voidable only, and follow the goods into the hands of third parties.<sup>9</sup> In *Fazal v. Mangaldas*,<sup>10</sup> a distinction is drawn between contracts obtained by fraud, and performance obtained by fraud, the contract being void.

### (4) Onus of proof.

The *onus* is on the party seeking to avoid the contract to show that the buyer *did not* purchase in good faith and without notice.<sup>11</sup> In case of sale by mercantile agents, the onus of proving good faith, etc. is on the person purchasing from the mercantile agent.<sup>12</sup>

For definition of "good faith" and "notice" see notes under section 27, *ante*.

1. Robin & Rambler Coaches Ltd. v. Turner, (1947) 2 All E.R. 284 (K.B.).
2. Clough v. L. & N. W. Rly Co. Ltd., (1871) L.R. 7 Ex. 26, 36.
3. Re Eastgate Ex-p Ward, (1905) 1 K.B. 465; Tilley v. Bowman, (1910) 1 K.B. 745.
4. Tilley v. Bowman, *supra*.
5. Halsbury, 3rd Edn., Vol. 34, p. 82 f.n. (d).
6. Scarf v. Jardine, (1882) 7A.C. 345, 361; Clough v. L. & N. W. Rly. Co. Ltd., *supra*.

7. Ibid; Morrison v. Universal Marine Ins. Co., L.R. 5 Exch. 197.
8. Pease v. Lowden, 59 U.S. 578; Mohny v. Reed, 40 Mo. App. 99.
9. Tholosiram v. Duraji, 15 Mad. L.J. 375.
10. (1922) 46 Bom. 489; see also Jamsetji v. Hajibhai, (1912) 37 Bom. 158.
11. Whitehorn Brothers v. Davison (1911) 1 K.B. 463.
12. Heap v. Motorists' Advisory Agency, (1923) 1 K.B. at p. 589.



30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or the transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have effect as if such lien or right did not exist.

### Synopsis

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|--|--|
| (1) <i>Seller or buyer in possession after sale—analogue law.</i>          | (4) <i>Hire-purchase agreements.</i>   |
| (2) <i>Sub-section (1)—disposition by seller in possession after sale.</i> | (5) <i>Attachment and sale in execution of decree—auction purchaser.</i>         |
| (3) <i>Sub-section (2)—disposition by buyer in possession after sale.</i>  | (6) <i>Disposition by a mercantile agent acting for the seller or the buyer.</i> |

#### (1) Seller or buyer in possession after sale—Analogous law.

The section is based on section 25 of the English Act (See Appendix) which in its turn was based to a large extent on sections 8 and 9 of the English Factors Act, 1889. There was no corresponding provision in Chapter VII of the Indian Contract Act.

Fraudulent disposition of goods by a seller who remained in possession of the goods sold was not provided for in the earlier English Factors Acts of 1823, 1825 and 1842, those being applicable only to "agent entrusted" with goods, a term which did not include the seller. In *Johnson v. Credit-Lyonnais*,<sup>1</sup> the buyer had left the documents of title to goods in the seller's hands and the latter had fraudulently pledged the goods to an innocent pledgee. The court held that the buyer was entitled to recover the goods from the pledgee. Section 3 of the English Factors Act, 1877, therefore, provided that the seller in possession of document of title could make a valid sale, pledge or other disposition of goods to a buyer who had no notice of the former sale. This Act, however, applied only to "documents of title". Section 1 of the English Factors Act, 1889,



extended the rule laid down in section 3 of the Factors Act of 1877 to goods.

Similarly, section 4 of the English Factors Act, 1877, for the first time provided that the buyer in possession of documents of title could make a valid disposition of goods so as to defeat the unpaid seller's rights. Section 9 of the English Factors Act, 1889, extended this rule by including the case of possession by the buyer not only of documents of title but also of goods.

It is to be noticed that section 27 (proviso) deals with cases where a mercantile agent is in possession with the consent of the owner; there need not be any contract or sale to the agent. Mere possession with consent confers a right on such agent to transfer a good title provided he does it in the usual course of business. Here the person transferring has no title but he occupies a position which confers the right on him. Under section 29, a person obtaining possession under a voidable contract can transfer a good title to a *bona fide* purchaser, provided the contract has not been avoided at the time of sale. Here the title of the person selling is voidable and such title is considered good until the contract is avoided. Under section 30(1), the seller has no title at the time of sale, etc., but has possession, and inasmuch as he had title before he is considered or reputed to have it until contrary is known. Under S. 30(2), the person selling, etc. has either bought or agreed to buy and is in possession and as such is *prima facie* competent to transfer a good title.

The section is silent about passing of property to the buyer. If the property has passed to the buyer, he can always confer a good title to a *bona fide* buyer or pledgee from him independently of the section.

Commenting on sub-section (2) of this section it has been observed in *Maung Aye Maung v. A. Scott & Co. and others*<sup>1</sup> that the general principle of law is that only the owner can give a good title to another of his own property and the law has always done its best to protect the right of the legal owners. The commercial world, however, is more interested in removing restriction upon trade and it is quite clear that business would be impossible if every time a purchaser wished to buy goods, he had to examine the title of his vendor. So the power given by section 30(2), Sale of Goods Act, is in a sense a compromise which enables in certain circumstances a person, who is not a legal owner, to transfer the title.

**(2) Sub-section (1)—disposition by seller in possession after sale.**

When the seller retains title to the goods even after a contract of sale, he can always sell them again and confer a good title on the buyer. When the title is transferred he cannot resell except under S. 54(2) which specifically gives him the power to resell under certain circumstances. Under S. 30(1), if the seller having sold the goods retains possession of the goods or of documents of title to goods and sells or pledges the same himself or through a mercantile agent to a person who buys in good faith and without notice of the previous sale, such a sale has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

1. A.I.R. 1940 Rangoon 1, p. 2.



For the application of this sub-section it is essential that the seller should be in possession after sale and there should be delivery or transfer of the goods or documents of title by the seller or by a mercantile agent acting for him. When the property has not passed, the buyer seems to have only a *jus in personam* against the seller and no *jus in rem*,<sup>1</sup> and if he is in default the case is covered by section 54 of the Act. In *Nicholson v. Harper*<sup>2</sup>, the plaintiff had purchased wine stored in a warehouse-man's cellars, and the seller afterwards pledged the wine to the warehouse-man to secure advances made by him in good faith and, without notice of the sale, and on the seller becoming bankrupt his trustee put up the wine for sale. *Held*, that the plaintiff was entitled to the wine, as there had been no delivery of the goods to the pledgee after the sale, but they had continuously remained in his possession, and as there was no transfer to him of any document of title, and this sub-section did not apply, one or other of these things being necessary under sub-section (1). Where the seller after sale continued in possession and sold them to a decree-holder of the seller, it was held that the decree-holder acquired a good title.<sup>3</sup> In *Kitto v. Billie*<sup>4</sup> it was held that execution of a deed of assignment does not amount to delivery.

It would appear that the possession must be by the seller *qua* seller ; and not in any other capacity, as, for instance, that of a hirer. Thus where the sale having been completed by delivery, the goods are bailed or leased back to the seller, this sub-section will not apply.<sup>5</sup> In *City Fur Manufacturing Co. v. Fureenbond Ltd.*,<sup>6</sup> H purchased a large quantity of fur at an auction and asked the auctioneer L who was acting also as broker to pay for and retain the goods. Subsequently H agreed to sell the fur to the plaintiffs, obtained money therefor, but without paying the sum due to L went to the defendants and agreeing to pledge the fur borrowed £ 178 0sh. 6d. the amount due to L and gave a delivery order addressed to L. When L was paid, the defendants obtained possession to the goods as a pledge for the advance made by them. Plaintiff sued to recover the goods, and the court held that L's possession was on behalf of H and H's pledge to defendants was valid as H was a seller in possession after sale, and such possession need not be actual or personal possession and may be possession by an agent, warehouse-man or mercantile agent.

In *Cahn v. Pockett's Bristol Channel Co.*,<sup>7</sup> a seller of goods sent to the buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for price of the goods contained in the bill of lading, but the buyer never accepted the draft and retained the bill of lading, which he endorsed to sub-purchaser, who received it in good faith for valuable consideration and without notice of any right of the original seller in respect of the goods. *Held*, the buyer having become insolvent, that he was in possession of the bill of lading with the consent of the seller so that its transfer to the sub-purchaser gave the latter a good title to the goods and that the original seller had no right to stop the goods *in transitu*.

1. See notes under S. 22.

2. (1895) 2 Ch. 415, 73 L.J. 19, 64 L.J. Ch. 672.

3. *Framice v. Mc Gregor*, 27 P.R. 1902. See also *Haji Rahimbux v. Central Bank of India*, (1928) 56 Cal. 367.

4. (1895) 72 L.J. 266.

5. *Mitchell v. Jones*, (1905) 24 N.Z.L.R. 932.

6. (1937) 1 All E.R. 799.

7. (1899) 1 Q.B. 643 ; 68 L.J.Q.B. 515.



In *Worcester Works Finance Ltd. v. Cooden Engineering Co. Ltd.*, (1971) 3 All E.R. 708 C.A., in June 1966 the defendants sold a car to G for £525 against a cheque for this sum and delivered possession of the same. G was registered as the owner of the car. On 14th July G invoiced the car to the plaintiffs at a price of £645 and the plaintiffs paid the amount to G, and the plaintiffs on the same day, let the car on hire-purchase terms to M, who signed a delivery receipt acknowledging that he had taken delivery of the car. In fact M never took delivery of the car and never paid any of the instalment charges. In the meantime G's cheque to the defendants for the £525 was dishonoured, and in consequence, on 15th August the defendants, with G's consent, retook possession of the car which was still in G's custody. In order to conceal his fraud from the plaintiffs G kept up the payment of M's hire instalments but, after some months, stopped doing so, the balance of the hire-purchase price outstanding being then some £315. Subsequently the defendants let the car out on hire-purchase themselves and registered their interest with the Hire-Purchase Information Bureau. In consequence the plaintiffs came to know that the defendants had the car and brought an action claiming that the car was theirs and that they were entitled to £315 damages for conversion. It was held that the defendants had a good defence to the action by virtue of S. 25(1) of the (English) Sale of Goods Act, 1893 (corresponding to S. 30(1) of the Indian Act) for the following reasons : (i) G was a person who, having sold the car to the plaintiffs, continued in physical possession of it, and it was irrelevant whether the seller remained in possession as bailee or trespasser, or whether he was lawfully in possession or not ; having sold the car to the plaintiffs G continued in physical possession of it, albeit wrongfully, until it was retaken by the defendants ; (ii) the retaking of the car by the defendants constituted a delivery of the car by G since G had voluntarily acquiesced in the retaking ; it was furthermore a delivery under a 'disposition' in that a new interest in the car had been effectually created since it was clear that in retaking the car the defendants had waived any right to sue on G's cheque in consideration of his surrendering to them his interest in the car ; (iii) on the evidence it was clear that the defendants had retaken the car 'in good faith and without notice' of sale to the plaintiffs.

Lord Denning M.R. observed : The word 'notice' in S. 25(1) meant actual notice *i.e.* knowledge of the sale or deliberately turning a blind eye to it.

If there is a substantial break in the continuity of possession by the seller, *e.g.*, if he actually delivers over the goods to a purchaser who keeps them for a time and then the seller gets them back, S. 25(1) may not apply.

In *Trivedi Pranshankar v. Jayaguru Rughanath*,<sup>1</sup> there was sale by P to his brother L. Sale deed did not recite transfer of possession. P continued in possession as ostensible owner and sold property to J. It was held (*obiter*) that as between P and L principles of S. 30 would apply and L and those taking the title under L would be bound by sale to J.

In *Eastern Distributors Ltd. v. Goldring (Murphy Third Party)*<sup>2</sup> it was held : Section 25 (of the English Sale of Goods Act, 1893) does not apply unless the seller remains in possession as seller. In particular, S. 25 does

1. Civil S.A. No. 84 of 1851 decided on 2121.  
28-1-1952 ; Indian Digest (1952) p.

2. (1957) 2 All E.R. 525.



not apply to a person who, having sold a vehicle to a hire-purchaser company buys it back under a hire purchase agreement. This is because the character of the possession has changed.

Apparently, the word 'delivery' refers to 'goods' and the word 'transfer' to 'documents of title'. It is not the contract that is validated under the section, but the delivery or transfer under the contract.

In *Parbati Debi Bagla v. Lachminarayan Biswas*,<sup>1</sup> it was held: In order that S. 30 (1) may apply, possession by the seller must be *qua* seller. But if the jural relationship between the parties has altered and the possession is no longer that of a seller but of a hirer or bailee, operation of S. 30 (1) is excluded.

There need not be actual physical delivery of the goods sold to the buyer and delivery of the seller under a hiring agreement, but it is sufficient if it is established that after the sale the seller was holding under a separate hiring agreement.

Where the goods sold was a second-hand motor car, the failure to give notice of the hiring agreement to the Motor Vehicles Department does not affect the position.

**Section 30 (1)—Applicability—Seller need not be in actual physical possession of goods.**

**Hypothecation is not protected by the section as there is no delivery of possession or transfer of property right in goods.**

**Sale in pursuance of order of Court even if order is by consent of parties is not covered by S. 30 (1)—Sale by Receiver in pursuance of order of Court in suit by hypothecatee of goods.**

In *Pramatha Nath v. Maharaja Probirendra*,<sup>2</sup> it has been held: S. 30 (1) does not require that the seller must be in actual physical possession of the goods. It is enough that he should have such control over the goods as to transfer possession by making over a document of title. The section refers to possession not merely of goods but also of documents of title to goods. Possession of documents of title to goods is equated to possession of goods. Possession of documents of title enables the holder of the document to transfer title and possession by endorsement and delivery of the documents of title to goods.

S. 30(1) would come into play when only property right is transferred to the disponent. By hypothecation no interest or property is transferred to the hypothecatee. Hypothecatee has nothing more than equitable charge to have his claim realised by the sale of goods hypothecated. By a charge no interest in the property is transferred. The only right acquired by the chargeholder is the right to be paid out of the property charged. The hypothecatee has not only no interest in the goods hypothecated, he has not even the right to get possession of the goods. Having no right of property, not even right to possession, he is not entitled to any protection under S. 30(1) of the Act. The words 'other

1. A.I.R. 1957 Cal. 551.

2. A.I.R. 1966 Cal. 405.



disposition' must be construed *ejusdem generis* 'sale or pledge' i.e. transfer of property or right to property for consideration. In any event 'transfer' contemplated by the section must include some property right in the moveables, and hypothecatee gets no such property right in the moveables. Even if the word 'transfer' is construed to be referable to goods and not to documents of title in goods, S. 30 (1) is not applicable to hypothecation of goods by the seller in possession.

The word 'delivery' has been defined in the Sale of Goods Act as 'voluntary transfer of possession' and the word 'transfer' in the section must be construed to mean 'voluntary transfer also'. 'Delivery or transfer' pursuant to a decree or order of the Court is not voluntary and as such is not within the meaning of the section. Such a sale pursuant to an order of the Court is not protected by S. 30 (1) of the Act.

Sale by the Receiver pursuant to a decree or order of the Court is not a sale by the owner of the goods but by the Court and the position is not different if the decree or order is by consent of the parties. It is a sale by the Court all the same, as distinct from the sale by a party to the litigation. What S. 30 (1) contemplates is a sale by the seller in possession and the requirements of the section would not be satisfied even if the seller himself sells the property pursuant to a decree or order of the Court. Intervention of the decree or order of the Court creates a new and different jural relationship which would prevent the operation of section 30 (1) of the Act. In order to attract the provisions of section 30 (1) of the Act the sale must be by the seller in possession *qua* seller. But the sale effected by the seller pursuant to a decree or order of the Court is a sale by the judgment-debtor pursuant to and as directed by the decree or order of the Court. Such sale whether by the seller himself or by Receiver pursuant to a decree or order of the Court in a suit by hypothecatee of goods cannot be considered to be a sale by the seller in possession even if the Receiver is deemed to act as the agent of hypothecator to effect such sale because of change of jural relationship.

**(3) Sub-section (2)—disposition by buyer in possession after sale.**

Sub-section (2) relates to a case where a buyer having bought or agreed to buy, for instance on credit, obtains with the consent of the seller, possession of the goods or the documents of title to the goods and sells or pledges them to a *bona fide* purchaser or pledgee. The seller having parted with the possession of the goods puts the buyer in a position to deal with them as his own, and whatever claim he may have against the buyer is not available against a *bona fide* transferee. The delivery or transfer by such a buyer or by a mercantile agent for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods is to have effect as if such lien or right did not exist.

If the possession of the property is obtained by the buyer with the consent of the seller, it is immaterial that the consent was subsequently withdrawn<sup>1</sup> provided, of course, that the sub-buyer had no notice of the withdrawal of the consent. It would also seem that the consent need not

1. *Cahn v. Pockett's Bristol Channel*

*Steam Packet Co., supra.*



necessarily be free consent. Cases of that kind so far at any rate as documents of title are concerned appear to be dealt with by section 23. Even if the possession be obtained by fraud, provided it does not amount to larceny by a trick, the case seems to fall under this sub-section.<sup>1</sup>

Where the buyer obtains the documents in his own right this sub-section does not seem to apply. Thus, if the seller under a f. o. b. contract on shipping the goods, takes the mate's receipt in his own name, thereby reserving the power to obtain a bill of lading to his own order, and the buyer afterwards demands and obtains the bill of lading from the master, he does not obtain it with the consent of the seller.<sup>2</sup>

This section is clearly applicable only to persons who have either bought the goods or have agreed to buy the goods.<sup>3</sup>

There may arise three sorts of cases to which this sub-section would be applicable. First, where the buyer obtains possession of the goods before property had passed to him. An instance of that is when the seller by the contract reserves some special interest in the goods.<sup>4</sup> Another case may be where the goods are intended to be subject to the seller's lien, and he delivers them to the buyer for some purely temporary purpose on the undertaking of the buyer to redeliver them to the seller to keep in his possession until the price is paid.<sup>5</sup>

The second case is where the buyer has obtained possession of the documents of title before the property in the goods has passed to him. In *Cahn v. Pockett's Bristol Steam Packet Co.* cited above, the property in the goods never passed to the buyer by reason of the provisions of section 25 (3); but the buyer had obtained possession of the bill of lading with the consent of the sellers for, although it was the buyer's duty to return bill of lading as he did not accept the bill of exchange annexed to it, it was sent to him by the seller quite voluntarily. It was, therefore, held that the plaintiffs obtained a good title to the goods as against the original seller, for, "from the point of the *bona fide* purchaser, the ostensible authority based on the fact of possession is the same, whether there is property at the time of the disposition or not."<sup>6</sup>

The third case is where the buyer obtains the documents of title after the property in the goods has passed to him, but the goods are still subject to the seller's lien or right of stoppage in transit, or subject perhaps to some special interest reserved by the contract. Cases of this class would ordinarily fall under section 53 of the Act, with the difference that this sub-section provides for cases where the documents are improperly obtained, and protects the second purchaser who takes them in good faith and without notice of the original seller's right, while section 53 assumes that the documents are properly obtained.

1. See notes under section 27.

2. See *Craven v. Ryder*, (1815) 6 Taunt. 433, 16 R.R. 644, and cf. *Inglis v. Robertson*, (1898) A.C. 616.

3. See also *Ghasiram Agarwal v. The State*, A.I.R. 1967 Cal. 568 (F.B.) cited at p. 180 ante—Agreement between retailer and Government for distribution of food through fair price

shop agreement of sale and not agency.

4. See *Dodsley v. Varley*, (1840) 12 A. & E. 632, 54 R.R. 652.

5. See *Tempest v. Fitzgerald*, (1820) 3 R. & Ald. 680, 22 R.R. 526.

6. Per *Collins*, L.J. (1899) 1 Q.B. at p. 658.



In *Metal Traders Inc. Ltd. v. The Jeypor Sugar Company Ltd.*, (1970) 1 An. W.R. 107<sup>1</sup>—it was held : The fact that goods are despatched F.O.B. in a ship chartered by the buyer or that the goods are shipped on account of the buyer is not necessarily conclusive of the property passing from the seller, provided the seller by his unequivocal act indicates his intention not to part with title in the goods. If the purchaser from the buyer refrains from making enquiries which would have certainly revealed the true state of affairs, he cannot plead good faith and want of notice.

It is necessary that there should be binding agreement to buy and not a mere option to buy. But the agreement may be conditional.<sup>2</sup> In this case the plaintiff entered into agreement with T to sell him "a plot of land for £584, subject to purchaser's solicitors approval of title and instructions" and in consideration of the above transactions of the plaintiff agreed to sell to T a motor car for £300, both sales to be carried out simultaneously. T subsequently got possession of the car 'on loan' from plaintiff and without paying for it sold it to the defendant who was a *bona fide* purchaser. Thereafter T's solicitor disapproved of the restrictive condition in connection with the land. Plaintiff sued to recover the car from the defendant. It was held that T had agreed to buy the car under a conditional contract and so under a contract of sale within the meaning of the Act, and no mere option to buy.

When goods are sold 'on approval' or 'on sale or return' the buyer has an option to buy, and so long as the option lasts there is no agreement to buy. But there is a sale when the option is exercised or is deemed to be exercised *e.g.* by signification of acceptance or by doing an act adopting the transaction or when no time is fixed, after the expiration of a reasonable time (*vide S. 24*). In such cases after the exercise of option the property in the goods is transferred to the buyer and he can always transfer a good title to *bona fide* transferee irrespective of section 30(2).<sup>3</sup>

#### **Meaning of "consent"—Effect of fraud or false representation—Agent's consent.**

In *Central National Bank v. United Industrial Bank*,<sup>4</sup> certain shares, property of one R, defendant No. 2, were agreed to be sold by R to D. R sent these shares along with the relative transfer deeds to the defendant bank with instruction to deliver over the share certificates and the transfer deeds to the purchaser against payment of the entire consideration money settled between R and D. The defendant bank directed one of its officers P to see D at his office and hand over to him the shares after receiving from him a pay order for the sum of Rs. 38,562-8-0, the amount of consideration, signed by the Punjab National Bank. P went to the office of D and there D took fraudulently the share certificates and the transfer deeds from P without giving him the pay order. D went to the office of the plaintiff bank and pledged the shares with it taking an

1. For facts of this case, see p. 465 *ante*.

2. *Marten v. Whale*, (1917) 2 K.B. 480.

3. See notes under S. 24. See also *Kempler v. Bravingtons*, (1925) 41 T.L.R. 519; *Bradley v. Ramsay & Co.*, (1912) 106 L.T. 771; *Weiner v.*

*Harris*, (1910) 1 K.B. 285; *Weiner v. Gill*, (1906) 2 K.B. 574; *Kirkham v. Attenborough*, (1857) 1 Q.B. 201; *Truman v. Attenborough*, (1910) 26 T.L.R. 601.

4. A.I.R. 1954 S.C. 181.



advance of Rs. 29,000 in terms of an agreement which was previously arrived at between them. D also executed a promissory note for the said amount in favour of the plaintiff. D was not heard of thereafter. A complaint was lodged with the police on behalf of the defendant bank. The cheque for Rs. 100 which was given by D to the plaintiff bank for opening an account for the first time in his name with the plaintiff bank was dishonoured and the plaintiff bank thereupon wrote a letter to D demanding payment of the loan at once and threatening to sell the shares in case of default. As no reply came from D, the plaintiff sold these shares through a broker who took delivery of those shares and gave the plaintiff a cheque of Rs. 16,000 in payment of the price. The payment of the cheque, however, was stopped and the police, who had already taken the matter in hand, took possession of the shares. One Shaw alleged accomplice of D was prosecuted but was acquitted. The defendant bank, who had paid the full price of these shares to R, then presented an application to the magistrate, praying that the shares might be returned to it on the ground of its being owner thereof. On getting information of this application, the plaintiff bank instituted a suit, the allegation in substance being that the plaintiff being the pledgee of shares was entitled in law to the possession thereof. R having been paid off by the defendant bank, had no further interest in the litigation, this now being entirely between the two banks. It was *held* :

(1) The word "consent" as used in section 30(2) of the Sale of Goods Act, 1930, means "agreeing on the same thing in the same sense" as defined in section 13 of the Indian Contract Act. There is no definition of "consent" in the Sale of Goods Act itself, but section 2(15) of the Act definitely lays down that the expressions used and not defined in the Act, but which are defined in the Indian Contract Act shall have the same meaning as has been assigned to them in the latter Act.

(2) If an innocent purchaser or pledgee obtained goods from person in possession thereof, whose possessory right is defeasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the right of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt but so long as it is not determined it is sufficient to enable him to create title in his favour of an innocent transferee for value without notice.

(3) The position, however, is entirely different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person. Thus A might obtain possession of the goods from the owner by falsely representing himself to be B. In such cases, the owner can never have consented to the possession of goods by A ; the so-called consent being not a real consent is a totally void thing in law.

The position, therefore, is that when the transfer of possession is voidable merely by reason of its being induced by fraud which can be rescinded at the option of the owner, the consent which followed false representation is a sufficient consent within the meaning of section 30(2) of the Sale of Goods Act. But where the fraud induced an error regarding the identity of the person to whom or the property in respect of which possession was given, the whole thing is void and there is no consent in



the sense of an agreement of two persons on the same thing in the same sense.

(4) It does not make any difference in the application of the principles stated above if the fraud or deception, practised by a person in obtaining possession of goods from the owner, is of such a character as to make him guilty of criminal offence. What section 30(2) contemplates is that the buyer, to whom the property in the goods sold has not passed as yet, must obtain possession of the goods with the consent of the seller before he can give a title to an innocent purchaser or pledgee. There can be no dispute that to establish consent of the owner of the goods, it is his state of mind that is the only material thing for consideration and not that of the receiver of goods. Even if the owner was induced to part with the goods by fraudulent misrepresentation, he must yet be held to have consented to give possession; and the fact that the receiver had a dishonest intention or a preconcerted design to steal or misappropriate the goods and actually misappropriated them, may make him liable for a criminal offence, but consent of the owner actually given cannot be annulled thereby. In order that a fraudulent receiver of goods must be punished criminally, the material thing is his dishonest intention; but that is altogether immaterial for the purpose of determining whether there was consent on the part of the owner of the goods under the Sale of Goods Act.

(5) Whether there is consent or not has to be proved as a fact in accordance with the principles of the law of contract and when it is proved to exist, its existence cannot be nullified by application of any rule of criminal law. On the facts and circumstances of the case, consent of the owner for possession was not proved.

(6) The consent of a person, who is acting as agent of the owner, would be as effective as the consent of the owner himself.

In *D.F. Mount Ltd. v. Jay & Jay (Provisions) Co. Ltd.*, (1959) 3 W.L.R. 537, it was held: Section 25 (2) of the (English) Sale of Goods Act, 1893 [corresponding to S. 30 (2) of the Indian Sale of Goods Act, 1930] does not apply only in those cases where the buyer transfers the same documents as that of which he is in possession with the consent of the seller. The object of the sub-section is to protect an innocent person in his dealing with a buyer who appears to have the right to deal with the goods in that he has been allowed by the seller to be in possession of the goods or documents of title relating to them. In such a case the sub-section provides that any transfer of the goods or documents of title by the buyer to a person acting in good faith and without notice of any want of authority on the part of the buyer shall be as valid as is expressly authorised by the seller.

**Section 30(2)—Contract of sale—Buyer obtaining delivery of goods not in terms of contract but by practising fraud upon agent of seller—Property so obtained pledged with a bank having no notice of fraud—Bank obtains indefeasible title to the goods pledged.**

In *Mohd. Sherif v. Official Liquidator*, (A.I.R. 1964 Kerala 135), under the terms of a contract of sale the buyer had to pay 65% of the price on arrival of the goods and a bill was drawn for that purpose and though



advance of Rs. 29,000 in terms of an agreement which was previously arrived at between them. D also executed a promissory note for the said amount in favour of the plaintiff. D was not heard of thereafter. A complaint was lodged with the police on behalf of the defendant bank. The cheque for Rs. 100 which was given by D to the plaintiff bank for opening an account for the first time in his name with the plaintiff bank was dishonoured and the plaintiff bank thereupon wrote a letter to D demanding payment of the loan at once and threatening to sell the shares in case of default. As no reply came from D, the plaintiff sold these shares through a broker who took delivery of those shares and gave the plaintiff a cheque of Rs. 16,000 in payment of the price. The payment of the cheque, however, was stopped and the police, who had already taken the matter in hand, took possession of the shares. One Shaw alleged accomplice of D was prosecuted but was acquitted. The defendant bank, who had paid the full price of these shares to R, then presented an application to the magistrate, praying that the shares might be returned to it on the ground of its being owner thereof. On getting information of this application, the plaintiff bank instituted a suit, the allegation in substance being that the plaintiff being the pledgee of shares was entitled in law to the possession thereof. R having been paid off by the defendant bank, had no further interest in the litigation, this now being entirely between the two banks. It was *held* :

(1) The word "consent" as used in section 30(2) of the Sale of Goods Act, 1930, means "agreeing on the same thing in the same sense" as defined in section 13 of the Indian Contract Act. There is no definition of "consent" in the Sale of Goods Act itself, but section 2(15) of the Act definitely lays down that the expressions used and not defined in the Act, but which are defined in the Indian Contract Act shall have the same meaning as has been assigned to them in the latter Act.

(2) If an innocent purchaser or pledgee obtained goods from person in possession thereof, whose possessory right is defeasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the right of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt but so long as it is not determined it is sufficient to enable him to create title in his favour of an innocent transferee for value without notice.

(3) The position, however, is entirely different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person. Thus A might obtain possession of the goods from the owner by falsely representing himself to be B. In such cases, the owner can never have consented to the possession of goods by A ; the so-called consent being not a real consent is a totally void thing in law.

The position, therefore, is that when the transfer of possession is voidable merely by reason of its being induced by fraud which can be rescinded at the option of the owner, the consent which followed false representation is a sufficient consent within the meaning of section 30(2) of the Sale of Goods Act. But where the fraud induced an error regarding the identity of the person to whom or the property in respect of which possession was given, the whole thing is void and there is no consent in



menthol crystals were consigned by the firm of M/s. Harshadrai Mohanlal & Co., to self and entrusted to the then G.I.P. Railway for carriage from Thana in Bombay to Okhla (Delhi) under the railway receipts. The said firm endorsed the relevant railway receipts in favour of Morvi Mercantile Bank Ltd. against an advance of Rs. 20,000 made by the Bank to the firm. The said consignment did not reach Okhla and the railway failed to deliver the boxes. Thereupon the Bank as the endorsee of the said railway receipts for valuable consideration, filed a suit for the recovery of Rs. 35,500 being the value of the goods contained in the said consignments as damages. The Supreme Court *by majority* allowed a decree for Rs. 35,500 observing, "The law on the subject, as we conceive it, may be stated thus: An owner of goods can make a valid pledge of them by transferring the railway receipt representing the said goods. The general rule is expressed by the maxim *nemo dat quod non habet* i.e. no one can convey a better title than what he had. To this maxim, to facilitate mercantile transactions, the Indian law has grafted some exceptions, in favour of *bona fide* pledges by transfer of documents of title from persons, whether owners of goods or their mercantile agents who do not possess the full bundle or rights of ownership at the time the pledges are made. To confer a right to effect a valid pledge by transfer of documents of title relating to goods as owners of the goods with defects in title and mercantile agents and to deny it to the full owners thereof is to introduce an incongruity into the Act by construction. On the other hand the real intention of the Legislature will be carried out if the said right is conceded to the full owner of goods and extended by construction to owners with defects in title or their mercantile agents."<sup>1</sup>

#### (4) Hire-purchase agreements.

A hirer under a hire-purchase agreement who has merely an option to buy, and is not under a binding agreement to buy the goods, would not be a person who has "agreed to buy the goods" within the meaning of this section. In *Belsize Motor Supply Company v. Cox*<sup>2</sup>, a motor car was delivered on hire for 24 months at a monthly payment of hire at £15-2-2., £50 to be paid in advance, and each subsequent payment to be made in advance on specified dates. If the hirer should on or before the expiry of 24 months be desirous of purchasing the vehicle, he could do so by making the amount of hire paid equal of £424-11-6. There were certain restrictions as to reselling, selling etc., and in case of breach it was made lawful for the owner to take possession of the vehicle, and terminate the agreement. During the currency of the agreement there being a sum due and unpaid on account of hire, the hirer, without the consent of the owner, pledged the car to a pledgee who took it in good faith and without notice of the owner's rights. The owner on coming to know of this demanded the car from the pledgee who refused to return it. At the date of the demand and refusal there was sum of £59-9-0 due and unpaid on account of hire. *Held*, that the effect of the agreement was that, having paid 24 instalments the hirer had an option either to become purchaser of the car or to return it and claim back the £50 paid in advance and the agreement did not impose any obligation on the hirer to purchase and so he was not a person who had "agreed to buy" within the meaning of section 25 of the English Act. It was *also held* in that case that the pledgee had an interest in the car, and

1. Case-law and provisions of relevant statutory law on the subject reviewed.

2. (1914) 1 K.B. 244.



the railway receipt was taken in the name of the consignee it was not sent to the consignee but was sent to a bank along with the bill for 65% of the price and the railway receipt was to be received by the consignee after retiring the bill and the consignee obtained delivery of the goods from the railway not by retiring the bill and producing the railway receipt but by giving a letter of indemnity to the railway. It was *held*: The property had not passed to the buyer and it was really by a tortious act that he came into possession of the goods. The fact that the railway receipt was taken in the name of the consignee did not show that the property in the goods passed as soon as the goods were appropriated and handed over to the railway.

**Section 30(2)—Contract obtained by fraud—Rights of defrauded party—Rescission of contract—Notice to agent of defrauding party—Scope of S. 19 of Contract Act and S. 30, Sale of Goods Act, 1930—Applicability of S. 86, Trusts Act—Insolvency of defrauding party pending suit by defrauded party—Suit is not barred—Scope of S. 28(2), Provincial Insolvency Act.**

In *Official Receiver, Jhansi v. Jugal Kishore Lachhi Ram Jaina*, (A.I.R. 1963 All. 459 F.B.) C at Jhansi offered to send goods to P at Jalna in Hyderabad to be sold through P. P agreed. C sent two railway receipts by post simultaneously with a Hundi for Rs. 20,000 through Central Bank of India to P. P on presentation of the Hundi declined to pay that much amount on the ground that the goods purporting to be covered by the railway receipts could not be worth more than Rs. 15,000. The Central Bank communicated that fact to C who directed the Bank to accept Rs. 15,000, which, on demand, P paid to the Jalna Branch of the Bank. The Jalna Branch transferred that amount to the Jhansi Branch, where it was credited to C's account. In the meantime P discovered that the railway receipts did not cover any goods and directed to Jalna Branch of the Bank to have the payment of Rs. 15,000 paid by it to be withheld. The Jhansi office on information from Jalna office withheld the amount of Rs. 15,000 with itself. The question arose whether P or C had lawful title to the said sum of Rs. 15,000. It was *held*: Section 30 (2) of the Sale of Goods Act has been enacted to protect an innocent purchaser who has received the property in good faith and without notice of lien or other right of the original seller in respect of the goods, which admittedly was not the position of C. This provision is obviously based upon considerations of public policy and the larger interests of society. The considerations which led to the enactment of S. 30 (2) of the Sale of Goods Act are wholly different from those which led to the enactment of S. 19 of the Contract Act. No considerations of public policy are involved in the enactment of the latter section. It is only when the deceived party insists on the performance of the contract by the defrauding party that the latter can insist on its rights in the contract and not otherwise. Immediately a contract is rescinded by the defrauded party on the ground of fraud, it is rendered void *ab initio* i.e. right from the inception.

**Sections 30, 53—Endorsement of railway receipt in favour of a bank as a pledge for loan advanced—Bank can sue for recovery of full damages from the Railway authorities.**

In *Morvi Mercantile Bank Ltd. v. Union of India, through the General Manager, Central Railway, Bombay*,<sup>1</sup> 6 boxes alleged to have contained

1. A.I.R. 1965 S.C. 1954. Also cited at pp. 28, 50 ante.



contract, and not on the term as used by the parties. The test to be applied in ascertaining the nature of the transaction is whether the agreement imposes an obligation on the hirer to buy though the consideration is payable by instalments (in which case it will be an agreement to buy) or whether the hirer is not bound to pay the full amount of the purchase money or can terminate the hiring at any time by delivering the chattel to the other party (in which case it will be an agreement to hire). The fact that the property is not to pass until the whole amount is paid or that the owner has the option of putting an end to the agreement and recover possession of the chattel does not conclusively determine the nature of the transaction. In *Lewis v. Thomas*<sup>1</sup>, the hirer had the option of terminating the hiring at his own costs after not less than one-half of the total amount of the instalments had been paid. *Held*, there was no agreement to buy as the hirer had reserved to himself the right to determine the contract and so the case came within the principle of *Helby v. Matthews*, *supra*.

In determining whether property has passed to the hirer it is important to consider in the first place whether there is an agreement to hire (in which case the property would not pass) or an agreement to buy. If there is an agreement to buy, then the next question is, what is the intention of the parties as to the passing of property which is to be ascertained from a consideration of the whole contract. When goods are delivered under an agreement to buy it is presumed that the intention is that property should pass. But this presumption could be rebutted by evidence of a contrary intention to be adduced from the agreement itself taken as a whole. In *McEntire v. Crossley*<sup>2</sup>, there was an agreement for letting out a gas engine at a rent to be paid by instalments amounting in all to £240 with an option to the lessee to purchase the engine upon paying in full. Until payment in full, the engine was to remain the sole and absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments or if the lessee should become bankrupt the lessor might elect to recover the full balance remaining due or instead to resume possession of the engine and sell it. The lessee after paying the first instalment became bankrupt. It was *held* that under the construction of the agreement the property never passed to the lessee but remained in the lessors. In *Cole v. Nandlal*<sup>3</sup>, there was an agreement to sell on a hire-purchase system nine lorries which provided that the lorries were not to be considered as sold until the final payment had been received, the consideration being payable by certain instalments. It was *held* that the property passed. In *Bhimji v. Bombay Trust Corporation*<sup>4</sup>, property was held to pass under the old S. 78 of the Contract Act though the agreement provided "pending the currency of the agreement the plaintiff was to hold the car as bailee of the defendant company, and was not to have any property or interest as purchaser in it until he exercised his option of purchasing."

1. (1919) 1 K.B. 319. See *Grande Maison D' Automobile v. Beresford*, (1909) 25 T.L.R. 522, hirer with an option to purchase; *McKenzie & Co. v. Muhammad* (1929) 4 Lah. 510; *Edwards v. Vaughan*, (1910) 26 T.L.R. 545.

2. (1895) A.C. 457; *Ex-parte Rawlings*,

(1888) 22 Q.B.D. 193; Property did not pass until all the instalments were paid.

3. (1924) 26 Bom. L.R. 880; case-law discussed. See *Maung Ba Oh v. Motor House Co.*, (1929) 7 Rang. 431, sale with a penalty clause.

4. (1930) 32 Bom. L.R. 64, 79.



that therefore the measure of damages was not full value of the car but was only the value of the owner's interest therein, *i.e.* the amount of hire and purchase money remaining unpaid.

In *Helby v. Matthews*<sup>1</sup>, the hirer of a piano agreed to pay rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire if the hirer punctually paid all the monthly instalments, the piano should become his sole and absolute property. The hirer received the piano, paid a few of the instalments, and pledged it with a pawn-broker as security for an advance. *Held*, that upon a true construction of the agreement, the hirer was under no obligation to buy, but had an option either to return the piano or to become its owner by payment in full. So he had not "agreed to buy" within the meaning of the section and the owner was entitled to recover the goods from the pawn-broker.

On the other hand, in *Lee v. Butler*<sup>2</sup>, the hirer of furniture agreed to pay rent in two instalments and upon such payment the furniture etc. would become the absolute property of the hirer. The agreement also provided that no property or interest in the said furniture, goods etc. other than as tenant should rest in the hirer until the whole of the rent had been actually paid as provided. The hirer, before the last payment had accrued due or been paid, sold and delivered the furniture to the defendant who received them *bona fide* etc. *Held*, that the hirer had agreed to buy and so the purchaser from him got a good title. "Here there was an agreement to buy. The purchase money was to be paid in two instalments, but as soon as the agreement was entered into, there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment."<sup>3</sup>

In *Whiteley v. Hilt*,<sup>4</sup> the hire-purchase agreement was held to be assignable, but the assignee could only retain possession of the chattel upon the terms of the contract. There the hirer of a piano had an option to purchase it by payment of a certain number of quarterly instalments, but was to remain a bailee only until the last instalment was paid, the hirer having the right at any time to terminate the agreement by returning the piano. The hirer paid several instalments and then sold the piano to the defendant. In an action of detinue and conversion the defendant paid into court the amount of the remaining unpaid instalments. *Held*, that the defendant acquired the right of the hirer under the agreement before anything had been done to terminate it, no instalment being then in arrear, and that the measure of damages was the amount of the unpaid instalments, and that the plaintiff was not entitled to recover the piano or its full value, but only the amount paid into court. The sale by the hirer was held, under the circumstances, not to amount to a repudiation of the contract of hiring.

Whether the contract between the parties amounts to an agreement to buy or only an option to purchase depends on the construction of the

1. (1895) A.C. 471.

2. (1893) 1 Q.B. 318.

3. Per Lord Herschell in *Helby v.*

*Matthews*, *supra* at p. 478.

4. (1918) 2 K.B. 808.



**(6) Disposition by mercantile agent acting for the seller or the buyer.**

A disposition by a mercantile agent of the buyer or the seller who has possession of the goods stands on the same footing as a disposition by such buyer or seller himself and a person dealing with him in good faith and without notice of the other party's rights is as much protected as if he had dealt so with the principal himself. But this protection extends only to the cases where the agent dealt with is mercantile agent as defined in section 2, clause 9, and does not extend to the case of any agent who does not answer that description.<sup>1</sup> Even a mercantile agent who obtains possession of the goods otherwise than as such agent or dispose of the goods otherwise than while acting as agent for such seller or buyer cannot give a good title to a dealer with him even if he is a dealer in good faith and without notice of the nature of his possession.<sup>2</sup> The only fact that estops the real owner of the goods from claiming them from a subsequent disponent from a mercantile agent is that he voluntarily passes possession to him as such agent, for once he has made over possession to him as such he cannot question his authority which in the case of a mercantile agent is incidental to his profession as such and does not require any special conferment.

1. *Cole v. N.W. Bank*, (1857) L.R. 10 C.P. 354 (372-373).      2. *Ibid.*



A hirer under a hire-purchase agreement is competent to assign his interest, in the absence of a contract to the contrary.<sup>1</sup> Where a hirer has pledged or sold the article before the termination of the contract of hiring, the court may, in its discretion, direct the purchaser or pledgee to pay the owner the amount of hire unpaid, instead of returning the chattel.<sup>2</sup>

Where the hirer is under the contract bound to keep the chattel in repair, he has implied authority to employ a repairer who will ordinarily have a lien for repairs on the article as against the owner,<sup>3</sup> except in cases where he has had notice of the hirer's want of authority.<sup>4</sup> A hire-purchase agreement does not become a sale until the conditions of the agreement are fulfilled.<sup>5</sup>

In *Marten v. Whale*<sup>6</sup>, where B agreed to buy a car if his solicitor approved and having obtained possession of the car sold the same to C but the solicitor consequently disapproved of the transaction it was held that the title had passed to C, the buyer.

See also now the provisions of the *Hire Purchase Act, 1972*, with reference to which the above decisions should be read.

#### **(5) Attachment and sale in execution of decree—Auction-purchaser.**

In *Maung Aye Maung v. A Scott and Co. & others*,<sup>7</sup> the question of law referred to a Full Bench was in the following terms :

If a decree-holder attaches and sells in execution of a decree against a judgment-debtor (the sale proclamation saying that the right, title and interest only of the judgment-debtor is being sold) moveable property and such property is subsequently recovered by its true owner from the auction-purchaser, is the auction-purchaser entitled to recover from the decree-holder the money which he has paid on the ground that there has been a total failure of consideration ?

The facts of the case were as follows :

The first defendants, Messrs A. Scott & Co., delivered to Saw Yu Hoe, defendant (2), an engine upon a hire-purchase agreement ; by the terms of the agreement the engine was to remain the property of the vendors until the purchase price was paid in full. One W. Lin Mun obtained a money-decree against Saw Yu Hoe and purported in execution thereof to attach this engine which was in the judgment-debtor's possession but was the property of the first defendants Messrs Scott & Co. It was then ostensibly put up for sale and purchased by the appellant Maung Aye Maung. When the appellant discovered that the engine which he thought he had bought and for which he had paid the purchase price belonged to Messrs Scott & Co. and that he was obliged to return it to them, he sought to recover the purchase price from some one or other of the defendants.

*Held*, that the answer to the question raised in the reference must be given in the affirmative.

1. *Whiteley v. Hilt*, (1918) 2 K.B. 808.

2. *In re Wait*, (1927) 1 Ch. 606, C.A.

3. *Green v. All Motors Ltd.*, (1917) 1 K.B. 625 ; *Keene v. Thomas*, (1905) 1 K.B. 36.

4. *Albermale Supply Co. v. Hind & Co.*,

(1928) 1 K.B. 307.

5. *Gopal v. Sorabji*, (1904) 6 Bom. L.R. 871.

6. (1917) 2 K.B. 480.

7. A.I.R. 1940 Rangoon 1, p. 2.



the vendor undertakes that they shall be delivered in a reasonable time..... If I buy a horse of you in another man's field, it is part of the contract that if I go for the horse I shall have it."<sup>1</sup>

In *Firm Birdhi Chand v. Ramdeo*,<sup>2</sup> it was held : In a contract for sale of goods, unless otherwise agreed, delivery of goods and payment of price are concurrent conditions and where the plaintiff in a suit on breach of contract happens to be a seller, he must allege and prove that he was ready and willing to deliver the goods.

As regards the buyer in order to prove that he was ready and willing to perform his part of the agreement, it is not necessary for him to show that he actually made a tender of the price. It is sufficient if he was able to perform his part of the contract. As regards the seller also all that he has to show is that he had goods at his disposal and could easily deliver the same. Under S. 35 of the Act also, in the absence of an express contract the seller of the goods is not bound to deliver them until the buyer applies for delivery.

The contract of sale may modify the terms. In a sale on credit, the title and the right to immediate possession are transferred<sup>3</sup> though payment is postponed. Where the buyer has put an end to the agreement and has repudiated his obligation, the seller is under no duty to deliver.<sup>4</sup> Where the seller does not give facilities to the purchaser in making delivery, he cannot maintain an action for the price of goods sold.<sup>5</sup>

The section must be read subject to the provisions of Chapter V, *post* and sections 7 and 8 *ante*.

In *Ian Stach Ltd. v. Baker Bosley Ltd.*<sup>6</sup>, it was held : In the case of F.O.B. contract, an ordinary F. O. B. contract providing for a period of shipment financed by a confirmed banker's credit, the *prima facie* rule is that the credit must be opened at the latest by the earliest shipping date.

A letter of confirmed credit constitutes a direct undertaking by the banker that the seller, if he presents the documents as required in the required time, will receive payment; and where there is provision that under a contract a confirmed credit is to be provided, then, that undertaking from the banker should be obtained before the seller embarks upon those operations which lead directly to the performance of his obligations under the contract.

## (2) In accordance with the terms of the contract of sale.

The duties of either party are regulated by the terms of the contract. Thus the general obligation to deliver may be modified by the terms of the contract. As Lord Blackburn says, there is no rule of law to prevent

1. *Buddle v. Green*, *supra*.

2. I.L.R. (1969) 19 Raj. 481 : 1970 Raj. L.W. 148. See Yearly Digest 1970, Colmn. 1007 ; A.I.R. 1950 P.C. 90 and A.I.R. 1927 Lah. 176 followed.

3. *Bloxam v. Sanders*, (1825) 107 E.R. 1309 ; 28 R.R. 519; *Staunton v. Wood*, (1851) 117 E.R. 1025, 83 R.R. 641.

4. *Chunnamal v. Mool Chand*, A.I.R. 1928 P.C. 99 : 9 Lah. 510.

5. *Smith v. Chance*, (1819) 106 E.R.

540 ; 21 R.R. 485.

6. (1958) 2 W.L.R. 419. See also *W.J. Alan Ltd. v. El. Naser Co.*, (1972) 2 All E.R. 127 C.A.—confirmed letter of credit established ; letter of credit ordinarily operating as conditional payment ; payment absolute and buyer discharged from liability when letter of credit honoured by confirming bank.



the parties from making whatever bargain they please,<sup>1</sup> or to waive their rights of enforcing or demanding reciprocal performance against or from the other.<sup>2</sup> Thus, where the seller gives the buyer a delivery order for the goods it may be a condition that the order should be given up to the warehouse-man before the buyer can get the goods.<sup>3</sup>

“As sale is a consensual contract, the parties may by agreement make the price payable how, when, and where they please ; and when the time of payment arrives, the parties may agree that the debt shall be discharged by any means which amount to an accord and satisfaction.”<sup>4</sup> Delivery, acceptance and payment all must conform to the terms of the contract of sale.

**\*32.** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

#### Synopsis

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|--|---|
| (1) <i>Payment and delivery concurrent conditions.</i> | (3) <i>Unless otherwise agreed.</i>     |
| (2) <i>Readiness and willingness—evidence.</i>         | (4) <i>Concurrent conditions.</i>       |
|  | (5) <i>Delivery at seller's option.</i> |
|  | (6) <i>C.I.F. contract.</i>             |

#### (1) Payment and delivery concurrent conditions.

If A and X agree that the performance of their respective promises shall be simultaneous, or at least each shall be ready and willing to perform his promise at the same time, then the performance of each promise is conditional on his concurrence of readiness and willingness to perform, and the conditions are *concurrent*.

“Where two acts are to be done at the same time as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act ; and this particularly applies to all cases of sale.”<sup>5</sup> The present section is based on this well-established rule.<sup>6</sup>

The general principle laid down in section 61 of the Indian Contract Act, 1872, is that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise'. A contract of sale is an example of a contract consisting of reciprocal promises to be simultaneously performed, and, therefore, the seller is not bound to

1. *Calcutta Co. v. De Mattos*. (1863) 32 L.J.Q.B. at p. 328.  
 2. *Sooltan v. Schillers*, 4 Cal. 252.  
 3. *Bartlett v. Holmes*, (1853) 13 C.B. 658.  
 4. *Chalmers, Sale of Goods Act*, 1893, 16th Edn., p. 145. See also *Att. Gen. v. Pritchard*, (1928), 97 L.J. K.B. 561 cited under S. 55 *post*.

\*Analogous law

Section 28 of the English Sale of Goods Act, 1893, which is the same as section 32 of the Indian Act.  
 5. *Notes to Pordage v. Cole*, (1669) 1 *Williams' Notes to Saunders' Reports*, 319 (ed. 1871), p. 556.  
 6. See *Chengravelu v. Venkanna*, A.I.R. 1925 Mad. 971 : 86 I.C. 299.



deliver, if the buyer is not ready and willing to pay the price on delivery,<sup>1</sup> and conversely, the buyer is not bound to pay the price and is not liable to an action for failure to accept the goods, if the seller was not ready and willing to let the buyer have the goods on demand.<sup>2</sup>

Repudiation of contract depends on an express or implied term. The contract must be capable of the interpretation that it was the intention of the parties that the failure to pay for any one delivery would mean a breach of the whole contract. When the contract is not capable of such interpretation and when the seller himself has not delivered the goods in terms of the contract, he is not entitled to treat the buyer's failure to pay as repudiation of the contract particularly when there is no evidence either that any demand for payment had been made on the buyer or that the bill, if any, was presented for payment.<sup>3</sup>

In *Pulgaon Cotton Mills v. Gulabai*,<sup>4</sup> the plaintiff under a contract was to take delivery of the goods on a certain date. He filed an application for insolvency before that date. The interim receiver who was appointed in the insolvency proceedings also did not act immediately or even within a reasonable time to adopt the contract of the plaintiff. It was *held* that on the facts, at no time was the plaintiff ready and willing to fulfil his part of the contract, that the insolvency was equivalent to a notice by the insolvent that he did not intend to perform his obligation, and that the conduct of the plaintiff and the interim receiver entitled the defendants to treat the contract as abandoned by the plaintiff. Inordinate delay in such cases may well be taken to be evidence of the abandonment of the contract, dispensing with express rescission by notice or agreement.

In *Sujanmal v. Radhey Shyam*, A.I.R. 1976 Raj. 98, it was held : It is manifest that a contract of sale, always involves reciprocal promises, the seller promising to deliver the goods sold and the buyer to accept and pay for them. In the absence of a contract to the contrary they are to be performed simultaneously and each party should be ready and willing to perform his promise before he can call upon the other to perform his. The seller owes to the buyer as onerous a duty to deliver the goods, as the buyer owes to the seller the duty to accept and pay for them. When the plaintiff in a suit for breach of contract happens to be a buyer he must prove that he applied for delivery and he was ready and willing to pay the price of the goods (1970 Raj L.W. 148 cited at p. 525 *ante* relied on).

In *Sinason Teicher Corpn. v. Oilcakes, etc. Co.*, the Arbitration Tribunal held : "In so far as it is a question of fact we find, and so far as it is matter of law we hold, that the buyers' obligation was to provide a bank guarantee within a reasonable time before October 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952." The tribunal found further that even if the obligation was simply to provide the guarantee within a reasonable time in all the circumstances, the guarantee was provided within that time. The sellers contended that the guarantee had not been given within a reasonable time, and asked for the case to be remitted for a finding on that point. It was *held* that as the contract was silent as to the time when the guarantee should be issued, the buyers' obligation in law was to provide

1. *Morton v. Lamb*, (1797) 7 T.R. 125.  
4 R.R. 395.

2. *Dixon v. Fletcher*, (1837) 3 M. & W.  
146, 49 R.R. 543.

3. *Rohtas Industries Ltd. v. Maharaja of Kasimbazar China Clay Mines*, I.L.R. (1951) 1 Cal. 420.

4. A.I.R. 1953 Nag. 345.



it within a reasonable time before the first date for shipment, viz. Oct. 1, 1952 : accordingly, there was no error of law in the conclusions of the tribunal, and the appeal should be dismissed.<sup>1</sup>

A direction to pay the price of the goods within a specified period does not take the right of the purchaser to demand delivery of goods at the time of payment. If the plaintiff (purchaser) gives up a valuable right under the Sale of Goods Act, 1930, and makes payment in advance, he cannot hold the person at whose bidding he entered into a transaction of sale responsible if the goods are not delivered.<sup>2</sup>

## (2) Readiness and willingness—evidence.

The general rule laid down in this section thus is that the obligation of the seller to deliver and that of the buyer to pay are implied concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance, or offer to perform, or averting readiness and willingness to perform his own promise. And the words “ready and willing” imply, not only the disposition, but the capacity to do the act.<sup>3</sup>

Under the English law it seems that in an action for non-delivery, the buyer need not give evidence that he was ready and willing to pay, till the seller shows he was ready to deliver.<sup>4</sup> “The averment of the plaintiff’s readiness and willingness to perform his part of the contract will be provided by showing that he called on the defendant to accomplish his part.” Conversely, in an action for non-acceptance, the seller need not prove any tender of delivery. It is enough to show that he was ready and willing to deliver.<sup>5</sup> The Indian Courts, however, in dealing with cases under section 51 of the Indian Contract Act, have always insisted upon the plaintiff to go further and give some affirmative evidence that he was ready and willing to perform his part of the contract before he could succeed.<sup>6</sup> The Indian Sale of Goods Act being in substance a part of the Indian Contract Act, the same rule as under section 51 of the latter Act seems to be implied under section 32 of the former Act.

The seller need not have the goods in his actual custody or possession. It is sufficient if he has such control of them that he can cause them to be delivered ;<sup>7</sup> and similarly the buyer is ready and willing to pay if he has made proper arrangements for making payment.<sup>8</sup> It follows from this

1. (1954) 2 All E.R. 497.

2. *Loon Karan Sohanlal v. Firm John and Co.*, A.I.R. 1967 All. 308. Per Lord Abinger K.B. in *De Medina v. Norman*, (1842) 9 M. & W. 820, at 827, 11 L.J. Ex. 310, 60 R.R. 912 ; *Lawrence v. Knowles*, (1893) 5 Bing. N.C. 399 ; *Measures v. Measures*, (1910) 2 Ch. 248 ; 79 L.J. Ch. 707 (C.A.).

3. *Wilks v. Atkinson*, (1815) 1 Marshall 412 ; see also *Squier v. Hunt*, (1816) 3 Price 68 ; *Levy v. Lord Herbert*, (1817) 7 Taunt. 314, 318.

5. *Jackson v. Allaway*, (1844) 6 M. & Gr. 942 ; *Baker v. Firminger*, (1859) 28 L.J. Ex. 130 ; *Levey v. Goldberg*, (1922) 1 K.B. 688, at p. 692 (non-

delivery).

6. *Ganesh Das Ishar Das v. Ram Nath*, A.I.R. 1928 Lah. 20 : 9 Lah. 148 : 11 I.C. 498 ; *Chengravelu Chetty & Sons v. Akarapu Venkanna & Sons*, A.I.R. 1925 Mad. 971 : 86 I.C. 299. See also *Radhelal v. Ratanlal*, 1949 Nag. L.J. 337 : I.L.R. (1949) Nag. 555 cited under S. 38 post.

7. *Kanwar Bhan Sukha Nand v. Ganpat Rai Ram Jiwan*, A.I.R. 1926 Lah. 318 : 7 Lah. 442 : 94 I.C. 304 ; *Nalam Lackshmikanthan v. Narayanswami Iyer*, A.I.R. 1926 Mad. 1109 : 97 I.C. 986.

8. *Kidar Nath Behari Lal v. Shimbhu Nath Nandu Mal*, A.I.R. 1927 Lah. 176 ; 8 Lah. 198 : 99 I.C. 812.



that actual tender of delivery,<sup>1</sup> or of the money<sup>2</sup>, is unnecessary to enable the seller to maintain an action for the price for failure to accept, or the buyer to maintain an action for failure to deliver.

If the buyer is insolvent, or states that he will not accept delivery, this is strong evidence that he is not ready and willing to pay.<sup>3</sup> Likewise, a wrongful refusal by one party to be bound by the contract discharges the other from the performance of condition, which he would otherwise have to fulfil, and the latter is thereupon exonerated from the necessity of proving his readiness and willingness to perform them.<sup>4</sup>

In *Mulchand Chandalia v. Kundanmull*<sup>5</sup>, in a contract of sale of ready goods, it was held that it is enough if between the contract date and the date of delivery, the seller is in a position to deliver. In *Satyanarayanmurthi v. Erikalappa*<sup>6</sup> it was decided that in case of repudiation by the buyer, the seller's suit for damages could not be defeated by proof of inability to implement the contract after such repudiation.

The phrase "the seller must be ready and willing to pay the price in exchange for the possession of the goods" does not necessarily mean exchange then and there, but exchange in a business sense.<sup>7</sup> So, where price is payable in exchange of shipping documents, either expressly or by implication under the section, the seller performs his contract by tendering the documents although the goods may be incapable of inspection and acceptance, and the buyer must pay the price without waiting for their arrival.<sup>8</sup>

### (3) Unless otherwise agreed.

The rule laid down in this section is only a general one and all agreements to the contrary override it. Thus the buyer may agree to pay the price on a fixed date, which may arrive before the time of delivery. In such a case, the delivery is not a condition precedent to payment.<sup>9</sup> On the other hand, the seller may agree to deliver irrespective of payment, as when he sells on credit, in which case payment is not a condition precedent to delivery.<sup>10</sup> In C.I.F. contracts, generally, the price is payable in exchange for the shipping documents,<sup>11</sup> though this exception perhaps is more apparent than real.<sup>12</sup> When goods are sold on credit, and nothing is agreed upon as to time of delivering the goods, the buyer is immediately entitled

1. *Jackson v. Allaway*, (1844) 4 Man. & G. 942; *Boyd v. Lett*, (1845) 1 C.B. 222; *Levey v. Goldberg*, (1922) 1 K.B. 688, 692.

2. *Rawson v. Johnson*, (1801) 1 East 203, 6 R.R. 252; *Shriram Rupram v. Madangopal Gowardhan*, (1902) 30 Cal. 865; *Peare Lal Kishan Prasad v. Diwan Singh Ganeshi Lal*, A.I.R. 1930 All. 661; 125 I.C. 453; cf. *Pickford v. Grand Junction Railway*, (1841) 8 M. & W. 372, 378, 58 R.R. 742; see also *Zippel v. Kapur*, A.I.R. 1932 Sind 9; 139 I.C. 114.

3. *Lawrence v. Knowles*, (1893) 5 Bing. N.C. 399, 50 R.R. 721; *Chunna Mal Ram Nath v. Mool Chand*, A.I.R. 1928 P.C. 99; 9 Lah. 510.

4. See *Dayabhai Dipchand v. Maniklal Vrijbhukan*, (1871) 8 B.H.C.C.A. 123.

5. (1919) 47 Cal. 458; 57 I.C. 140.

6. A.I.R. 1926 Mad. 410.

7. *Ryan v. Ridley & Co.*, (1902) 8 Com. Cas. 105.

8. *E. Clemens Horst Co. v. Biddell Bros.*, (1912) A.C. 18.

9. *Smith v. Woodhouse*, (1806) 2 Bos. & P.N.R. 233.

10. *Staunton v. Wood*, (1811) 16 Q.B. 638; 83 R.R. 641; *R. v. Jones*, (1898) 1 Q.B. 119—An agreement to sell on credit may be inferred from the very circumstances of the case, as e.g. where a man dines at a restaurant.

11. *E. Clemens Horst & Co. v. Biddell Brothers*, (1912) A.C. 18.

12. See notes in Appendix "C.I.F. Contracts". See also *Orient Co. v. Brekke*, (1913) 1 K.B. 531.



to the possession, and the right of property at once vests in him.<sup>1</sup> But if he has not obtained possession within the period of credit, the seller may refuse to deliver until the price is paid.<sup>2</sup> In *Field v. Lelean*<sup>3</sup>, shares were sold under a written contract which provided "payment half in two, and half in four months". *Held*, evidence was admissible of a trade usage that delivery could not be given until payment to which the contract was silent. In *Lockett v. Nicklin*,<sup>4</sup> goods were ordered by letter which did not mention any time of payment but the order did not contain the whole contract. *Held*, evidence was admissible to show that the goods were supplied on credit. Where no time is fixed for the delivery or payment, the correct construction of the law is that the delivery is to take place on payment of the price, and that the buyer will pay the price on receipt of the goods.<sup>5</sup> The words "cash on delivery" mean cash in exchange for, and simultaneous with, the delivery of the thing promised.<sup>6</sup>

Although section 32 may be excluded by the contrary agreement that the buyer should be entitled to credit, if the buyer becomes insolvent, the provision for credit is excluded by law.<sup>7</sup>

In *New Victoria Mills Co. Ltd. v. Commr. of I.T., U.P.*,<sup>8</sup> the relevant account year was 1st November, 1943 to 31st October, 1944. It was admitted before the Appellate Tribunal, the Assistant Commissioner and the Income-tax Officer that the amount of Rs. 1,39,561 was the price of coal which had been supplied to the assessee in the month of June, July and August, 1943 ; and it had been consumed in the account year before 1st November, 1943. The assessee, however, claimed under S. 10(2) (xv) a deduction of this amount as expenditure for the relevant year on the ground that there was an agreement with the pool association that the price of the coal supplied would not be payable till the invoices had been received by the assessee. This invoice was received after 31st October, 1943. It was *held* that the fact that the coal was purchased and was consumed in the year previous to the relevant account year was admitted and the admission could, therefore, be treated as good evidence for the finding that coal was received and consumed in the year previous to the relevant account year. The question as to when the liability to pay the price arose was a question of law covered by section 32 of the Sale of Goods Act, and it was for the assessee, if he wanted to prove that there was an agreement to the contrary, to give such evidence.

#### (4) Concurrent conditions.

A concurrent condition may itself depend on a condition precedent. Thus, where goods are to be delivered as directed or required by the buyer, he must give directions, after which the seller must be ready and

1. *Bloxam v. Sanders*, (1825) 4 B. & C. 941, 948, per Bayley J.

2. See *Dicker v. Jackson*, (1848) 6 C.B. 103.

3. (1861) 30 L.J. Ex. 118.

4. (1848) 2 Ex. Ch. 93. See also *Ford v. Yates* (1841), 2 M. & Gr. 549—evidence of a course of dealing between the parties to allow six months' credit was rejected.

5. *Juggernath v. Beck*, 2 N.W.P. 60 ; *Carlises v. Ricknauth*, 8 Cal. 809.

6. *Heilgers & Co. v. Jadub Lal Shaw*, 16 Cal. 417 (422).

7. *Ex-parte Chalmers*, (1873) 8 Ch. App. 289 ; *Ex-parte Carnforth Haematite Iron Co.*, (1876) 4 Ch. D. 108 C.A.

8. (1952) All. L.J. 194 : (1952) 21 I.T.R. 567.



willing to deliver.<sup>1</sup> Where goods are deliverable by instalments, the concurrent conditions as to delivery and payment *prima facie* exist with regard to each instalment.<sup>2</sup> Where there is an entire contract for the sale of a quantity of goods, a complete delivery by the seller is a condition precedent to the buyer's obligation to accept and pay for any of them, even though the goods are deliverable by instalments.<sup>3</sup>

#### (5) Delivery at seller's option.

Where the delivery of the goods is under the contract to be at the seller's option, there must be implied an additional term to the contract in respect of a delivery made during the currency of the option that the seller shall give to the buyer sufficient notice of his intention to make delivery and a reasonable time in which to arrange for funds with which to pay for the goods. But when the seller fails to exercise his option to deliver the goods before the last day the contract plainly becomes a contract to sell and deliver the goods on the last day and the buyer must be ready and willing to take delivery of the goods and pay for them on that day. No notice to the buyer of intention to deliver on the last day is necessary.<sup>4</sup>

Readiness and willingness to perform includes ability to perform.

Suit by buyer for damages — Section 51, Indian Contract Act, 1872.

In a suit by the buyer for damages for breach of contract for sale of goods it is incumbent upon him to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the goods or that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money. Therefore, where the buyer is proved to have been in a state of acute financial embarrassment on the date of delivery and could not have paid for the goods bought if the seller had delivered them to him, the buyer cannot be said to have been ready and willing to carry out his part of the contract and therefore the seller is absolved from his liability under the contract.

*See also notes under section 38 for full discussion on the subject.*

#### (6) C.I.F. contract—Obligations of seller and buyer—Seller's obligation to obtain import licence to enable buyer to clear goods—Failure to tender documents—Effect—Contract Act, 1872, S. 51.

In *Narayanaswami Chetti v. Soundarajan Co. Ltd.*,<sup>5</sup> it was held: The vendor on C.I.F. terms is, in the absence of any specific provision to the contrary, bound by his contract (1) to make out an invoice of the goods sold; (2) to ship the goods at the port of shipment, unless the contract is in regard to goods already afloat; (3) to procure on shipment a contract of affreightment under which goods will be delivered at the

1. *Great Northern Rail Co. v. Harrison*, (1852) 12 C.B. 576, 600; 92 R.R. 786, 801.

2. *Brandt v. Lawrence*, (1876) 1 Q.B.D. 344, C.A.; see also *Mersey Steel Co. v. Naylor*, (1884) 9 App. Cas. 434, at p. 444. In the case of instalment contracts, section 32 must be construed subject to section 38(2), post.

3. *Oxendale v. Wetherell*, (1829) 9 B. & C. 386; 35 R.R. 207. See also *Longbottom & Co. v. Bass Walker & Co.* (1922) W.N. 245, C.A. cited under S. 46 post.

4. *Jagannath Sagarmal v. J.J. Aaron & Co.*, A.I.R. 1940 Rang. 284.

5. A.I.R. 1958 Mad. 43; (1957) 2 Mad. L.J. 328.



destination contemplated by the contract; (4) to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. The seller having procured the necessary documents is under an obligation to send them forward to the buyer, accompanied by an invoice showing the amount due from the buyer, within a reasonable time. If no place be named in the contract for the tender of the shipping documents, they must *prima facie* be tendered at the residence or place of business of the buyer.

The buyer must be prepared to pay or accept the draft, as the case may be, according to the terms of the contract of sale, within a reasonable time after the shipping documents are tendered to him. All that the buyer can call for is the delivery of the documents above-mentioned. The buyer cannot refuse the documents and ask for the actual goods nor can the vendor withhold the documents and tender the goods they represent.

There is no absolute rule of law that in every case of a C.I.F. contract there is an obligation on the part of the seller to procure an import licence so as to enable the buyer to clear the goods from the port.

In the instant case, in the absence of an express term in the contract, the Court would be justified in importing a term, that the buyer shall be permitted to avail himself of the import licence held by the seller. The business efficacy of the transaction would be effectuated only by implying such a condition.

**33.** Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

### Synopsis

- |  |   |
|--|---|
| (1) <i>Delivery—how made.</i>  | (4) <i>Anything which has the effect of putting the goods in the possession of the buyer.</i> |
| (2) <i>Modes of delivery.</i>  |   |
| (3) <i>Delivery should have the effect of putting the buyer in possession.</i> |   |

#### (1) Delivery—how made.

Possession of goods may be delivered in several ways according to the circumstances. Delivery may be made either to the person who is to acquire possession, or to a person authorised on his behalf. And it may be made in either case either by an actual and apparent change in the custody of the goods, or by a change in the character of a continuing custody. In the case of objects or an aggregate of objects, not capable of manual transfer by a single act, it has to be considered what acts are a sufficient transfer in fact. It has further to be considered when a transfer of custody in fact does or does not amount to delivery of possession in law.<sup>1</sup>

1. See Pollock and Wright on Possession,

p. 57.



The section reproduces section 90 of the Indian Contract Act, (Appendix) with the addition of the words "which the parties agree shall be treated as delivery." Paragraph 136 at p. 92 of Halsbury's Laws of England, 3rd Edn., Vol. 34, states the law on the subject as follows :

"Delivery of the goods may be made by the seller doing any act or thing whereby the goods are not put into the custody or under the control of the buyer or his agent in that behalf, or whereby the buyer or his agent is enabled to obtain such custody or control. Thus, delivery of goods may be effected by means of delivery of the key of the place where the goods are lying. Delivery may also be made by means of any act or thing which the parties agree shall be treated as a delivery.

"Where the goods are at the time of the contract of sale in the possession of the buyer or his agent, the completion of the sale operates *prima facie*, as a delivery of the goods."

'Delivery' is defined as meaning *voluntary* transfer of possession from one person to another.<sup>1</sup> It is essential that transfer of possession should be voluntary. Thus, although a theft of goods involves a transfer of possession from the possessor to the thief it cannot be said that the goods were delivered to the thief, as the transfer of possession is made without the consent of the owner or possessor, and is, therefore, not a voluntary transfer.<sup>2</sup>

Delivery, according to this section, may be made (a) by doing anything which the parties agree shall be treated as delivery, or (2) which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. Thus, parties may in time of war agree that the delivery of despatch telegram may take the place of a bill of lading.<sup>3</sup> Delivery to a carrier or wharfinger is generally regarded as delivery to the buyer.<sup>4</sup> Exchange of delivery orders also may result in transfer of property in the goods.<sup>5</sup>

## (2) Modes of delivery.

Ordinarily, delivery is of three kinds:

(1) ACTUAL DELIVERY—Actual or physical delivery of goods takes place where the goods are handed over by the seller to the buyer or his agent authorised to take possession of and hold them on his behalf. In *Galbraith v. Block*,<sup>6</sup> it was held that where the delivery, which was agreed to be made at the buyer's premises, was made to a person who appeared to have authority to receive

1. Section 2(2) ante ; see pages 16 and 22 to 28. See also illustrations under old S. 90 of the Contract Act (Appendix). See too Dist. Board, Hoshiarpur v. Hira Singh Jagat Singh, A.I.R. 1968 Punj. 289—Though passing of title in goods is an essential ingredient of sale, physical delivery of goods is not essential.

2. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 19.

3. See Haji Peer Mohammed v. Sakarath,

A.I.R. 1923 Mad. 103 : 43 M.L.J. 199.

4. See section 39 of the Act.

5. See D.M. Wadhawa v. Commissioner of I.T., Calcutta, (1966) 61 I.T.R. 154 cited at p. 28 ante.

6. (1922) 2 K.B. 155. See also Commr. of I.T. v. R.C. Gupta & Co., A.I.R. 1968 Cal. 385, with reference to S. 24 (1), Expl. 2. Income-tax Act, 1922—The expression "actual delivery is" likely to apply to all goods unless such meaning is not otherwise possible.



the goods, but had no authority in fact, there was a good delivery to the buyer.

In the case of actual delivery there is manual transfer of the commodity sold and the physical custody of the thing passes from the seller to the buyer. Thus, a watch, a book, or a gun sold may be actually transferred from the hand of the vendor to that of the purchaser or his agent, or if the commodity be bulky, it may be removed from the warehouse of the vendor to that of the purchaser, and placed under the control of the latter. In all such cases there is an actual delivery.

(2) SYMBOLIC DELIVERY—But the goods may not be capable of manual delivery, such as a hay-stack in a meadow, and law will not insist upon manual transfer of the commodity in such a case. Delivery, therefore, may be constructive and it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. The effect should be to put the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

A most common instance of symbolic delivery is the delivery of the key to the purchaser of the godown in which the specific goods sold are locked up. It gives to the purchaser actual control of the place where the goods are and thereby of the goods themselves.<sup>1</sup> In *Gough v. Everard*<sup>2</sup> where the key of a wharf was handed over, it was *held* to be a symbolical delivery, for the key carried with it the 'manual control' of the goods and the delivery of the key was held to be an "emphatic declaration of an intention to transfer control." But in *Milgate v. Kebble*,<sup>3</sup> where only the inner key of the warehouse was handed over, and the outer key was retained, it was *held* there was no symbolical delivery, as there was no access to the goods.

Bowen L. J. observed in *Sanders v. Maclean* :<sup>4</sup>

"A cargo at sea while in the hands of a carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by law merchant is universally recognised as its symbol and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo.....It is the key which in the hands of the rightful owner is intended to unlock the door of the warehouse floating or fixed in which the goods may chance to be."

It appears that merely telling a man that key of a warehouse, etc., is at his disposal is at most a licence, and as regards property or possession has no effect at all until he acts on the authority.<sup>5</sup>

It may also be noted that the key is not the symbol of the goods but its delivery has the effect of transferring the possession of the goods in the circumstances explained above.<sup>6</sup>

1. See *Wrightson v. McArthur and Hutchisons Ltd.*, (1921) 2 K.B. 807 ; *Ward v. Turner*, (1751) 2 Ves. Sen. 431, 443. See also *Vora Abbasbhai Mullan Valji v. Thakar Saheb of Kotda*, (1949) 2 Sau. L.R. 98, cited under S. 46 post.

2. (1863) 159 E.R. 1 ; 133 R.R. 558.

3. (1841), 133 E.R. 1073 ; 60 R.R. 475.

4. (1883) 11 Q.B.D. 327.

5. See *Hilton v. Tucker*, (1888) 39 Ch. D. 669, 676.

6. *Pollock and Wright on Possession*, p. 61 ; (cf.) *Wrightson v. McArthur*, (1921) 2 K.B. 807.



Constructive delivery.

### (3) CONSTRUCTIVE DELIVERY OR DELIVERY BY ATTORNMENT—

There may be a change in the legal character of the goods without any change in the actual and visible custody, for instance, by attornment, that is, by formal acknowledgment by the person who is in actual physical possession of the goods that he holds the goods on behalf of and at the disposal of another. In such a case the delivery is said to be constructive. The delivery of documents of title is a well-known instance of constructive delivery.

Attornment may happen in one of three ways :

#### (a) *Seller in possession.*

A seller in possession of the thing sold may assent to hold it solely on the buyer's account for instance as bailee. In *Elmore v. Stone*,<sup>1</sup> there was a sale of a horse. The seller at the buyer's request agreed to keep it at livery, the buyer being liable for the charges for the keep of the horse and moved the horse from one part of his stable to another. It was held that there was a delivery. *Marvin v. Wallis*<sup>2</sup> also related to sale of a horse. The seller asked the buyer to lend him the horse for a week to which the buyer assented and left the horse in the custody of the seller. It was held that there had been a delivery to the buyer.

The seller's assent must be proved ; it will not be presumed.<sup>3</sup> But acts of the buyer treating himself as owner and seller as his servant or bailee would be relevant to prove delivery as against the buyer. Thus in *Castle v. Swooner*,<sup>4</sup> the defendant gave a verbal order, with six months' credit for some rum and brandy of the plaintiff. The plaintiff sent defendant an invoice specifying particular goods as sold to him "free for six months," i.e. to remain in plaintiff's warehouse without charge, credit also being given for six months. At the end of the six months defendant asked plaintiff if he would take the goods back or sell them on defendant's account. This was held to amount to assent by defendant to plaintiff holding those goods for him as warehouse-man.

Similarly, where the goods are stored in the seller's warehouse, the seller after sale may agree to hold the goods on the buyer's behalf ; and the character of the seller's possession may consequently change. Such an agreement should be clearly proved and cannot be presumed by the mere issue of a delivery order : there should be some positive act done under it to operate as constructive delivery of the goods. In *Townley v. Crump*,<sup>5</sup> "there was a total failure of proof that where a vendor who is himself the warehouse-man sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates, by reason of this custom, to prevent a lien from attaching." In that case it appears that the seller had not made any transfer in their books.

Does the fact that the buyer pays, or agrees to pay warehouse rent for goods left in the seller's warehouse of itself sufficient to show that the

1. (1809) 1 Taunt. 458, 10 R.R. 578. But see *Carter v. Toussaint*, (1822) 5 B. & A. 885 where however there were no charges for keeping the horse.  
2. (1856) 6 E. & B. 726, 106 R.R. 784. See also *Ancona v. Rogers*, (1876) 1

Ex. D. 285.

3. *Re Roberts*, (1887) 36 Ch. D. 196, 200.  
4. (1861) 6 H. & N. 828, 123 R.R. 860 Ex. Ch. distinguished in *Dublin City Distillery v. Doherty*, (1914) A.C. 823.  
5. (1835) 4 Ad. & E. 58.



seller holds as his bailee? Lord Ellenborough seemed to have given a reply in the affirmative to this proposition in *Hurry v. Mangles*.<sup>1</sup> But in later authorities<sup>2</sup> it has been held that it would be too wide to hold that if there is nothing but payment of warehouse rent or agreement to pay, there is delivery. But if the buyer has actually rented part of the warehouse and the goods bought by him are transferred to that part, it appears to amount to delivery.

In *Whitehouse v. Frost*,<sup>3</sup> the vendee who resold the goods gave to the sub-vendee an order on the vendor to deliver them to the sub-vendee, and the vendor accepted that order. *Held*, there was constructive delivery though the goods were not separated from the bulk.<sup>4</sup>

(b) *Buyer in possession.*

Where the buyer is already in possession of the goods, delivery takes place, if the seller agrees to the buyer holding the goods as owner.<sup>5</sup> Here also the character of the possession is changed from that of a bailee for the seller to that of an owner.

(c) *Third party in possession.*

When the goods are in possession of a third party as bailee for the seller, possession is usually given by a direction to such third party requiring him to deliver them to, or to hold them on account of, the buyer, followed either by actual delivery to the buyer or by some acknowledgment on the part of third party that he holds the goods for the buyer.<sup>6</sup> The form in which such direction or acknowledgment is given is immaterial. Where the third party is a warehouse-man the direction usually takes the form of a delivery order and the acknowledgment of a warrant for delivery of the goods or any entry in the warehouse books of the name of the buyer as the person for whom the goods are held. The acknowledgment whatever its form, does not change the nature of warehouse-man's possessions; he still holds as bailee, but for the buyer instead of the seller. He has simply attorned to the buyer.<sup>7</sup>

It must be noticed that all the three parties must concur, otherwise there is no delivery. Accordingly, where the seller directed the warehouse-man to transfer the goods sold to the buyer's order, and the warehouse-man did so and sent the invoice and certificate of transfer by his clerk to the buyer with a request for payment but the buyer refused payment, it was *held* that there was no attornment, and therefore no delivery, as the

1. (1801) 1 Camp. 452, 10 R.R. 727. See illustration (d) to old section 90 of the Indian Contract Act, 1872.

2. See *Miles v. Gorton*, (1834) 2 Cr. & M. 504, 39 R.R. 820, approved in *Grice v. Richardson*, (1877) 3 App. Cas. 319 P.C.

3. 12 East 614.

4. In most of the above cases the question for consideration was whether there was receipt and acceptance to satisfy S. 17 of Statute of Frauds.

5. *Cain v. Moon*, (1881) 2 Q.B. 283 ;

*Blundell Leigh v. Attenborough*, (1921) 3 K.B. 235 ; a case of pledge if the pledgee is already in possession ; the contract of pledge is itself constructive delivery ; *Edan v. Dudfield*, (1841) 1 Q.B. 302 ; 55 R.R. 258.

6. S. 36(3) *infra*.

7. See *Dublin City Distillery v. Doherty*, (1914) A.C. 823, 843, 852, where the authorities and the law are fully discussed. See also *Farina v. Home*, (1894) 11 M. & W. 119.



buyer had not assented to the warehouse-man holding the goods as his agent.<sup>1</sup>

The mere handing of a delivery order or the like by the seller to the buyer is not sufficient;<sup>2</sup> the seller's bailee must be instructed and must assent to hold for the buyer. In *Farina v. Home*,<sup>3</sup> the wharfinger gave the seller a warrant making the goods deliverable to him or his assignee by endorsement on payment of rent and charges. The seller forthwith endorsed and sent it to the buyer, who kept it for ten months and refused to pay for the goods or to return the warrant saying he had sent it to his solicitor and intended to defend the suit as he had never ordered the goods, adding that they would remain for the present in bond. *Held*, to be no actual receipt. The warrant was only an engagement by the wharfinger to hold the goods for the consignee, or his assignee, and attornment was necessary. But the facts showed sufficient evidence of acceptance to go to the jury.<sup>4</sup>

When once assent of all has been obtained, there is effected a complete delivery as between seller and buyer, and any wrongful dealing by the third party will entail no liability on the seller.<sup>5</sup>

It is also essential that the warehouse-man be in actual physical possession of the goods, otherwise there would be nothing on which the attornment could operate. It is, however, clear that in such a case if the warehouse-man attorns to the buyer without having actual possession, he may be estopped later on from denying his being in possession of the goods.

The goods also must be ascertained before there could be delivery by attornment. In *Laurie and Morewood v. Dudin and Sons*,<sup>6</sup> A sold to plaintiff 700 quarts of maize out of 600 quarts lying with defendant, a warehouse-man, and gave a delivery order. The defendant warehouse-man entered the same in his books. *Held*, that the mere entry in the books did not operate as constructive delivery to the buyer and as there had been no ascertainment, the stoppage must be upheld. But in *Anglo Indian Jute Mill Co. v. Omademull*,<sup>7</sup> where the plaintiffs had advanced money on the security of certain delivery order in respect of goods in the possession of the defendants, it was *held* that the defendants had no lien when the cheque of the buyer was dishonoured and that they were estopped from denying that the goods had been paid for, or goods of the required quantity had been appropriated to the delivery order.

1. *Godts v. Rose*, (1855) 139 E.R. 1058 ; 104 R.R. 668—a case where the buyer did not assent to the third party holding to the goods as his agent ; see *Poulton and Son v. Anglo American Oil Company Ltd.*, (1911) 27 T.L.R. 216 C.A. for a case where there was no assent by the seller. As to the necessity for the bailee's assent, see section 36(3).

2. *McEwan v. Smith*, (1849) 2 H.L.C. 309, 81 R.R. 166.

3. (1846) 16 M. & W. 129 ; 16 L.J. Ex. 73 ; 73 R.R. 423.

4. In the language of the English case on the Statute of Frauds, taking and keeping a delivery order is evidence of

acceptance, but not of receipt. The "actual receipt" of the Statute of Frauds, appears on the whole to correspond to the delivery of the present section, regarded however from the buyer's point of view.

5. *Wood v. Tassell*, (1944) 115 E.R. 90 ; 66 R.R. 374.

6. (1926) 1 K.B. 223.

7. (1911) 38 Cal. 127 ; 10 I.C. 859 ; (cf.) *Eagleton v. E.I. Rly. Co.*, (1872) 8 Ben. L.R. 581. See also *Shaw v. Bill*, (1884) 8 Mad. 38 ; where the seller was held liable ; the third person though attorned to the buyer had not the goods in his possession.



**(3) Delivery should have the effect of putting the buyer in possession.**

Delivery should have the effect of putting the buyer in possession. And so, where the wood of fallen trees is sold, the mere fact of the buyer cutting them up will not amount to taking possession of them until he carts them away.<sup>1</sup>

In order to constitute delivery the buyer or his authorised agent must have possession of the goods. The Act does not define possession but in order to constitute possession the buyer should be in a position to exercise some degree of control over the goods either directly or through an agent.<sup>2</sup> Section 1 (2) of the Factors Act, 1889 (Eng.) defines possession as follows: "A person shall be deemed to be in possession of goods or of the documents of title to the goods where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf." It is not necessary to constitute delivery that the buyer should accept the goods; possession does not necessarily amount to acceptance. The buyer can reject the goods after delivery but he cannot do so after acceptance.

**Anything which has the effect of putting the goods in the possession of the buyer.**

The phrase includes any act either by the seller or by the buyer with the assent of the seller whereby control of goods is transferred from the seller to the buyer, according to the terms of the contract.<sup>3</sup> If the buyer, being entitled under the contract to some time for inspection, is not given any such opportunity or, being entitled to goods free from demurrage, is offered goods under demurrage, such offer of performance is not valid. Where delivery is not according to the terms of the contract, it is no delivery at all so as to exonerate the seller from his liability to deliver.<sup>4</sup> As has already been noticed, a mere giving of the delivery order by the vendor to the vendee where goods are in possession of a bailee, is not sufficient to constitute a valid delivery unless and until it is also assented to by such bailee.<sup>5</sup> But if the bailee agrees, the delivery is complete and the property in the goods sold passes to the buyer.<sup>6</sup>

**Section 33—Delivery of goods to party—What constitutes—Railway receipt surrendered and delivery book signed by consignee even before goods were unloaded from wagons—Held though there was taken delivery there was no real delivery.**

*In Union of India v. West Punjab*,<sup>7</sup> the delivery book had been signed and the railway receipts had been delivered to the railway; but evidence was that it was the practice at particular railway station, so far as the J.C.

1. Chotku v. Ram Nath Sahu, A.I.R. 1936 All. 880 : (1936) A.L.J. 1270.  
2. See Pollock and Wright on 'Possession,' pp. 43, 46.  
3. Motichand v. Fulchand, 26 Cal. 142.  
4. 2 B.L.R. (O.C.) 154 ; Bombay United Merchants Co. v. Doolubram and others, 12 Bom. 50.

5. Le Geyt v. Harvey, 8 Bom. 501 ; G.I. P. Rly. v. Hanumandas & Co., 14 Bom. 57.  
6. 8 B.L.R. 581 ; Ganges Manufacturing Co. v. Sourujmull & others, 5 Cal. 669 ; Ramdeo v. Cassim Mamoojit, 21 Cal. 173.  
7. A.I.R. 1966 S.C. 395.



Mills was concerned to sign the delivery book and hand over the railway receipt and give credit vouchers in respect of the freight of the consignment, even before the goods had been unloaded from wagons. The evidence also established that even after token delivery had been made in the manner indicated above, the consignee was not authorised to remove the goods from the wagons and that it was the railway which unloaded the wagons and it was thereafter that the consignee was permitted to remove such goods with the permission of the Assistant Goods Clerk. It was *held*: Till they were unloaded by the railway, the goods must be held to be in the custody of the railway and no delivery could be said to have taken place merely by signing the delivery book and surrendering the railway receipts. Thus though there was a token delivery there was no real delivery by the railway to the consignee.

**Sections 33, 44, 56, 60—Contract for supply of goods to defendant in three equal instalments—Contract being indivisible, failure to deliver first instalment did not entitle the defendant to cancel the whole contract—Plaintiff entitled to damages for repudiation of contract by the defendant—Measure of damages.**

*In Union of India v. Nuddea Mills Co. Ltd.*,<sup>1</sup> the plaintiff, under a written contract, agreed to supply to the Union Government 600 bales of B's twill bags, each bale containing 300 bags, to be delivered in three equal instalments during the months of April, May and June. The payment for each instalment was to be made against delivery of 'pucca delivery orders' on the mill concerned. The defendant rescinded the contract on the ground that the plaintiff failed to supply the first instalment. Allowing the plaintiff's suit for damages it was held: (1) A contract should be read as a whole and not in part for a proper appreciation, construction and effect of the contract. The express words of the contract in this case and the plaintiff's own pleadings therefore make it quite clear that the tendering of the Pucca Delivery Order in the contract was a term and condition of the contract and not mere warranty; (2) the clause of the contract relating to the date of tendering of the Pucca Delivery Order, 30th April, 1952 etc. should be read as 'by the 30th April, 1952 etc.' Those dates 30th April, 1952; 31st May, 1952 and 30th June, 1952 were intended to be the last days for the tendering of the P.D.O. It did not mean that the P.D.O. could not be delivered earlier than the last date. Delivery P.D.O. on 23rd April, 1952, was therefore wrongly refused by the appellant; (3) the delivery order was a document of title and ownership to the goods represented by it and operated as an authority to receive the goods referred to in the document; (4) though the quantity of B's twill bags was to be delivered in three equal monthly instalments, the contract to supply them was one indivisible contract; therefore even assuming that the contractor had failed to deliver the first instalment it did not entitle the defendant to cancel the whole contract; (5) as the breach of the contract was on the part of the appellant and the cancellation of the contract by the appellant was wrongful, the plaintiff respondent was entitled to damages and the measure of damages was the difference between the contract price and the market price at the appointed time of delivery of each instalment.

1. I.L.R. (1966) 2 Cal. 98.



34. A delivery of part of goods, in progress of the delivery, has the same effect, for the purpose of passing the property in such goods, as delivery of the whole, but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

#### Part delivery—its effect.

This section repeats the provisions of old section 92 of the Indian Contract Act (See Appendix) and affirms the English common law rule that the delivery of the part may be a delivery of the whole, if it is so intended and agreed, but not otherwise, and the burden of proof seems to be on the party affirming that such was the intention.<sup>1</sup> It must be compared with sections 48 and 51(7), which relate to the effect of delivery of part of the goods on transferring the possession in the remainder to the buyer, so as to put an end to the seller's lien or right of stoppage in transit.

"It seems to me," said Brett L.J., "that delivery of part, or even of the bulk of a cargo, is not *prima facie* a delivery of the whole and that those who rely upon part delivery as constructive delivery of the whole are bound to show that the part delivery took place under such circumstances as to make it constructive delivery of the whole."<sup>2</sup>

The delivery of part operates as a constructive delivery of the whole only where the delivery of the part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part in the acceptance of constructive possession of the whole,<sup>3</sup> i.e., a recognition that the actual holder of the residue has begun to hold as the buyer's agent. Where the buyer took delivery of a part without making any inspection, and sold that portion to third parties, the circumstances were held to point to delivery of part in progress of the delivery of the whole.<sup>4</sup>

If part be delivered with the intention of separating it from the rest, it does not operate as delivery of the whole.<sup>5</sup> Where the buyer accepts delivery and pays part of the goods but refuses to take delivery of the remaining portion of the goods as not conforming to the contract, there is no delivery of the whole; consequently, the seller can only sue the buyer for damages for non-acceptance, and not for the price.<sup>6</sup> The fact that each one of several bales agreed to be sold is to be paid for separately on delivery, indicates that delivery of one bale is not intended to pass the property in all.<sup>7</sup> In *Bolton v. L. & Y. R. Co.*<sup>8</sup> referred to above, the buyer accepted and paid for three bales when sent but refused to accept the remainder when sent objecting to the weight and quality and returned them to seller. The seller again returned

1. Lord Blackburn in *Kemp v. Falk*, (1882) 7 App. Cas. 573, 586.

2. *Ex-parte Cooper*, (1879) 11 Ch. Div. 68, 73, C.A. If the cargo were one machine or the like, in parts the delivery of an essential part might be such a circumstance, *ib.*, at p. 75.

3. *Bolton v. L. & Y.R. Co.*, (1866) L.R. 1 C.P. 431 at p. 440; *Pranlal Bhaichand v. Maneckji Petit Manufactur-*

*ing Co.*, A.I.R. 1933 Bom. 46 : 140 I.C. 610.

4. *Pranlal v. Maneckji Petit*, *supra*.

5. *Dixon v. Yates*, (1833) 5 B. & Ad. 313, 339, 341 : 39 R.R. 489, 497, 499.

6. *Mitchell Reid & Co. v. Buldeo Das*, (1887) 15 Cal. 1; *Dixon v. Yates*, *supra*.

7. *Ibid.*

8. (1866) L.R. 1 C.P. 431.



them to the place where they were to be sent for delivery to the purchaser. Held, the rest of the goods were not delivered to the buyer and so transit was not at end and the unpaid seller could stop it.

The intention in any particular transaction is a question of fact to be determined with regard to all circumstances.

See Ss. 48 and 51 (7) as to the effect of part delivery on the seller's right of lien and stoppage in transit.

### Illustrations

(1) In *Hammond v. Anderson*,<sup>1</sup> specific goods lying at a wharf were sold for a lump sum. The seller left an order with the wharfinger to deliver the goods to the buyer, who had paid for them by a bill. The buyer subsequently weighed the goods and took away part of them. *Held*, there was a delivery of the whole of the goods.

(2) In *Slubey v. Heyward*<sup>2</sup>, the defendant being in possession, as sub-buyer of a cargo of wheat, of bills of lading which had been endorsed to him by the buyer, had ordered the vessel to Falmouth, with the seller's consent, and there had begun receiving the cargo from the master, and had already taken out 800 bushels, when the original seller attempted to stop the further delivery because his buyer had become insolvent. *Held*, that this constituted a delivery of the whole, ending the transitus.

(3) The buyer of a cargo of wheat made an assignment of his effects to trustees for the benefit of his creditors and endorsed the bill of lading to one of the trustees with an endorsement directing the master to deliver possession of the within-mentioned quantity of wheat to R.J., "Being one of my assignees, to be disposed of as he may think proper." The ship arrived at an intermediate port and the trustees took samples of the wheat and sold the greater portion to sub-buyers to whom it was delivered and directed the master to take the remainder to the final port of destination, which he did. *Held* that in those circumstances the whole cargo had been delivered at the intermediate port.<sup>3</sup>

(4) In *Burney v. Poyntz*,<sup>4</sup> the buyer of a parcel of hay asked the seller's permission to take a part, and this was granted. It was *held* not to be a delivery of the whole. "Here," said Park J., distinguishing *Hammond v. Anderson*, "the intention of both parties was to separate the part delivered from the residue, and the vendee took possession of part only."

(5) If the contract be an entire contract and incapable of severance the delivery of a part, necessarily is a delivery of the whole.<sup>5</sup> But if it is severable, the delivery of a part is only delivery *pro tanto*.<sup>6</sup>

(6) In the case of a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, if the seller makes

1. (1803) 1 B. & P.N.R. 69, 8 R.R. 763.

2. (1795) 1 Hy. Bl, 504, 3 R.R. 486.

3. *Jones v. Jones*, (1841) 8 M. & W. 431, 58 R.R. 765.

4. (1833) 4 B. & Ad. 568, 31 R.R. 309. See also *Jackson v. Rotax Motor*, (1910) 2 K.B. 937; Goods to be deli-

vered as required; buyer accepted part of the goods and rejected the rest. *Held*, he could do so.

5. *Brewer v. Salisbury*, 9 Barb. 511; *Chamberlain v. Farr*, 23 Yerm. 265.

6. Story on Contract, S. 811.



defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or to pay one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.<sup>1</sup>

**35.** Apart from any express contract, the seller of goods  
 Buyer to apply for delivery. is not bound to deliver them until the buyer applies for delivery.

### Synopsis

(1) *Buyer to apply for delivery.*

(2) *Express contract, Ss. 35, 54,—  
Contract Act, Ss. 73, 74.*

#### (1) **Buyer to apply for delivery.**

This section repeats section 93 of the Indian Contract Act, 1872 (See Appendix). Although there is no specific provision in the English Act corresponding to it, the principle seems to have been well recognised in England also. As Sir Mackenzie Chalmers observes:<sup>2</sup> "As regards mode of delivery there was very little authority, but the assumed rule was that it was for the buyer to take delivery, and that in the absence of any different agreement, the duty of the seller to delivery was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery." It has also been observed in Halsbury's Laws of England:<sup>3</sup>

"The rule assumed and stated by text-writers previously to the Act was that *prima facie* it is the duty of the buyer to take the goods, and that the seller's duty is fulfilled by his putting the goods at the disposal of the buyer at the place of delivery.....There seems to be nothing in the wording of the Act to displace this rule."

Under the Indian law, as stated in this section, in the absence of express contract, the seller is under no duty to deliver unless the buyer applies for delivery, and the rule is not affected by the fact that the goods are to be acquired by the seller and when they are acquired, the seller notifies to the buyer that they are in his possession; it is still the duty of the buyer to apply for delivery. Where the seller gives notice of arrival of the goods, it is the buyer's duty to apply for delivery. In *Ganesh Das v. Ram Nath*,<sup>4</sup> where the contract provided that on the arrival of the

1. Divakaruni Sambasiva Rao and Bros. v. Kurnala Vendeatrao, Tobacco Seed Oil Firm, 1955 Andhra W.R. 252.  
 2. Sale of Goods Act, 16th Edn., p. 150 citing Smith v. Chnace. (1819) 2 B. & Ald. 754, at p. 755; Wood v. Tassell, (1844) 6 Q.B. 234, 60 R.R. 374. The learned author adds: "It seems a pity that a more definite *prima facie* rule has not been laid down by the Act."

3. 3rd Edn., Vol. 34; p. 93, f.n. (t).

4. A.I.R. 1928 Lah. 20; 9 Lah. 148; see also Ishardas v. Dhanpatrai, A.I.R. 1927 Lah. 687; 8 Lah. 514; Kanwar Bhan v. Ganpatrai, A.I.R. 1926 Lah. 318; 7 Lah. 442; Mohanlal v. Gyaniram, A.I.R. 1935 Nag. 111 (Buyer bound to send someone to take delivery).



railway receipt and the invoice the buyer should receive them on payment of the price, it was *held* that the fact of the seller giving notice of the arrival of the goods does not dispense with the duty of the buyer to apply for delivery. Moreover, the application for delivery must be an effective application ; if, for instance, the buyer is bound to pay the price on delivery, under section 32 he must when he applies for delivery be ready and willing to pay the price.<sup>1</sup>

In *Alapaty Ramamoorthy v. Polisetti Satyanarayana*,<sup>2</sup> it was observed : The language of S. 35 clearly indicates that the provision is intended for the benefit of the seller. The seller may, if he chooses, deliver the goods without any application in that behalf by the buyer. But he is also entitled to wait until the buyer applies for delivery, unless he has contracted himself out of this right.

It is also necessary that the demand be made by the buyer himself or by somebody else on his account. Where a buyer assigned his contract and got a subsequent reassignment, and sought to adopt the assignee's demand for delivery, it was *held* that the section was not complied with as there was no demand on his buyer's own account.<sup>3</sup>

On the other hand, it is the duty of the seller to deliver the goods when the buyer applies for the delivery and if the seller fails to do so, he is guilty of a breach of contract. Thus, where the contract provided for delivery in whole of November on seven days' notice from the buyer, and the buyer gave notice early in November, it was *held* that by the terms of the contract the buyer had the right to fix the date in November on which the delivery should be made, and the seller having failed to deliver as required by the notice, was guilty of a breach of contract.<sup>4</sup>

Where the buyer does not make any effective application for delivery up to a certain date, the seller is entitled to reasonable charges for care and custody up to that date.<sup>5</sup>

In *Sivayya v. Ranganayakulu*,<sup>6</sup> a case under old section 93 of the Contract Act, the corresponding words "special promise" were commented upon by the Judicial Committee and it was held that these words indicate an express stipulation as to delivery which relieves the buyer from the obligation to apply for delivery or the necessary implication of such a stipulation from the nature of the contract as expressed, and that it may arise also out of usage or custom of trade. It was further observed that in the absence of any proof of such custom or usage or any express or implied term in the contract, there is no special promise such as to absolve the buyer from his obligation under the section.

In *Hind Mercantile Corporation Ltd. v. Miryala Venkateswarlu & Co.*,<sup>7</sup> it was *held* : section 35 of the Act prescribes that apart from any express contract the seller of goods is not bound to deliver them until the buyer applies for delivery. It would, therefore, follow that unless there is a

1. Ganesh Das v. Ram Nath, *supra*.

2. A.I.R. 1958 Andh. Pra. 550.

3. Mulji v. Nathubhai, (1891) 14 Bom. 1. See also Juggernath v. Maclachlan, (1881) 6 Cal. 681 ; Kanooram v. Gopal, (1875) 24 W.R. 178.

4. Juggernath v. Maclachlan, (1881) 6

Cal. 681.

5. Kamruddin Kadibhai & Co. v. M.C. Anjangaon, A.I.R. 1951 Nag. 148 : 1950 N.L.J. 363.

6. A.I.R. 1935 P.C. 67 : 58 Mad. 670.

7. A.I.R. 1959 Andh. Pra. 545.



contract to the contrary to relieve the buyer from the obligation to apply for delivery, or unless there is a trade usage or custom which expressly relieves the buyer from the statutory obligation, the seller is not bound to deliver. Therefore, if the seller can establish that there was no demand for the delivery of the goods, there can be no question of breach of contract if he fails to deliver goods and the buyer can have no cause of action as against the seller.

Where from the nature of the transaction, the seller has to requisition empty drums from the buyer in order that oil may be filled in those drums and delivered, the statutory obligation that the buyer has to apply for delivery of oil drums under S. 35 of the Act is postponed to a reasonable time, that being the time requisite for the supplier to call for the empty drums and fill them up.

Where according to the terms of a written contract the goods have to be supplied at the buyer's mills, according to S. 35 of the Act the buyer has to apply for delivery. The buyer has further to be ready with the money for payment at the time of delivery. There is no obligation on the defendant to send or deliver the goods unless the buyer applies for it and the price is offered. The obligation to apply for delivery may however be relieved by a special contract to the contrary or mercantile usage.<sup>1</sup>

Where the buyer sues the seller for damages for non-delivery of goods, application for delivery on his part is a part of the cause of action unless there is an express stipulation to the contrary and must be explicitly stated in the plaint.<sup>2</sup>

Section 35 makes no distinction between the sale of ready goods and of forward goods and the buyer can only be relieved from his statutory obligation to apply for delivery by an express stipulation to the contrary.<sup>3</sup>

If the seller agrees to deliver on board the buyer's ship as soon as the latter is ready to receive the goods, the buyer must name the ship and give notice of his readiness to receive the goods on board before he can complain of the non-delivery.<sup>4</sup>

The condition precedent imported in all contracts by this section, apart from special agreement, to the buyer's duty to claim delivery may, however, be waived by the seller and is waived impliedly where he so incapacitates himself from complying with the demand, by consuming, reselling, or otherwise disposing of the goods, as to render the demand idle and useless.<sup>5</sup> Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract express or implied between the parties.<sup>6</sup>

1. *Madina Rice Mills v. Sampangiriah*, Reg. Appeal No. 124 of 1949-50, (Mys.). *Indian Digest* (1952), p. 2121.
2. *Ibid*, 37 Mys. H.C.R. 16 distinguished. See also *Dinkerrai v. Sukhdayal*, A.I.R. 1947 Bom. 293 cited under S. 36 post.
3. *Dinkerrai Lalit Kumar etc. v. Sukhdayal Rambilas etc.*, A.I.R. 1947 Bom. 293; A.I.R. 1935 P.C. 67

- relied upon, See also *Radhelal v. Ratanlal*, (1949) Nag. L.J. 337 cited under S. 36 post—breach of contract under Ss. 35, 36, post.
4. *Armitage v. Insole*, (1850) 14 Q.B. 728.
5. *Muniswami Chetti & Co. v. Muniswami Chetti & Co.*, A.I.R. 1944 Mad. 418.
6. *Remfry*, p. 256.



**Delivery to be "as and when goods come."** A contract for sale of goods provided that delivery was to be given "ex-godown as and when the goods come." The goods arrived on 2nd December, 1942, but the seller did not give delivery. The buyer demanded delivery on 9th December, 1942, but the demand was not complied with. In a suit for damages it was *held* that the contract was broken on 2nd December, 1942, and the damages must be assessed on the basis of the market price on that date and not on 10th December, 1942.<sup>1</sup>

**Executory contract.** Under the Indian law, there is a statutory obligation on the buyer to call upon the seller to perform delivery and in the case of an executory contract, unless it can be said otherwise from the words thereof, the buyer must not only be ready and willing to perform his part of the contract but must also have applied for delivery before he can charge the seller with non-delivery.<sup>2</sup>

**C.I.F. Contract—Applicability** Under C.I.F. contract there is a clear obligation on the seller to tender the shipping documents or certain agreed documents at a particular stage and the buyer's obligation is to pay the price against the tender of the documents or against delivery of goods and tender of the documents. When it is an initial obligation of the seller to tender the documents and it is upon such tender that the obligation of the buyer arises to pay the price in exchange of the documents and to take delivery of the goods, the provisions of S. 35 are not applicable. Where according to the proper construction of the contract the obligation of the seller was to deliver the goods ex jetty after the arrival of the goods at the port of destination and to tender the appropriate documents at that stage, the buyer cannot be made liable for any breach of the statutory obligation to apply for delivery nor can he be called upon to make an application for delivery as contemplated by the section.<sup>3</sup>

The expression 'apart from any express contract' is introduced in S. 35 for excluding the scope of any implied stipulations.<sup>3</sup>

Where the goods are being imported from a foreign country by the seller and the delivery is to be given at the jetty, there is clearly an obligation on the sellers to inform the buyer about the arrival of the goods at the port of destination. It is only then that the obligation, if any, of the buyer to apply for delivery would arise. But where no intimation was given at all about the time of the arrival of the goods or the ship, and it was only after the committal of a breach of the contract by the seller by not delivering the goods at the jetty or after removing the goods to the godown that the buyer was called upon to take delivery, the buyer cannot be made liable for the breach of the statutory obligation to apply for delivery.<sup>3</sup>

**Anticipatory breach of contract by seller.** In the case of anticipatory breach of contract on the part of the seller, S. 35 has no application when the buyer treats the contract as rescinded by virtue of S. 60 of the Act.<sup>4</sup>

1. Section 36 (infra); Yangtze Ins. Association v. Lukmanjee, (1918) A. C.p. 589 P.C.  
2. Alapaty Ramamoorthy v. Poliseti Satyanarayana, A.I.R. 1958 Andh. Pra. 550.

3. B.R. Herman & Mohatta (Indian) Ltd. v. Pran Bally Majumdar, A.I.R. 1960 Cal. 524; 64 C.W.N. 798.  
4. Devi Lal v. Govind Lal, A.I.R. 1961 Raj. 283.



**(2) Express contract, sections 35, 54—Contract Act, sections 73, 74.**

Under a contract the buyers who were the plaintiffs agreed to purchase from the defendant who was the seller, subject to conditions and terms noted therein, a certain quantity of yarn and accepted the seller's godown delivery at the seller's option between the first and the last date of October 1943 and to pay the full value for the same and to accept the goods delivery as per the contract terms of Messrs. The Madurai Mills Ltd. with the seller. Clause 4 of the contract was to the following effect : "If the buyer fails to take delivery as required by the seller's notice, the seller shall have the right to sell such goods by public or private sale at the buyer's risk." 133 bales of cotton yarn were agreed to be purchased by the plaintiffs for which purpose a sum of Rs. 10,560-8-0 was advanced to the defendant.

It was *held* : (1) There had been an express contract which would not make the general provisions of S. 35 of the Sale of Goods Act applicable. There was no doubt whatever that there was no obligation cast upon the plaintiffs to apply for delivery until the notice was received. The opening words of condition 4 namely "that if the buyer fails to take delivery" surely connoted delivery as contemplated by the contract and not after the breach had taken place. The preamble portion of the contract where mention was made of the buyer accepting the seller's godown delivery at seller's option between the first and last day of the month would mean that the initiative had to be taken by the seller to inform the buyer that the goods were ready for delivery.

(2) The expression "seller's option" in the preamble meant that the seller should first intimate to the buyer of the availability of the goods and the readiness to deliver, and until the seller exercised that option the buyer could not do anything and, therefore, the important factor was communication of the date by the seller when the goods will be delivered, in which case alone the buyer could apply for delivery. Since the defendant did not intimate that the goods were ready for delivery before the month of October was over, there had been no breach on the part of the plaintiffs. Even if the plaintiffs knew that the defendant could have got the bales of yarn from the Mills as and when it was necessary, that would not be sufficient unless the initiative was taken by the defendant to inform the plaintiffs of his readiness and willingness to deliver the goods and also to ask the plaintiffs to tender the sale price.

(3) None of the incidents of a deposit as contemplated in mercantile transactions was present in the advance paid by the plaintiffs to the defendant. It was the duty of the defendant to give notice of sale and that not having been done the unpaid seller shall not be entitled to recover any damages whatever. The plaintiffs would be justified in asking for refund of advance which could not be considered as a deposit as understood in English law. But the claim for interest made by the plaintiffs was unsustainable for the reason that by their conduct the defendant rightly or wrongly believed to some extent that the goods would be taken delivery of after 31-10-1943 though the plaintiffs had not by anything in writing or in express words indicated that.<sup>1</sup>

1. Sundararama Iyer & Co. v. M. Mudaliar, A.I.R. 1957 Mad. 228. Case-law

discussed.



*In Alapathy Ramamoorthy v. Poliseti Satyanarayana*,<sup>1</sup> it was held : An express contract means the reciprocal promises contained in the words of the contract or resulting from a true construction of them and excludes stipulation which may arise out of any usage or custom or which may be inferred from the conduct or course of dealings between the parties. Section 35 imports into all contracts of sale of goods, a term that the seller is not bound to deliver the goods until the buyer applies for delivery, which may be negatived only by the actual words used in the bargain between them or a true construction of these words.

In this case, the plaintiff entered into contracts with the defendants to buy gunnies. The contracts were for the sale of goods by description and were executory. Although the time and place of delivery were fixed, payment was stipulated against delivery order. At the end of the contracts, the plaintiff passed to the defendants a "stop-loss" letter, under which the plaintiff agreed to accept damages in lieu of delivery. The plaintiff without applying for delivery, sued the defendants for damages for non-delivery. It was held : The contracts could by no means be construed as relieving the plaintiff of his obligation to apply for delivery. As the plaintiff admittedly did not apply for delivery, he had no cause of action for claiming damages. The defendants were not bound to deliver until the plaintiff made an effective application for delivery and in the absence of any such application they could not be held liable for non-delivery.

The plaintiff's right to recover damages under stop-loss letter depended upon whether the defendants wrongfully neglected or refused to deliver the goods. There was no such default on their part, because they were entitled to wait for the plaintiff's application for delivery, which was never made. There was nothing in the words of the "stop-loss" letters which would warrant the conclusion that they were inconsistent with the buyer having to apply for delivery.

36. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer

1. A.I.R. 1958 Andh. Pra. 550.



unless and until such third person acknowledges to the buyer that he holds the goods on his behalf :

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

### Synopsis

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|--|--|
| (1) <i>Rules as to delivery—analogueous law.</i>   | (7) <i>Sub-section (3)—goods in possession of third person—attornment of bailee.</i> |
| (2) <i>Place of delivery—sub-section (1).</i>  | (8) <i>Proviso to sub-section (3)—documents of title.</i>                            |
| (3) <i>Distinction between contract of sale of goods and contract to deliver goods in payment of a debt.</i> | (9) <i>Sub-section (4)—reasonable hour of delivery.</i>                              |
| (4) <i>Delivery of goods in sea transit.</i>   | (10) <i>Sub-section (5)—cost of putting the goods in deliverable state.</i>          |
| (5) <i>Delivery ‘ex-ship.’</i>   |  |
| (6) <i>Reasonable time—sub-section (2),</i>  |  |

#### (1) Rules as to delivery—Analogous law.

This section is a combination of section 29 of the English Act and old section 94 of the Indian Contract Act (See Appendix A and Appendix B). The second part of section 29 (1) of the English Act has been omitted and in its place the provisions of old section 94 of the Indian Contract Act have been substituted with the words ‘manufactured or’ added before the word ‘produced’. Sub-sections (2) to (5) are the same as sub-sections (2) to (5) of section 29 of the English Act.

#### (2) Place of delivery—sub-section (1).

Sub-section (1) clearly lays down that whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Thus, as to the *place* where delivery is to be made, this will generally be regulated by agreement, which is usually binding on both parties, but when nothing is said about it in the contract, the rule laid down in this sub-section is that goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, *i.e.* future goods, at the place at which they are manufactured or produced. It seems immaterial whether the goods are specific or unascertained or whether parties have knowledge as to where they are. Generally speaking, the goods are at the place of business or residence of the seller ; and if not, the parties are



supposed to know where they are or where they will be produced or manufactured. So the buyer is supposed to know where the delivery is to be obtained. If however the buyer does not know where the goods are, the seller must give him notice of the place where the goods are in order to enable him to apply for delivery. Consequently, it follows that when the goods are to be produced or manufactured, the seller must give notice to the buyer that they are ready before he could apply for delivery. Under the English Act, in the absence of any special agreement, "the place of delivery is the seller's place of business if he has one, and if not, his residence" unless the contract is for the sale of specific goods which, to the knowledge of the parties, are at some other place, then that place is the place of delivery. The omission of second clause of sub-section (1) of section 29 of the English Act, in the Indian Act, is due to the fact that it is severely criticised by the text-writers as not laying down a very definite *prima facie* rule.<sup>1</sup> The legislature has, therefore, preferred the phraseology of section 94 of the Indian Contract Act, 1894, in its place.<sup>2</sup>

The first portion of the sub-section deals more with the mode of delivery than with the place of delivery. As has already been pointed out under the last section, the general rule is that the buyer should apply for delivery and the seller is not bound to deliver the goods unless a delivery is demanded by the buyer. Before the enactment of the English Sale of Goods Act, 1893, there was very little authority on the point, the assumed rule being that it was for the buyer to take delivery, and that in the absence of any different agreement the duty of the seller to deliver was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery.<sup>3</sup> Where there was sale of a cask of wine to be delivered at the buyer's house and the carrier delivered the wine there to an apparently respectable person who signed for it and then made off with it, it was *held* that this amounted to a delivery to the buyer.<sup>4</sup>

The parties are at liberty to agree that delivery should be given in any way or at any place. When a mode of delivery is indicated in the contract, it is for the benefit of both the parties and cannot be altered except by the mutual consent.<sup>5</sup> In this case, the contract provided for delivery *f. o. b.* Liverpool. The buyer claimed to be entitled to waive the condition as to delivery and to take delivery of the goods before they were put on board the ship. It was *held* that the term as to mode of delivery was for the benefit of either party, and either party could waive such term without the consent of the other party. In *Grenon v. Lachmi Narain*,<sup>6</sup> there was a contract for the sale of goods "to be delivered at any place in Bengal... to be mentioned hereafter." It was *held* that it did not fall within the operative part of old section 95 of the Indian Contract Act, for there was special promise as to delivery, giving the buyer the right to fix the place anywhere in Bengal, and the words "to be mentioned hereafter" expressed only what the law would have implied that the seller was entitled to reasonable notice

1 See Chalmers, 16th Edn., p. 150.

2 See Special Committee's Report.

3 See *Wood v. Tassell*, (1844) 6 Q.B. 234 ; *Smith v. Chance*, (1819) 2 B. & Ald. p. 755,

4. *Galbraith v. Grant & Block*, (1922) 2 K.B. 155.

5. *Maine Spinning Co. v. Sutcliffe & Co.* (1917) 87 L.J.K.B. 382.

6, (1896) 24 Cal. 8 ; L.R. 23 I.A. 117,



of the buyer's choice and that the matter did not fall within the ambit of section 94 at all, but rather under section 49 of the Contract Act; there was in fact no question under that section that the buyers had demanded delivery at the Howrah railway station, and the sellers had refused it. Where the choice for the place of delivery had been given originally to the buyer, a mention by him of a reasonable place would be sufficient to compel the seller to deliver the goods at such place in fulfilment of the contract and such contract would not fall within this sub-section which provides only for the cases where there is no special promise as to delivery.<sup>1</sup> In *Phul Chand v. Jugal Kishore*<sup>2</sup>, the Lahore High Court held that the buyer should ask to have the goods made over to him at the seller's place of business and not his own. This was also a case under old section 94 of the Indian Contract Act.

Where the defendant sold certain goods to the plaintiff and the agreement between the parties was to deliver the goods on a certain day and on such day the plaintiff wrote a letter to the defendant saying that the latter should give delivery and take full amount, it was *held* that the plaintiff not having applied for delivery as required by Ss. 35 and 36 he was responsible for the breach of the contract. It was *also held* that the letter written by the plaintiff showed willingness but there was nothing to show his readiness. The plaintiff not having satisfied the Court that he was "ready and willing" to pay the money as required by S. 32, he was responsible for the breach of the contract on account of this failure also.<sup>3</sup>

In the absence of any express or implied contract to the contrary, the goods sold or agreed to be sold are to be delivered under S. 36 (1) of the Act at the place at which they are at the time of sale or of the agreement to sell. But where there is an implied agreement that the goods should be delivered at a particular place, the Court at that place has jurisdiction to entertain a suit for the breach of the contract.<sup>4</sup>

Where the place of delivery is within the option of either party, it is a condition precedent to the liability of the other party that he should receive notice of the place of delivery.<sup>5</sup>

Where the goods are to be taken by the buyer from the seller's land or premises, the contract of sale by implication confers on the buyer a licence by the seller to the buyer to enter upon the land or premises to remove the goods.<sup>6</sup> It would appear that such a licence is irrevocable.<sup>7</sup>

**Section 36 (1)—Contract for supply of coal—No express or implied contract between parties as to place of delivery—Goods are deemed to have been delivered at the place where they were at the time of sale—Delivery to carrier when delivery to buyer.**

In *Bibhuti Bhusan Bose v. National Coal Trading Co.*,<sup>8</sup> the plaintiff, a registered firm carrying on business at Katrasgarh in the district of

1. See also *Savage Mfg. Co. v. Armstrong*, 19 Maine 147; *Armitage v. Insole*, (1850) 14 Q.B. 728.

2. A.I.R. 1927 Lah. 693 : 8 Lah. 501.

3. *Radhelal v. Ratanlal*, 19.9 Nag. L.J. 337 : I.L.R., (1949) Nag. 555.

4. *Jai Narain v. Nathmal*, A.I.R. 1953 Ajmer 29. See also *Battepati v. Calcutta Glass and Silicate Works*, A.I.R. 1949 Mad. 145.

5. *Davies v. McLean*, (1873) 21 W.R.

264 (seller's option); *Armitage v. Insole*, (1850) 14 Q.B. 728; 80 R.R. 388 supra; *Sutherland v. Allhusen*, (1866) 14 L.T. 666

6. *Halsbury, Laws of England*, Vol. 34, p. 94; *Jones v. Tankerville*, (1909) 2 Ch. 440 at p. 442. *Liford's case* (1614) 11 Co. Rep. 46b, 52b, Plowd. 17a, 77 E.R. 1206.

7. *Ibid.*

8. A.I.R. 1966 Pat. 346.



Dhanbad, filed a suit against the defendant, who was a coal merchant at Calcutta, for the recovery of a sum due, for coal supplied to him. The suit was filed in Dhanbad Court. The defendant raised an objection to the maintainability of the suit in Dhanbad Court on the allegation that no part of cause of action arose within the jurisdiction of that Court.

It was, however, an admitted fact that the despatches of coal used to be made by the plaintiff by railway and the railway receipts along with the bills for coal supplied were handed over to the defendant. No specific mode of delivery as agreed to by the plaintiff, however, was alleged and proved by the defendant. On the question whether Dhanbad had jurisdiction to entertain the suit, it was *held* : On facts of the case, in the absence of any other material on the record, it must be presumed that the deliveries of the consignment used to be made to the defendant within the territorial jurisdiction of the Dhanbad Court, where the consignments were booked by rail for transmission to the defendant ; for S. 36(1) of the Sale of Goods Act provided that in the absence of any express or implied contract between the parties, goods sold were to be delivered at the place at which they were at the time of the sale, and goods agreed to be sold were to be delivered at the place at which they were at the time of the agreement to sell, or if not then in existence at the place at which they were manufactured or produced.

Further, S. 39 of the said Act laid down that where, in pursuance of a contract of sale the seller was authorised or required to send the goods, to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer was *prima facie* deemed to be a delivery of the goods to the buyer. Consequently, in the instant case it must be held that the cause of action arose within the jurisdiction of the Dhanbad Court since the deliveries of the goods sold took place when the consignments in question were booked by rail for transmission to the defendant. Therefore as the coal supplied to the defendant was in existence in the coal fields within the jurisdiction of the Dhanbad Court and the goods were booked by rail at places within the same jurisdiction, the deliveries to the defendant must be held to have been made within the same jurisdiction, and hence the Dhanbad Court had territorial jurisdiction over the suit.

### **(3) Distinction between contract of sale of goods and contract to deliver goods in payment of a debt.**

A contract of sale differs from a contract to pay an existing debt in specific articles. Where it is agreed that a debt is to be satisfied by delivering specified articles and no place of delivery is specified, the debtor must ask the creditor to appoint a place, and if the creditor fails to appoint a reasonable place, the debtor may himself appoint a reasonable place on giving notice to his creditor, and deliver the goods there. The same rule applies where the time of delivery is fixed although the place is not.<sup>1</sup>

### **(4) Delivery of goods in sea transit.**

This sub-section does not deal with cases of "symbolic" delivery of goods in course of transit at sea by means of the bill of lading, or the conditions under which the buyer must pay against the shipping document or is entitled to await actual delivery of the goods.<sup>2</sup>

1. Per Couch C.J. in *Dadabhai v. Sulleman*, (1868) 5 B.H.C.A.C. 126, 128.

2. See *E. Clemens Horst Co. v. Biddell*

*Bros.* (1922) A.C. 18 adopting Kennedy L.J.'s dissenting judgment in *Biddell v. E. Clemens Horst Co.*, (1911) 1 K.B. at p. 952.



**(5) Delivery "ex-ship".**

In a contract of sale "ex-ship", the seller makes a good delivery if, when the vessel has arrived at port of delivery, and has reached the usual place of delivery therein for the discharge of such goods, he pays the freight, and furnishes the buyer with an effectual direction to the ship to deliver.<sup>1</sup> Lord Sumner observed in this case :

"In the case of a sale ex-ship, the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery, and has reached place therein which is usual for delivery of goods of the kind in question. The seller, therefore, has to pay the freight or otherwise release the ship-owner's lien and to furnish the buyer with an effectual direction to the ship to deliver."

**(6) Reasonable time—sub-section (2).**

This sub-section corresponds to sub-section (2) of section (29) of the English Act declaratory of the common law rule. This sub-section provides that, where the seller is bound to send the goods to the buyer without application by the latter, he must send them within a reasonable time, if no time is specified in the contract.

The law implies a reasonable time within which the contract is to be performed when the contract itself is silent as to the time of performance. Once a reasonable time is implied within the meaning of section 36, sub-clause (2), the contract becomes a contract to be performed at a fixed time as much as if the parties themselves have fixed a specific time. In the one case it is the act of parties which determines the time when the contract is to be performed: in the other case it is by implication of law that the time is determined. But in either case *time cannot be extended* by the unilateral act of a party. In the first case, when the fixed time has expired, there would be a breach; in the latter case, when the reasonable time implied by the law has expired, equally so there would be a breach unless either in the one or in the other case there is an agreement between the parties to extend the time for the performance of the contract.<sup>2</sup>

The question, what is a reasonable time, is a question of fact<sup>3</sup> depending in each case upon the particular circumstances, the nature of the commodity, the question of transport, the time during which the contract was entered into and so on;<sup>4</sup> accordingly, evidence may be given of the surrounding circumstances in which the contract was made in order that the question may be determined,<sup>5</sup> and also facts subsequently causing delay without the seller's fault<sup>6</sup> or causes on which the seller has no control. But if delivery be not made within a reasonable time, though the delay may not have been due to the seller's default, it may frustrate the buyer's adventure and entitle him to refuse acceptance.<sup>6</sup> In *Re Carver &*

1. *Yang-tsze Ins. Ass. v. Luckmanjee*, (1918) A.C. 585 P.C. ; 87 L.J. (P.C.) 111.

2. *Dinkerrai Lalit Kumar etc. v. Sukh-dayal Rambilas etc.*, A.I.R. 1947 Bom. 293.

3. See section 63, post.

4. *Ellis v. Thompson*, (1838) 3 M. & W. 445, 49 R.R. 679 : goods were described as ready for shipment but there was considerable delay in carrying

them to the port of shipment from the mine : held, the buyer could reject the goods ; *Sujanmal v. Radhey Shyam*, A.I.R. 1976 Raj. 98.

5. *Hick v. Raymond*, (1893) A.C. 22, at p. 33 ; *Re Carver & Co. and Sassoon Co.*, (1911) 17 Com. Cas. 59.

6. *Jackson v. Union Marine Insurance Co.*, (1874) L.R. 10 C.P. 125, Ex. Ch. *Re Carver & Co. and Sassoon & Co.*, supra.



*Co.*,<sup>1</sup> the delay was due to ship getting stranded. It was *held* that the mere fact that the goods when these arrived were exposed to higher competitive market than that which was expected was not sufficient to warrant a finding that the commercial object of the contract was defeated, although the seller might be liable for damages for delayed delivery. Similarly, delay in discharging cargo may be excused when it is done within a reasonable time under the circumstances.<sup>2</sup>

In *M/s. Sahu & Co. v. M/s. Sriram Vijay Kumar*,<sup>3</sup> also it was held: Law will imply that the performance is to be done within a reasonable time and what is reasonable time must, in each case, depend upon the particular circumstances, the nature of the commodity etc. Failure to supply the goods within reasonable time amounts to breach of contract.

Where a clause in a contract states a specific date for delivery, but expressly states that such delivery date cannot be guaranteed, a clause in this form places upon the seller duty to deliver within a reasonable time of the specified date. What is reasonable time from the specified date is a question of fact depending upon all the circumstances of the case as they exist up to the time when delivery is or ought to be made.<sup>4</sup>

In England, what is a reasonable time, would be determined by the jury.

The sub-section applies only where the making of delivery depends entirely on the seller. If it depends on some concurrent act of seller and buyer, the only liability imposed is that each shall use reasonable diligence in performing his part in the joint act.<sup>5</sup>

A contract by a manufacturer to supply some specified goods "as soon as possible" means within a reasonable time.<sup>6</sup>

Where the seller is not bound to send the goods but the buyer is bound to take possession of them from the seller or a third person, the seller is deemed to promise that the buyer, if he applies for the goods within a reasonable time, shall receive them.<sup>7</sup>

It has been held under the English Act that where a certain number of 'days' are allowed for delivery, they are to be counted as consecutive days and include Sundays, unless the contrary be expressed,<sup>8</sup> or a usage to that effect be shown.<sup>9</sup> If a certain number of days are allowed for the delivery they must be counted exclusively of the day on which the contract was entered into.<sup>10</sup> A promise to deliver goods in two months *from* October

1. (1911) 17 Com. Cas. 59, 67.

2. *Hick v. Raymond*, (1893) A.C. 22. See also *Wertheim v. Chicoutimi Pulp Co.*, (1911) A.C. 301; *British Motor Body v. Shaw & Co.*, (1914) S. C. 922.

3. (1971) (2) C.W.R. 86. See *Yearly Digest 1971*, August issue, Column 1471.

4. *McDougal v. Aeromarine of Emsworth Ltd.*, (1958) 1 W.L.R. 1126.

5. *Ford v. Cotesworth*, (1868) L.R. 4 Q.B. 127, 133; *Pearl Mill Co. v. Ivy Tannery Co.*, (1919) 1 K.B. 78.

6. *Attwood v. Emery*, (1856) 140 E.R. 45, 107 R.R. 595. (cf. *Alagirisamy v. Runa Cheena*, (1924) 19 L.W. 654 : 78 I.C. 326. See also *Mundal & Co. v. A.C. Mohammad*, 53 C.W.N. 843.

7. *Buddle v. Green*, (1857) 27 L.J. (Ex.) 33, 114 R.R. 991.

8. *Brown v. Johnson*, (1842), 10 M. & W. 331.

9. *Cochran v. Retberg* (1803), 3 Esp. 121. See also *Nielson v. Wait*, (1885) 16 Q.B.D. 67 (C.A.).

10. *Webb v. Fairmaner*, (1848) 3 M. & W. 473.



5 is fulfilled by delivery at any time on the whole day of December 5, so that an action against the seller would be premature, if brought before the 6th. Where, however, the last day of the period is a Sunday, it would seem to be doubtful whether it should not be excluded where delivery on that day would be a violation of the Sunday Observance Act, 1677.<sup>1</sup> In *Coddington v. Paleologo*,<sup>2</sup> where the contract was for the delivery of goods. "delivering on April 17th complete 8th of May," the Court of Exchequer was equally divided on the question whether the seller was bound to commence delivery on April 17. In *Cox v. Todd*,<sup>3</sup> a contract to deliver barley "alongside a sloop or warehouse in all April or sooner" was held not to have been fulfilled by the seller bringing the barley into dock on the 29th, four days being required for complete delivery.

It has been held that unless there is a custom to the contrary,<sup>4</sup> when the period fixed expires on a holiday, the delivery should be made on the previous office-day and not on the next office-day.<sup>5</sup> Where, however, the effect of the strict enforcement of the rule is to render the performance impossible, for instance, where the whole period consists of holidays<sup>6</sup> or where the last day is Sunday and the performance is prohibited by the provisions of Sunday Observance Act<sup>7</sup> or where the act to be done is to be done not by the party but by the court or by the party in conjunction with the court and the court or its office is closed on the last day,<sup>8</sup> the act in all these cases may be performed on the next practicable day. Where by the contract a party is to have so many days for doing an act the days mean consecutive days, including Sundays and other holidays unless there be a custom to the contrary.<sup>9</sup>

As to the meaning of 'month' see notes on pages 259-260.

In *India Red Lead Factories Co. v. Parsottamdas Narsingdas*,<sup>10</sup> it was held: Reasonable time is to be determined with reference to a particular point of time. If it be suggested that there is an extension of time for delivery within a reasonable time, it is impossible to predicate as to what would be the reasonable time for delivery unless it is pleaded that delivery was to be within a reasonable time from a determined factor like the date of the contract or any specified time of delivery. Where the plaintiff's case is that the time for delivery was extended from time to time at the request of the defendant, the plaint cannot be read as pleading that there was an arrangement for extension of time for delivery within a reasonable time.

Mere forbearance from suing or giving a formal notice is not enough to form an agreement for extension of time. Such an agreement cannot be founded on a unilateral act of the promisee to extend the time of performance of his own accord and for his benefit. Unless both the buyer and the seller agree, there cannot be an extension of time.

1. See *Child v. Edwards*, (1909) 2 K.B. 753.

2. (1867) L.R. 2 Ex. 193.

3. (1825) 7 D. & R. 131. See Benjamin on Sale, 8th Edn., pp. 692, 693.

4. *Lal Chand v. J.L. Kerston*, 15 Bom. 338.

5. *Motumal v. Ruttonji*, 24 I.C. 883.

6. *Mayer v. Harding*, (1866-67) 2 Q.B.

410; *Waterton v Baker*, L.R. (1867-68) 3 Q.B. 173

7. *Mitch v. Frankan & Co.*, (1909) 2 K.B. 100.

8. *Morris v. Barrett*, 7 C.B.N.S. 139; *Hughes v. Griffiths*, 13 C.B.N.S. 324.

9. *Brown v. Johnson*, 10 M. & W. 331 (334).

10. A.I.R. 1960 Cal. 327.



Where the promisor fails to perform the contract at the stipulated time, it is open to the promisee to avoid the contract. If he does not avoid the contract, the fact of non-avoidance does not by itself change or alter the time of performance. There has to be an agreement between the two parties to extend the time for performance.

Where there is extension of time there must be a new delivery date. It may be a stipulated date or if no date be fixed, the delivery has to be performed within a reasonable time. Such reasonable time will then be determined with reference to the time up to which there has been agreement extending the time for performance. In such cases it is vital to plead the time up to which the time for performance was by agreement extended so that the term of delivery as being within a reasonable time and during the subsistence of the contract can be ascertained.

The sub-section assumes that nothing further remains to be done by the buyer. Where goods are deliverable to the buyer 'on request,' or 'as required,' or on similar terms, the seller is not to deliver the goods until the buyer calls for delivery. It is a condition precedent to the buyer's right of action that he should make his request either personally or by letter.<sup>1</sup> If the buyer calls for delivery, the seller must deliver the goods within a reasonable time thereafter.<sup>2</sup> If the buyer does not call for delivery within a reasonable time after the contract, the seller may give him notice to do so.<sup>3</sup> Where the contract does not limit the time for the buyer's request in a contract for goods to be delivered 'as required,' the buyer must require delivery within a reasonable time but the seller cannot rescind the contract on the ground of delay without giving the buyer a notice. "No doubt," says Pollock C.B., "where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, viz., that *every reasonable condition is also implied* and it seems to me reasonable that the party who seeks to put an end to a contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them."<sup>4</sup>

But this rule is not an absolute rule—the facts may show (for instance by inordinate delay) a mutual intention to abandon the contract, or may show such conduct on the part of the buyer as to mislead the seller into believing that the contract has been abandoned and therefore to estop the buyer from setting it up.<sup>5</sup> If owing to excessive delay by the buyer the seller is prejudiced, the seller may be discharged.<sup>6</sup>

It has been observed that *prima facie* the buyer has whole of his life to call for delivery in such cases<sup>7</sup> and the rule as to reasonable time is excluded.<sup>8</sup> Therefore, the seller is not discharged, as noticed above, because

1. *Bach v. Owen*, (1793) 5 T.R. 409. See *Radford v. Smith*, (1838) 3 M. & W. 254.

2. *Bowdell v. Parsons*, (1808) 10 East 359; *G.N. Railway Co. v. Harrison*, (1852) 12 C.B. 576, 92 R.R. 786.

3. See *Halsbury*, Vol. 34, (3rd Edn.), p. 95.

4. *Jones v. Gibbons*, (1853), 8 Exch. 920,

at p. 922.

5. *Pearl Mill Co. v. Ivy Tannery Co.*, (1919) 1 K.B. 78.

6. See *Ross v. Shaw*, (1917) 2 Ir. R. (K.B.) 367.

7. *Llanelly Rail and Dock Co. v. London and North Western Rail Co.*, (1874-75) L.R. 7 H.L. 550.

8. *Ibid.*



the buyer does not call for delivery within a reasonable time after the contract, but the buyer's liability may be hastened by notice.<sup>1</sup> If the buyer fails to call for delivery within a reasonable time after the notice, the seller may repudiate the contract, if it is an entire one.<sup>2</sup> "Where, however, the property in the goods has passed to the buyer, the seller may, at his option, keep the goods and charge the buyer, the expenses for care and custody of the goods."<sup>3</sup> Where goods are deliverable by instalments each instalment to be separately paid for, the contract is divisible, and partial breach by the buyer does not necessarily entitle the seller to repudiate the whole contract.<sup>4</sup> Where, however, the price is not apportioned in each instalment, the seller is entitled to repudiate the whole contract if the buyer fails to take delivery of any instalment within a reasonable time after notice by the seller.<sup>5</sup> Similarly, where the seller is not bound to send the goods, but the buyer is to take possession of them from the seller or a third person, the seller is deemed to promise that the buyer, if he applies for the goods within a reasonable time, shall receive them.<sup>6</sup> Similar principles *mutatis mutandis* apply to the buyer's liability to accept goods where the time of delivery is indefinite and within the option of the seller.<sup>7</sup>

The promisor of an act which is to be performed, 'immediately on demand' or 'on demand,' or 'on notice,' is entitled to reasonable time after demand or notice for complying with his promise.<sup>8</sup> The expression 'forthwith' may mean no more than 'without delay or loss of time.' It is less strict than the expression 'immediately'.<sup>9</sup>

A contract for sale of goods provided that delivery was to be given "ex-godown as and when the goods come." The goods arrived on 2nd December, 1942, but the seller did not give delivery. The buyer demanded delivery on 9th December, 1942, but the demand was not complied with. In a suit for damages, *held*, that the contract was broken on 2nd December, 1942, and the damages must be assessed on the basis of the market price on that date and not on 10th December, 1942.<sup>10</sup>

In *Toyo Menka Kaisha Ltd. v. Chabildas Nathubhai*,<sup>11</sup> the contract was for delivery of seventy-five bales ready and twenty-five bales of September delivery. Forty-eight bales were delivered between 17-9-20 and 21-10-20; and although the delivery of these forty-eight bales extended right up to 31-10-1920, it was *held* that the date of breach was *eight* days after 13-9-20, with regard to the contract for the sale of ready goods.

1. Jones v. Gibbons, (1853) 8 Exch. 920; Halsbury, Vol. 34 (3rd Edn.), pp. 95, 96 f.n. (h).

2. Ibid., pp. 95, 96.

3. See section 44, *infra*: Greaves v. Ashin, (1813) 3 Camp. 426.

4. See section 38(1) *infra*; Eastern Counties Ry. Co. v. Phillipson, (1855) 16 C.B. 2.

5. Chanter v. Leese, (1840) 5 M. & W. 698; Kingdom v. Cox, (1848) 5 C.B. 522.

6. Buddle v. Green, (1857) 27 L.J. Exch. 33; Halsbury, Vol. 34, 3rd Edn., p. 95.

7. Halsbury, Vol. 34, 3rd Edn., p. 95,

f.n. (h.).

8. Brighty v. Norton, (1862) 3 B. & S. 305; 129 R.R. 337; Toms v. Wilson, (1862) 4 B. & S. 442, 129 R.R. 799; Moore v. Shelley, (1883) 8 App. Cas. 285, 293, P.C.; Greenway Bros. v. Jones & Co., (1915) 33 T.L.R. 184—delay was in contemplation.

9. Roberts v. Brett, (1865) 11 H.L.C. 337; 145 R.R. 723.

10. B. Muniswami Chetti & Co. v. D. Muniswami Chetti & Co., A.I.R. 1944 Mad. 418; 1944 M.W.N. 275.

11. A.I.R. 1922 Bom. 203; 24 Bom. L.R. 146.



The learned judge said that the forty-eight bales which were delivered must be appropriated to the ready contract ; and with regard to the balance, he awarded damages on the basis that the breach had taken place within a week of 13-9-20.

In *Dinkerrai Lalit Kumar etc., v. Sukhdayal Rambilas etc.*,<sup>1</sup> where the contract of sale was of ready goods and the parties contemplated that they should be despatched as early as possible, a *fortnight's* time from the date of contract was held to be a reasonable time. Deliveries made after the fortnight's time were held not referable to the contract in suit but to a different transaction.

In the above case, on 26th June, 1942, the defendants sold to the plaintiffs 33 bales of piece-goods or 36 bales, three bales more according to the option of the defendants. In all delivery was given of 22 bales between 3rd July and 21st August, 1942. The defendants failed to give delivery of remaining 11 bales, and the plaintiffs filed a suit for damages for non-delivery of the 11 bales. It was *held* that there was a breach on the part of the defendants, that the due date of the performance of the contract was 10-7-1942 and that the damages must be assessed on the basis of the date of breach being 10-7-42.

In *Bejoy Krishna v. N.B. Sugar Mills Co.*,<sup>2</sup> there was contract for the sale of liquid molasses on terms 'f.o.r. Gopalpur,' and 'ready delivery.' There was nothing in the contract to suggest as to who, whether the buyer or the seller, was responsible for procuring tank wagon at the siding where the molasses could be pumped into the tank wagons. It was *held* :

(i) Evidence was admissible to prove the usage of the trade in such circumstances ;

(ii) there would be no inconsistency in adding to the clause that the sale is f.o.r. the trade usage, if it was found to exist, that the mills should procure the rail wagons into which they were to load the goods ;

(iii) to prove the usage, it was not necessary to establish either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these became a local law. The usage might be still in course of growth, it might require evidence for its support in each case, but in the result it was enough if it appeared to be so well-known and acquiesced in that it might be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract ;

(iv) on evidence the alleged usage that it was for the seller to procure the tank wagons, was not established ;

(v) there was also no implied warranty that the seller would provide the wagons.

Reference was made in the above case to the following remarks of Parke B, in *Hutton v. Warran* :<sup>3</sup>

"It has long been settled that in commercial transactions extrinsic evidence of custom and usage admissible to annex

1. A.I.R. 1947 Bom. 293 ; see also *Phoenix Mills Ltd. v. Madhavdas Rupchand*, (1922) 24 Bom L.R. 142—Such deliveries are referable to a separate transaction and not to the

contract in suit.

2. A.I.R. 1949 Cal. 490 ; I.L.R. (1945) 2 Cal 173.

3. (1836) 1 M. & W. 466, at p. 475.



incidents to written contracts in matters with respect to which they are silent.....and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound but a contract with reference to those known usages."

Reference was also made to the following words of Lord Campbell C.J. in *Humfrey v. Dale*:<sup>1</sup>

"In a certain sense every material incident which is added to a written contract varies it and makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations, and be different contracts. To take a familiar instance by way of illustration: on the face of a bill of exchange at three months after date the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but, by the custom, he is only bound to do so at the end of the days of grace, which vary according to the country in which the bill is made payable, from three up to fifteen. The truth is that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as if expressed in the written contract would make it insensible or inconsistent."<sup>2</sup>

**(7) Sub-section (3)—goods in possession of third person—attornment of bailee.**

This sub-section corresponds to sub-section (3) of section 29 of the English Act. It enacts that where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. The issue or transfer of any document of title to goods, however, operates as delivery even where the goods are in possession of a third person and is not affected by the provision of the rule.<sup>3</sup>

The acknowledgment must be given with the consent of both seller and buyer.<sup>4</sup> In sub-section (3) the assent of the buyer and of the seller to the attornment is assumed; and it merely declares that there is no delivery until the bailee also assents. It is therefore the duty of both the seller and the buyer to do what is necessary to obtain the assent of the

1. (1857) 7 El. & Bl. 266, at pp. 274-275.

2. See also *Juggmohan Ghosh v. Manick Chand*, 7 M.I.A. 263 at p. 282—Mercantile usage, evidence of.

3. See *Wardar's (Import & Export) Co. Ltd. v. W. Norwood & Sons Ltd.*, (1968) 2 All E.R. 602 referred to at

pp. 371, 430 *ante*. See also *Looke, P.P. v. N.J. Mathew*, 1968 Cr. L.J. 561 (Ker.) cited at p. 389 *ante*.

4. *Godts v. Rose*, (1855) 139 E.R. 1058; 101 R.R. 668; *London Founders Assn. v. Clarke*, (1888) 20 Q.B.D. 576.



bailee.<sup>1</sup> If the third party refuses to acknowledge the buyer's title and the buyer has done all that he is required to do, the buyer may repudiate the contract.<sup>2</sup> If the buyer is in fault, the seller may treat the delivery as having been properly made.<sup>3</sup>

A sold to B on 15th April, 1931, certain quantity of wool which was in possession of C on the date of sale. Subsequently, C wrote a letter to B on 19th April, 1931, that he had no objection to B's removing the wool from him at any time and that he would not be responsible for the same. It was *held* that C's letter was a plain acknowledgment by him that he held the wool on behalf of B and there was delivery within the meaning of section 36 (3) on 19th April, 1931.<sup>4</sup>

It is to be observed that it is assumed that the property in the goods has passed, for the opening words are "where the goods at the time of sale are in the possession of a third person," and by section 4 (3) there is a sale only when the property in the goods is transferred from the seller to the buyer. An attornment, therefore, before the property has passed, does not operate as a delivery, and is ineffectual except as an estoppel.<sup>5</sup> Thus an acknowledgment made while the goods are unascertained is ineffectual, although it would estop the person acknowledging from subsequently denying the buyer's right to possession.<sup>6</sup>

If the third person is not in actual possession, there can be no constructive possession through him. Even if he attorns to the buyer, and is estopped as against him from denying possession, that will not amount to delivery by the seller to the buyer.<sup>7</sup>

A buyer of goods obtained from his seller a delivery order on a third person. But he was not in fact able to obtain delivery from that third person. Meanwhile the seller unaware of such non-delivery paid the price to the third person and sued to recover it from the buyer, on the ground that he was made to pay the third person by the failure of the buyer to inform him as to non-delivery of goods. It was *held* that the seller could not recover from the buyer the price for the goods which, though were purchased, were not in fact delivered. It was *further held* that a buyer who had obtained a delivery order was not in law bound to inform the seller of the goods that he had failed to obtain delivery.<sup>8</sup>

**(8) Proviso to sub-section (3)—documents of title.**

The *proviso* in this sub-section takes documents of title to goods outside the scope and operation of this section. As a result of it, the

1. See *Smith v. Chance*, (1819) 2 B. & Ald. 753 ; 21 R.R. 485 (seller in fault); *Winks v. Hassall*, (1829), 9 B. & C. 372 (customs duties payable by buyer); *Buddle v. Green*, (1857) 27 L.J. Ex. 32, 114 R.R. 991 (presenting delivery order).  
2. *Pattison v. Robinson*, (1816) 105 E.R. 990.  
3. *Bartlett v. Holmes*, (1853) 38 E.R. 1347 ; 93 R.R. 658.  
4. *Prem Singh Hiyanki v. Deb Singh Bisht*, A.I.R. 1948 P.C. 20.

5. *Busk v. Dabis*, (1814) 2 M. & S. 397 ; 15 R.R. 228.  
6. *Ibid* ; See *Swanwick v. Sothern*, (1839) 9 A. & El. 895 ; 48 R.R. 740 ; *Hayman v. M. Lintock*, (1907) S.C. 936 ; *Anglo-India Jute Mills v. Omodemull*, (1911) 38 Cal. 127.  
7. *Mc. Ewan v. Smith*, (1859) 2 H.L.C. 309 ; 81 R.R. 166 ; *J.C. Shaw v. Bill*, (1885) 8 Mad. 38.  
8. *Vishwanath, v. Ram Narain Das*, 1940 All. 405 ; 190 I.C. 109.



transfer of a document of title to goods, which is defined in section 2(4) *ante*, operates as a delivery of the goods themselves. All other documents require an attornment by the bailee.<sup>1</sup> Before the passing of the English Sale of Goods Act, 1893, the Common Law excepted only the bill of lading from the operation of this rule on the ground that it was the only document of title which *per se* transferred possession. So under the Common Law rules all other documents of title except the bill of lading required an attornment by the person in possession. Before the passing of this Act, this Common Law rule was also followed in India. Illustration (b) to section 90 of the Indian Contract Act (See Appendix) showed that an order on a warehouse-man given to a buyer required the bailee's assent before it amounted to delivery.

Summing up the position under the English law, Sir Mackenzie Chalmers has observed :

"As regards documents of title, the common law drew a hard and fast distinction between bills of lading and other documents. The lawful transfer of a bill of lading was always held to operate as a delivery of the goods themselves because while goods were at sea they could not be otherwise dealt with. But the transfer of a delivery order or dock warrant operated only as a token of authority to take possession, and not as transfer of possession ; and as between immediate parties, there is nothing to modify the common law rule. If, however, a buyer or mercantile agent, who is in lawful possession of any document of title to goods transfers it for value to a third person, the seller's right of lien and stoppage in *transitu* are thereby defeated."<sup>2</sup>

The subject is more fully dealt with under section 53.

#### (9) Sub-section (4)—Reasonable hour of delivery.

This sub-section corresponds to sub-section (4) of section 29 of the English Act. It altered the previously existing law in so far as it treated the reasonableness of the hour as a question of law, for determining which elaborate rules were laid down in the case of *Startup v. Macdonald*.<sup>3</sup> The sub-section makes the question what is reasonable hour a question of fact.

#### (10) Sub-section (5)—Cost of putting the goods in deliverable state.

The sub-section corresponds to section 29(5) of the English Act. It does not deal with the expenses incidental to delivery, but only with expenses of putting the goods in a deliverable state. The term "deliverable" is defined in section 2(3) *ante*.

In the absence of an agreement to the contrary, the expenses of and incidental to, making delivery of the goods must be borne by the seller ; the expenses of and incidental to, receiving delivery must be borne by the buyer.<sup>4</sup> Thus, when the contract is for delivery 'ex-ship' the seller must do all that is necessary to release the ship owner's lien<sup>5</sup> and if "from the deck" pay all charges to be paid, such as harbour dues, to enable the goods to be removed from the deck.<sup>6</sup> Where goods are sold 'F.O.B.'

1. Cf. *Farina v. Home*, (1846) 16 M. & W. 119, 73 R.R. 433.

2. Sale of Goods Act, 16th Edn., p. 151.

3. (1843) 6 Man. & Gr., 533, 64 R.R. 810.

4. *White v. Williams*, (1912) A.C. 814 ;  
*Neill v. Whitworth*, (1865) 18 C.B.

(N.S.) 435, 148 R.R. 752 : *Acme Wood Flooring Co. v. Sutherland Innes Co.* (1904) 9 Com. Cas. 170.

5. *Yangtze Insurance Association v. Lukmanjee*, (1918) A.C. 585, P.C.

6. *Playford v. Mercer*, (1870) 22 L.T. 41.



the seller must bear the expenses of, and upto, shipment.<sup>1</sup> In a 'C.I.F.' contract, the seller is, as between himself and the buyer, chargeable with the amount of freight and the insurance charges, and the buyer, if he pays any such charges, can claim credit for them.<sup>2</sup> Wharfage charges incurred after shipment and delivery of shipping documents fall on the buyer.<sup>3</sup>

Where a contract for the sale of sugar contained the term, "free on board a foreign ship" it was held that the seller was not bound to deliver the goods into the hands of the purchaser, or to transfer them into his name in the books of warehouse where they were stored, but only to put them on board a foreign ship which it was the duty of the purchaser to name.<sup>4</sup> Where the contract of sale contained a term "the cotton to be taken from the quay" and the seller on its arrival warehoused the cotton and sent the buyer a delivery order which he refused to accept relying on this term as condition precedent, it was *held* that this was a stipulation introduced in favour of the seller and not a condition precedent, upon the performance to which the buyer could insist, and that the contract amounted to a contract to deliver at a reasonable time and circumstances, the goods to be at the buyer's charge from the time of their landing on the quay.<sup>5</sup> Where the goods were agreed to be taken from the deck, it was *held* that the harbour dues charged to be paid before goods could be removed were payable by the seller.<sup>6</sup> Where the consignees of two charges of coal sold them to the Government on the *c. i. f.* terms, the latter guaranteeing their discharge "cost of stevedoring to be paid by the Government," and it apprised that the consignees had, previously to the knowledge of the purchaser, agreed with the ship-owners to effect the discharge, "steamer paying one shilling per ton towards cost of same," it was *held* that the finding of the courts below that purchaser's contract had been fulfilled by payment of the said cost less the stipulated contribution by the ship-owners was good.<sup>7</sup> Where goods were sold "cost, freight and insurance to buyer's wharf Victoria Docks, London" and they were discharged in London elsewhere than at buyer's wharf and under the "London Clause" in the Bill of Lading certain charges were paid, it was *held* that these charges must be borne by the seller and not by the buyer.<sup>8</sup> Where goods are sold as a price to cover freight and insurance to London or any named port, payment being by acceptance receiving shipping documents, the seller fulfills his contract when he puts the goods on board the ship and hands over to the consignee shipping documents and policy of insurance in conformity with the contract and in such a case the consignee would be liable to pay charges in the nature of wharfage charges on the goods. Even if the goods do not come forward to their destination under the ordinary *c. i. f.* contract, the consignee having received the shipping documents and the policy of

1. *Cowasjee v. Thompson*, (1845) 13 E.R. 454, 70 R.R. 27; *Re Cock*, (1879) 11 Ch. D. 560; *Stock v. Inglis*, (1884) 12 Q. B. D. 564.  
 2. *Ireland v. Livingston*, (1872) 5 H. L. 395; *Public Works Commissioner v. Houlder Brothers*, (1908) A. C. 276.  
 3. *Acme Wood Flooring Co. v. Sutherland Innes Co.*, *supra*.

4. *Wackerbarth v. Masson*, (1812) 3 Camp. 270.  
 5. *Neill v. Whitworth*, (1866) L.R.I.C.P. 684. sub. nom. 11 L.T. 677.  
 6. *Playford v. Mercer* (1870) 22 L.T. 41.  
 7. *White v. Williams*. (1912) A.C. 814.  
 8. *Acme Wood Flooring Co. v. Sutherland Innes & Co.*, (1904) 9 Com. Cas. 170.



insurance has his remedy either against the ship or on the policy.<sup>1</sup> So also delivery 'free on board' or what are known *f.o.b.* contracts only mean that the price shall be that which the seller stipulates for and the buyer shall not have to pay for the wagons or carts necessary to carry the goods from the place where they are, at the time of sale and that the seller shall bear all those charges and put them free on board the ship the name of which must, of course, be furnished by the buyer.<sup>2</sup> This rule may, however, be varied by an established usage to the contrary, as for instance, in London when goods are sold on terms '*f.o.b.*' the cost of shipping them falls on the seller, but the buyer is considered as the shipper.<sup>3</sup> If the goods dealt with by a *f.o.b.* contract are specific, the words '*f.o.b.*' mean, according to the general understanding of the mercantile communities in England, something more than merely that the shipper was to put them on board at his expense. They would mean that he was to so put them on account of the person for whom they shipped.<sup>4</sup>

### Illustrations

This section can be illustrated by the following examples :—

(1) There was a sale of 12 puncheons of rum, made from molasses of which 4 were delivered. The buyer pressed for delivery of the remainder, but the seller delayed and in the meantime an Act of Parliament was passed prohibiting the distillation of spirits from molasses and annulling all contracts for the sale of such spirits. It was *held* that sellers were liable in damages as having failed to deliver within a reasonable time.<sup>5</sup>

(2) In *Stonard v. Dunkin*,<sup>6</sup> a warehouse-man at the request of the owner gave a written acknowledgment that he had a parcel of malt for the plaintiff, who had advanced money on a pledge of it by the owner. The owner became bankrupt, and the warehouse-man, defendant, attempted, in an action of trover, to show that the malt had not been remeasured which by a usage of trade was necessary to pass the property, and that the property therefore passed to the owner's assignees. Lord Ellenborough said: "Whatever the rule may be between buyer and seller, it is clear that the defendants cannot say to the plaintiff, 'the malt is not yours' after acknowledging to hold it on his account. By so doing they attorn to him and I should entirely upset the security of mercantile dealings were I now to suffer them to contest this title".

(3) In *Buddle v. Green*,<sup>7</sup> there was a sale of slates lying at a named wharf, £ 10 to be paid as a deposit and the rest of the price to be paid and the slates removed on the 23rd February. Payment was made on the 24th February, and a delivery order was signed by the seller and given to the plaintiff. On the 3rd March the original seller of the slates stopped them, as it turned out wrongfully, and the wharfinger refused to deliver

1. Ibid. See also *Ireland v. Livingston*, (1872) L.R. 5 H.L. p. 406.

2. *Re Cock, Exp. Rosevear. China Clay Co.*, (1879) 11 Ch. D. 560.

3. *Per Lord Brougham in Cowasjee v. Thompson*, 3 Moo. I.A. 422.

4. *Stock v. Inglis*, (1884) 12 Q.B.D. 564,

affirmed in (1885) 10 App. Cas. 263, H.L.; *Browne v. Hare*, (1859) 4 H. & N. 822.

5. *Philips v. Blair & Martin*, (1801) 4 Paton. Scotch Appeal Cases 256.

6. (1809) 2 Camp. 344; 11 R.R. 724.

7. (1857) 27 L.J. Ex. 33; 114 R.R. 991.



them to the plaintiff when he presented the delivery order on the 5th March. This is no delivery.

(4) Sale of goods to be delivered in the last fortnight of March. Delivery is tendered at 9 P.M. on March 31. It is a question of fact whether this is a reasonable hour. If it is not, there is no delivery, and the buyer may repudiate.<sup>1</sup>

(5) Where there is sale of goods for ready money and the seller packs them in the buyer's boxes and in the buyer's presence, but they remain in the seller's premises, there is no delivery.<sup>2</sup>

(6) Where a contract for sale of goods provides that the vendor is to give 'station delivery', the question whether it involves a liability on the vendor to pay any customs duty that may have to be paid in the course of the transit up to the station is not a mere matter of law but must depend upon a proper allegation covering that point, the raising of proper issue and giving of relevant evidence on the matter by both sides.<sup>3</sup> In this case a contract for sale provided that the vendor was to supply 200 bags of *Kulthi* at Rs. 9 per bag at Muri Behal Railway Station. The vendor was to transport the goods to the station in his own carts. The vendor gave delivery of the first lot of 175 bags which was accepted by the vendee after paying the customs duty thereon at Rs. 3-2-0 per bag. When the second lot was sought to be delivered the vendee refused to pay the customs duty and therefore the lot was not delivered. Thereupon the vendor brought a suit for recovery of unpaid price of the first lot. The defendant pleaded that he had paid the customs duty on the first lot on plaintiff's account and should be given credit for the amount. He also claimed counter-damages for non-delivery of the rest of the lot. It was in evidence that the customs receipts were invariably made out in the name of the vendee indicating thereby that the responsibility for the payment of customs dues, in all such cases, was on the vendee rather than on the vendor. After the delivery of the first lot the defendant had written a letter to the plaintiff acknowledging his liability to pay for the price of the first lot without claiming any credit for the customs duty paid by him. The market price of *Kulthi* at the time of contract was Rs. 7 per bag. It was held on the facts and circumstances of the case that it was not within the contemplation of the contracting parties that the vendor was to pay the customs duty leviable on the goods, and hence the responsibility for meeting the customs duty was not on the plaintiff in spite of the somewhat loose use of the expression 'station delivery'.

**37.** (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept

1. *Startup v. Macdonald* (1843) 6 Man. & G. 593, 64 R.R. 810; Ex. Ch. [as modified by sub-section (4)].  
2. *Boulter v. Arnott*, (1838) 1 Cr. & M.

333.  
3. *Shree Chand Aggarwalla v. Bhagwan Das*, A.I.R 1952 Orissa 85.



the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

### Synopsis

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|---|--|
| (1) <i>Obligation in regard to quantity—delivery of wrong quantity—analagous law.</i> | (5) <i>'Description'—'goods of inferior quality.'</i>        |
| (2) <i>Sub-section (1)—short delivery.</i>  | (6) <i>Sub-section (4)—trade usage or special agreement.</i> |
| (3) <i>Sub-section (2)—delivery in excess of contract quantity.</i>                   | (7) <i>Determination of goods contracted for.</i>            |
| (4) <i>Sub-section (3)—mixed delivery.</i>  |  |

**(1) Obligation in regard to quantity—delivery of wrong quantity—analagous law.**

This section is based on section 30 of the English Act (See Appendix). Section 119 of the Indian Contract Act (See Appendix) provided for the case of a seller sending to the buyer goods not ordered with goods ordered. The present section is more comprehensive. It provides for three different contingencies, viz., (1) delivery of a quantity less than that contracted for ; (2) delivery of a quantity more than that contracted for ; and (3) the delivery of goods contracted for along with goods not of the contract description. These provisions are, however, subject to any usage of trade, express agreement or course of dealing between the parties.

Williston<sup>1</sup> states the principle thus :

“A difference in quantity from that ordered or contracted for by the buyer may become important in several ways, which it is desirable to distinguish. In the first place, the buyer may have ordered a specified quantity of goods. Such an order is, in legal effect, an offer ; and shipment of a different quantity cannot be an acceptance of that offer, for the rule in regard to the formation of contracts not only of sale, but of all kinds, is that the terms of an offer must be strictly complied with in order to form a contract. Secondly, if a contract has been formed for a specified quantity of goods, defects in quantity are vital in considering the seller's liability for failure to perform his promise. And decision, however, to the effect that delivery of the wrong quantity would not satisfy the seller's

1. Williston on Sales, Revised Edition, Vol. II, S. 459, pp. 720 to 723. See also *M.S. Sarda v. Netha Spg. Mills*,

*A.I.R. 1975 A.P. 169* cited under S. 38 *post*.



obligation under a contract a *fortiori* shows that such defective performance would not amount to acceptance of an offer.

"It is a third and entirely different question, however, what rights if any the buyer has besides suing the seller for breach of contract, and especially whether defective performance of his contract by the seller justifies the buyer in terminating it altogether. It might be urged as to this question that if the defect was slight in comparison with the amount involved in the contract, the buyer should be compelled to accept the defective performance and rely upon his claim for damages, under the rule of contracts that where a breach does not go to the essence, the injured party cannot refuse to go on with the contract but must seek redress in damages. The cases about to be cited, the authority of which was accepted in the provisions of the Sales Act, show, however, that a defect in quantity unless falling within the maxim *de minimis non curat lex*, is a breach going to the essence, and the buyer, except under special circumstances of custom or contract, cannot be compelled to accept a quantity different from that for which he bargained.

"This is not saying, however, that a tender of a defective quantity in every case justifies the buyer in immediately renouncing obligation under the contract. On the contrary, though the buyer may refuse the defective tender, it seems that if a proper tender is thereafter made within such limit of time as satisfies the terms of the contract, the buyer is bound to accept. One qualification should, however, be observed: the original defective tender may be made under such circumstances as to warrant the buyer in believing that the tender thus made is the only one that will be made. Under such circumstances the buyer would be justified in securing the goods he needed elsewhere, or in otherwise changing his position. Should he do this, subsequent correct tender by the seller, even though within a time in itself proper, need not be accepted."

In *Northern India Iron & Steel Co. v. State*, A.I.R. 1976 P. & H., 59, there was short supply of electricity to consumers of certain categories. The contention of the petitioners was that electricity being 'goods' within the definition of Section 2 (7) of the Sale of Goods Act, 1930, if goods are not supplied according to the terms of the agreement the consumer is liable to pay only for delivery of such quantity as has been supplied to the consumer. It was held: Section 37 of the Sale of Goods Act which relates to delivery of wrong quantity has no applicability in this case. It cannot be held in the instant case that the Haryana Electricity Board was not ready to serve the consumer as there is no lapse on its part on account of which the energy was not being supplied. Readiness to serve would mean that the Board has adequate arrangements to supply energy, and it can supply it, if not forbidden by any lawful order or prevented from any cause beyond its control, which was the case here because of power crisis. Electricity Act, 1910, gives full protection to the Board.

In two-part tariff system, if the Board does not charge demand charges, it shall be selling the energy at loss. This is not possible for the Board. All the consumers in the State (including the petitioners in the instant case) have signed agreement. The petitioners as well as other consumers did not raise any objection regarding tariff while regaining such agreements. It is, therefore, bound by it.

With all respect, while the court observing that '*no doubt, it is true that electricity falls within the definition of 'goods'*' (see Commr. of Sales



Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur, (1969) 2 S.C.R. 939 A.I.R. ; 1970 S.C. 732), failed to notice that the Supreme Court held electric energy as "goods" for the purposes of Sales Tax with reference to the definition of that term in Section 2 (d) of C.P. Act (21 of 1947) and Section 2 (g) of M.P. Act (2 of 1959) and not with reference to the Sale of Goods Act, 1930. However, this is immaterial as the Punjab & Haryana High Court did not rely on the definition of "goods" as such in the Sale of Goods Act, 1930, while deciding the case before it.

**(2) Sub-section (1)—Short delivery.**

As a general rule, "every contract for certain quantity of goods is *prima facie* an entire contract for that quantity and so delivery for anything falling short of specified quantity will not constitute sufficient delivery."<sup>1</sup> Subject to the rule *de minimis non curat lex*, the seller does not fulfil his contract by tendering less than stipulated and cannot call upon the buyer to accept it and equally the buyer cannot call for delivery of anything short of the full quantity unless he is prepared to accept the whole.<sup>2</sup>

The court applies the maxim *de minimis non curat lex* where the deficiency is negligible.<sup>3</sup>

If the contract is an entire contract for specified quantity to be delivered in parcels from time to time, the buyer may return the parcels first delivered, if the latter deliveries are not made, for the contract is not performed by the seller delivering less than the quantity.<sup>4</sup> If the contract is entire, neither party can claim performance of a part unless the contract so provides.<sup>5</sup>

In *Harnarain v. Firm Radhakrishnan Narayandas*,<sup>6</sup> it was held: Every contract for a quantity of goods is *prima facie* an entire contract. A breach of warranty in the matter of quantity may entitle the buyer to reject the goods out-right or at any time even after receipt of some of the goods. He is entitled to call for a partial delivery but is not bound to return that which he has received. If he has received only a part of the goods, he is responsible for the payment of price of the part delivered to him at the contract rate. In this sense the provisions of S. 37 (1) seem to supplement the provisions of S. 59 (1) of the Act. On consideration of the contract in question, there was a breach of warranty as to quality and quantity and therefore the buyer was entitled to reject the goods after accepting a part for which he was bound to pay at the contract rate.

In effect the tender of a less quantity by the seller amounts to new offer inasmuch as the buyer must accept and pay for or reject the whole of the amount tendered ; he cannot accept part and reject the rest<sup>7</sup>

1. *Mersey Steel Co v. Naylor*, (1844) 9 A.C. 434 ; *Harland v. Burstall*, (1901) 84 L.T. 324.

2. *Kingdom v. Cox*, (1848) 5 C.B. 522, at p. 526.

3. *Jackson v. Rotax Motor Co.*, (1910) 2 K.B. 937, C.A. ; *Harland v. Burstall* supra.

4. *Oxendale v. Wetherell*, (1829) B. & C. 386, at pp. 387-388 per Parke J. ; 33

R.R. 207, 208, 209 ; see also *Colonial Ins. Co. of N.Z. v. Adelaide Marine Ins. Co.*, (1886) 12 App. Cas. 128, at pp. 138, 140 ; *Harland v. Burstall*, supra.

5. See *Reuter v. Sala*, (1879) 4 C.P.D. 239.

6. A.I.R. 1949 Nag. 178.

7. *Champion v. Short*, (1807), 1 Camp. 53, 10 R.R. 631.



unless indeed the seller acquiesces in such a course, which would amount to an acceptance by him of a counter-offer by the buyer.

It is open to the buyer to waive his right of rejection and accept the goods, and in such a case, he is liable for the value of the goods, measured at the contract rate (which is deemed to be an index of the reasonable value).<sup>1</sup> But by accepting the lesser quantity, the buyer is not precluded from suing for damages on the ground of short delivery<sup>2</sup> or claiming a proportionate refund where he has paid as for the whole of the quantity contracted for.<sup>3</sup> In *Beck v. Szymanowski*,<sup>4</sup> the contract was for the sale of a quantity of sowing cotton to be accepted and paid for and to be deemed in all respects according to the contract unless objected to within 14 days after delivery. Later, the cotton was found to be less than the stipulated quantity. It was *held* that the condition applied to quality, not quantity, and the buyer was entitled to damages for short delivery. He might still have been so entitled, even if the condition had applied to quantity (per Lord Wrenbury, at p. 52). The buyer by accepting when he is entitled to reject waives the condition but may still treat the breach of it as a breach of warranty.<sup>5</sup>

Where goods have been rejected for short delivery or excess delivery, it is open to the seller to make, within the time limited, another delivery in conformity with the contract.<sup>6</sup>

### Illustrations

(1) In *Behrend v. Produce Brokers' Co.*<sup>7</sup>, there were two contracts for sale of cotton seed to be shipped in Alexandria and delivered in London to buyers' craft alongside payment to be in London in exchange for shipping documents. Part of the seed was delivered in London after payment by the buyers. The ship then left for Hull with the rest of the seed in order to discharge other cargo. She returned to London in a fortnight, and the balance of the seed was tendered to the buyers, but they refused to accept it: *held*, that each parcel of the goods was indivisible and that when the delivery had begun the buyers were entitled to receive the whole quantity before the ship left the port; that they were entitled to keep the seed actually delivered and to be repaid the price of the balance.

(2) In *Champion v. Short*<sup>8</sup>, the defendant ordered of the plaintiff half a chest of French plums, two hogsheads of raw sugar and 100 lumps of white sugar. Only the raw sugar and plums were delivered. The defendant accepted the plums but refused to pay for the raw sugar, as the white sugar had not been delivered; *held* that by accepting the plums the defendant had consented to a new contract for the plums and the raw sugar, and must pay for both. It follows from the principle of this

1. *Bragg v. Cole*, (1821) 6 Moore (C.P.) 114; *Shipton v. Casson*, (1826) 5 B. & C. 378; *Harland v. Burstall*, *supra*.

2. *Beck v. Szymanowski*, (1924) A.C. 43, H.L.; *Gorissen v. Perrin*, (1857) 2 C.B.N.S. 681, 109 R.R. 830.

3. *Behrend v. Produce Brokers' Co.* (1920) 3 K.B. 830.

4. *Supra*.

5. Cf. *Barker Junior & Co. v. Agius Ltd.*, (1928) 43 T.L.R. 751, 33 Com. Cas.

120 and S. 13 (2).

6. *Borrowman v. Free*, (1878) 4 Q.B.D. 500, followed in *Vilas Udyog Ltd. v. Prag Vanaspati Products*, A.I.R. 1975 Gujarat 112.

7. (1920) 3 K.B. 530; 90 L.J.K.B. 143; see also per Wright J. *Barrow v. Phillips*, (1929) 1 K.B. 574, 98 L.J.K.B. 193.

8. 1 Camp. 53.



case that had the plaintiff acquiesced in the defendant's refusal to pay for the raw sugar, the new contract would have been confined to the plums only.

(3) Contract for purchase of 3,000 tins of canned fruit from Australia to be packed in cases of each containing 30 tins. When the goods are tendered in London a substantial part is tendered in the cases containing 24. The buyer may reject the whole.<sup>1</sup>

(4) Unless the parties have otherwise agreed or the course of dealing between them or a usage of trade compels a different conclusion, the quantity fixed in the contract forms part of the description of the goods; in that case the tender of a greater or smaller quantity or of goods of a different description admixed with the contract goods constitutes a breach of the condition implied by S. 15, that the goods shall correspond with the description. Pursuant to S. 13(2), the buyer may elect—(1) to treat the contract as repudiated, or (2) treating the breach of the condition as a breach of warranty, to claim damages. In *Household Machines Ltd. v. Cosmos Exporters Ltd.*,<sup>2</sup> the plaintiffs entered into a series of contracts for the supply to the defendant of certain goods which were, to the plaintiffs' knowledge, intended for resale by the defendants to exporters. The plaintiffs failed to deliver some of the goods and the defendants declined to make any payments for those goods which the plaintiffs had delivered until the question of the undelivered items was settled. The plaintiffs therefore brought an action for the price of the goods delivered and the defendants counterclaimed for damages for non-delivery of part of the goods subject to the contracts and for a declaration of indemnity in respect of any damages which they might be liable to pay to the person to whom they had contracted to resell the goods. It was *held* that the buyers had not repudiated the contract, that they were entitled to damages, *viz.*, the loss of profit on the resale which they could not carry out, and that they were further entitled to be indemnified against any claims for damages which the exporters may make against them.<sup>3</sup>

(5) In *Wilkinson v. Barclay*,<sup>4</sup> the defendant invited tenders for the sale of a stock of home-grown timber in lots. The sale was subject to the Control of Timber (No. 21), Order (1941). The invitation to tender described each lot, gave the estimated measurement in cubic feet and the maximum price per foot-cube. It then went on to refer to the Control of Timber Order and to the licence under which the sale was made and set out the prescribed conditions of sale, on which alone the sale could be made. Finally, as permitted by the prescribed conditions of sale, certain non-prescribed conditions of sale were incorporated, among which was the following: "The lots are offered where and as they are and each lot will be considered for separately, and the sum offered will be subject to no allowance for any faults, defects, errors of description, measurement, quantity or for any cause and without, any warranty whatever." The prescribed conditions provided that in the event of inconsistency, the prescribed conditions should prevail. Tenders remitted by the plaintiff

1. *Moore & Co. v. Landauer & Co.*, (1921) 2 K.B. 519 (C.A.)

2. (1946) 2 All E.R. 622; 1947 K.B. 217.

3. The granting of a declaration of

indemnity is an interesting feature of the judgment.

4. (1946) 1 All E.R. 387.



for a number of lots were accepted, and the plaintiff paid to the defendant, in accordance with the contract before delivery, an amount based on the estimated measurement set out in the invitation to tender. On delivery the plaintiff discovered a considerable shortage. In an action by the plaintiff for the recovery of the amount overpaid, it was contended on behalf of the defendant that the non-prescribed condition was a bar to the action. It was *held* : (i) Although the non-prescribed condition excluded the right to reject and the right to claim damages for short delivery, it did not deprive the plaintiff of his right to recover money paid for timber which had not been delivered ;

(ii) even if it did, and in so far as it did, it formed no part of the contract because it was inconsistent with the prescribed conditions.

(6) "The parties often mitigate the strictness of the doctrine of 'More or less.' rejection on the ground of delivery of wrong quantity by express terms defining the quantity as 'approximately,' 'about' or 'more or less' ;<sup>1</sup> sometimes they specify the margin of the variation allowed e.g. '2 per cent, more or less', (corn trade) or provide that 'buyers shall not reject the goods herein specified but shall accept or pay for them in terms of contract, (timber trade),<sup>2</sup> but the latter clause does not operate so as to force the buyer to take goods which are neither within nor about the specification, nor commercially within its meaning."<sup>3</sup>

(7) "The tender of the wrong quantity evidences an unreadiness and unwillingness (on the part of the seller to perform), but that, in my opinion, must mean an excess or deficiency in quantity which is capable of influencing the mind of the buyer...The doctrine of *de minimis* (*non curat lex*) cannot, I think, be excluded merely because the statute refers to the tender of a smaller or larger quantity than the contract quantity as entitling a buyer to reject",<sup>4</sup> in a contract concerning ton or hundred weights a difference of a few pounds or ounces is negligible but an excess of several tons over the contract might be bad tender.<sup>5</sup> Where the variation appears on the face of the bill of lading even a variation of under 1 per cent might entitle the buyer to reject.<sup>6</sup> In contracts providing for instalment deliveries [S. 38 (2)] the deficiency is only covered by the rule of *de minimis* if it is an insignificant portion of the individual instalment.<sup>7</sup>

(8) In *Fattu Seth v. Firm Girdharilal*,<sup>8</sup> a constituent placed an order for cloth with a travelling agent. The principal purchased goods in the market and the parcel was consigned to the railway for delivery to the

1. *Ross T. Smyth & Co. Ltd. v. T.D. Bailey, Son & Co.*, (1940) 3 All E.R. 60.

2. *Green v. Arcos Ltd.*, (1931) 47 T.L.R. 336 ; *Wilensko Slaski v. Fenwick & Co. (West Hartlepool) Ltd.*, (1938) 3 All E.R. 429 ; see also *Re Harrison and Micks Lambert & Co.*, (1917) 1 K.B. 755 ; *Tebbits Brothers v. Smith*, (1917) 33 T.L.R. 508.

3. Per Bigham J. in *Vigers Brothers v. Sanderson Brothers*, (1901) 1 Q.B. 608, *Arcos Ltd.*, supra 337. See Schmitthoff "The Sale of Goods Act." 2nd

Edn., p. 127.

4. Per Lush J. in *Shipton Anderson & Co. v. Well Brothers & Co.*, (1912) 1 K.B. 574, 577.

5. *Payne & Routh v. Lillico & Sons*, (1920) 36 T.L.R. 569.

6. *Wilensko Slaski v. Fenwick & Co. (West Hartlepool) Ltd.*, supra 433.

7. *Jackson v. Rotax Motor & Cycle Co.*, (1910) 2 K.B. 937, 949. See Schmitthoff "The Sale of Goods Act" 2nd Edn., pp. 127, 128.

8. 1957 Nag. L.J. (Notes) 149.



vendee, but the vendor put into the parcel goods in excess of what was ordered. The goods were not delivered to the consignee. In a suit for the price of the goods filed against the vendee, the latter pleaded that since the goods were not ascertained and not appropriated to the contract with his consent, the property did not pass to him and he was not responsible for the loss ; if the goods had reached him, he would have either accepted them or rejected them in exercise of his rights under S. 37 (2) of the Act. He had a right to examine the goods before finally accepting them under S. 41 of the Act. Since the stage for accepting or rejecting was not reached he could not be liable for the price of the goods. It was *held* that the defendant's contention was well-founded and the suit was liable to be dismissed.

(9) Williston<sup>1</sup> states the principle thus : "Where the seller is under a contract to deliver a specific quantity of goods and tenders a smaller quantity, as full performance of his obligation, the buyer may reject the tender. The buyer may, however, accept the offer though defective. In so doing he enters into a new contract. The offer of a quantity not contracted for is a manifestation of the seller's willingness to sell that quantity. The terms of this new contract, if nothing is said, are identical with the terms of the original bargain, except as to quantity. If, therefore, the original bargain provided for a lump price, it would seem that the buyer, if he accepted the goods, would become liable for that price ; though inference would often be possible that the agreement was to pay the fair value of the goods, rather than the lump price. No such difficulty would arise if the original contract provided for payment by number, weight or measure : the buyer would then become liable to pay at this rate for the quantity of goods actually received.

"Where the seller's obligation is either by its terms or by the buyer's permission performable in instalments, it may happen that the buyer, not supposing the seller is going to be guilty of a breach of contract, accepts one or more instalments, assuming that the rest are to follow. If the buyer had contracted to pay a lump price after all the instalments had been delivered, it is obvious that the acceptance of the early instalments could not bind the buyer to pay the agreed price : delivery of the later instalments would be a condition precedent to the buyer's obligation to pay the entire price. Even if the price of each instalment was payable separately, the buyer should have relief. It is true that his acceptance of a part indicates an assent to take title to the goods offered, and to pay for them at the contract rate, but this assent was given in the justifiable expectation of receiving an additional quantity of goods. The buyer, on finding out that the contract is not going to be fully performed by the seller, has alternative remedial rights. (1) He may affirm the contract by paying the contract price and enforcing a right to damages for the seller's non-performance of the remainder of the contract. (2) If the goods received are still in his possession, he may rescind the contract, return the goods that he has received and refuse to pay the price, if not already paid, and, if already paid, recover it back.

"The buyer may endeavour to assert a third right, namely to pay nothing for the goods that he has received, and in considering the validity



of the claim, it may first be supposed that a divisible payment has been fixed by the contract for the goods received. In such a case, debt has arisen for which the seller should recover, though he will have a cross right for damages.

"It may, however, be supposed that the contract was entire and that no part of the price was due until full performance by the seller.

"Even in such a case, if the buyer accepted a portion of the goods knowing that no more were to be delivered, there is no difficulty in finding a real contract to pay for them, as distinguished from a *quasi-contractual* obligation, since the partial delivery was in effect a new offer. But if the deficient quantity of the goods was delivered under such circumstances that the buyer was not aware that full delivery would not be made, no new contract can be said to have been agreed to by the buyer. Here, accordingly, if the seller recovers payment for what he has furnished, the recovery is not on the contract, but on principles of *quasi-contract*. It is true that it has often been laid down that a contract will not be implied by the law in favour of one who is in default under an express contract, but the injustice of allowing the buyer to retain the benefit of goods without paying for them is so clear that even in England, where *quasi-contractual* rights are generally most strictly limited, recovery has been allowed, and the weight of authority in the United States aside from the Sales Act supports this view. In New York by a long series of decisions the seller has been denied relief, and this view has been accepted in a few other states. Section 44(1) of the Sales Act clearly defines the rights of the parties where that statute has been enacted.

"The seller's measure of damages if he is allowed to recover is not necessarily the contract price even if the contract fixes a price by number, weight or measure. If the buyer retained the goods, having it in his power to redeliver them after he knew that the seller was going to make default in delivering the whole amount it seems just that the buyer should pay the contract price. This result seems supported by the decisions which hold the buyer liable under such circumstances. It is commonly said that the retention operates as a severance of the contract. The buyer, however, may in good faith have dealt with the goods in such a way as to make it impossible for him to return them, and yet the value of the portion received may not be so large a proportion for the total price as the goods are of the total amount of goods which should have been delivered. As the buyer's obligation is imposed by law, the extent of it should be restricted to the benefit which the defendant has received. The seller, being a wrong-doer in failing to deliver the whole amount, can certainly claim no more than this ; and so it is provided in the section of the Sales Act under consideration.

"Though as has been seen the buyer may accept the smaller quantity offered, he has, it seems, no right to accept a portion only of this amount. If he does so, his action amounts to a new offer to the seller to purchase the partial quantity.

"Where goods are sent from a distance and a smaller quantity arrives than the contract requires it is frequently asserted by the seller that the full quantity was shipped and that part of the goods have been



lost in transit but this will not be assumed in the absence of any evidence to that effect, and proof of the quantity actually received at destination was competent evidence tending to prove the quantity actually shipped."

**(3) Sub-section (2)—delivery in excess of contract quantity.**

This sub-section relates to excess delivery. If more goods are sent than the purchaser agreed to buy, he may refuse to receive any portion of the goods so sent, and is not bound to incur risk or trouble in selecting some of the things and sending back others;<sup>1</sup> still more is this the case where the superfluous goods are not of the quality ordered.<sup>2</sup> In *Cunliffe v. Harrison*<sup>3</sup>, 10 hogsheads of claret were ordered and the seller sent 15. The buyer was held entitled to reject the whole. "The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to any that he may choose which ten he likes, for that would be to force a new contract upon him." In *Hart v. Mills*<sup>4</sup>, where an order was given for two dozen of wine, and four dozen were sent, it was *held* that the whole might be returned.

In this case also the buyer may reject the whole quantity delivered, or he may accept the goods included in the contract, and reject the excess. He cannot, however, claim to accept only part of the contract quantity of the excess except under a new contract.<sup>5</sup>

If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.<sup>6</sup> If the buyer accepts the greater quantity, he cannot afterwards sue for misdelivery.<sup>7</sup>

In *Doraiswami v. Subhana*,<sup>8</sup> a case under section 119 of the Contract Act, the principle that rejection was proper, if there is risk or trouble in separating the goods ordered from the goods not ordered was applied.

The rule of *minimis non curat lex* applies also to the case of a slight excess delivery. Accordingly, where the contract was for the sale of wheat which, with a limit of variation provided for in the contract might amount to 4,950 tons, and 55 lbs. more were tendered, but not charged for, it was *held* that the buyer must accept the delivery.<sup>9</sup> The burden of proving that a breach of contract falls within the principle *de minimis non curat lex* is on the party seeking to excuse the breach.<sup>10</sup> In *Vigers Bros. v. Sanderson*,<sup>11</sup> 33 per cent of the goods tendered were not "about the specification", not commercial within its meaning. It was *held* that the buyer could reject the

1. *Cunliffe v. Harrison*, (1851) 6 Exch. 903 ; 20 L.J. Ex. 325 ; *Dixon v. Fletcher*, (1837) 3 M. & W. 146 ; *Rylands v. Krellman*, (1865) 19 C.B.N.S. 351 ; *Hart v. Mills*, (1846) 15 M. & W. 85 ; 16 L.J. Ex. 200 ; *Jugal Keshore v. Kishori Lal*, A.I.R. 1924 Pat. 159 ; 74 I.C. 923.  
2. *Levy v. Green*, (1859) 1 E. & E. 969, 117 R.R. 552, Ex. Ch.  
3. *Supra*.  
4. (1846) 15 M. & W. 85, L.J. Ex. 200 ; 71 R.R. 578.

5. See also Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 98 (f.n.s.)  
6. *Ibid*, p. 128.  
7. So held by Acton J. in *Gabriel Wade & English Ltd. v. Arcos Ltd.*, (1929) 34 Ll. L. Rep. 306.  
8. A.I.R. 1927 Mad. 880 : (1927) M.W.N. 549.  
9. *Shipton Anderson & Co. v. Weil Bros.*, (1912) 1 K.B. 574.  
10. *Ranaasen & Sons v. Arcos Ltd.*, (1932) 37 Com. Cas. 291, C.A.  
11. (1901) 1 K.B. 608.



whole. In *Barrow Lane etc. Co. v. Phillips*<sup>1</sup>, it was held that the buyer must have knowledge of the quantity delivered before he would be bound by any election.

In *Vilas Udyog Ltd. v. Prag Vanaspati Products*, A.I.R. 1975 Gujarat 112, even before the goods reached the destination, the buyer had unilaterally cancelled the contract on untenable grounds and the seller was thus even prevented from making a second tender of goods, it was held, on the facts of the case, that it was the buyer who had committed the breach and not the seller. It was observed : The right to reject the goods is not equivalent to right to cancel the contract. If the buyer rejects the goods the seller has a right to tender again the contract quantity subject to the terms and conditions of the contract and the buyer is bound to accept the same (it was a case of delivery of excess quantity slightly or marginally in excess of contract quantity of goods). *Borrowman Phillips Co. v. Free and Hollis* (1878) 4 Q. B.D. 500 cited at p. 567 ante, followed.

#### (4) Sub-section (3)—mixed delivery.

The sub-section deals with mixed goods and lays down that where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.<sup>2</sup>

Section 199 of the Contract Act limited the buyer's rights to reject to cases where "there is risk or trouble in separating the goods ordered from the goods not ordered." This was based on the case of *Levy v. Green*<sup>3</sup> in which there was sale of certain articles of China, which had not been ordered and were clearly distinguishable, and sent them to the buyer. It was held that the buyer was entitled to reject the whole.

Thus under the old Act the buyer's right to reject the goods was limited. This sub-section modifies the law in favour of the buyer. Under the present law the buyer is not bound to accept the goods, however easy it may be to separate the goods which are contracted to be sold from the other, for "mixed with" means no more than "accompanied by."<sup>4</sup>

Where a contractor for the supply of coal sent coals partly according to contract and partly not, and mixed them all together in delivery, it was held that the whole quantity so delivered must be considered not according to contract.<sup>5</sup>

Where articles are added for purposes of packing, is it a mixture ? Apparently not.

In *Paul v. Pim*<sup>6</sup>, there was a sale of the cargo of maize shipped "per s.s. *Rijn* consisting about 2,813 French tons, or what steamer carries as

1. (1929) 1 K.B. 574, 588.

2. See *William v. Agius*, (1927) 43 T.L.R. 751.

3. (1859) 1 E. & E. 969, 117 R.R. 555, Ex. Ch.

4. *Moore & Co. v. Landauer*, (1921) 1

K.B. 73 ; affirmed (1921) 2 K.B. 519, C.A., supra.

5. *Nicholson v. Bradfield Union* (1866) L.R. 1 Q.B. 620 ; see also *Levy v. Green*, supra.

6. (1922) 2 K.B. 360.



per" certain bills of lading. The ship was loaded with maize of the contract quantity but in addition to it there was on board 58 tons of tobacco which was smuggled on board without the knowledge of the seller and which was not mentioned in bill of lading. *Held*, the maize shipped answered the description—"the cargo of maize as per bill of lading" and the buyer could not reject. One of the grounds of the finding of the court was that the tobacco which was on board was of an entirely and absolutely different nature from the cargo of maize and so there was no possibility of confusion between the two. The case was distinguished from *Borrowman v. Drayton*<sup>1</sup> where however the excess goods were of the same quality, and the word "cargo" was given the natural meaning *e.g.* the entire quantity of goods boarded on board a vessel for particular voyage.

In *Kulsekarapatnam Hand Match Workers Co-operative Cottage Industrial Society Ltd. v. Radhelal Lalloolal*, (1971) M.P.L.J. 552, there was sale of goods by description. A part of goods supplied were not of the description contracted for. The buyer gave intimation of the rejection of goods to the agent of seller. The agent intimated the fact of rejection to the principal. It was held that it was due intimation to the principal.

#### (5) 'Description'—'goods of inferior quality'.

The word 'description' in section 37 (3) is to be strictly construed. Thus where goods of the kind ordered were delivered, but some of them were of inferior quality, *held*, that the case was not within section 37 (3), and the buyer could not accept such part only of the goods as was according to the contract and reject the rest, his remedy is to accept or to reject all.<sup>2</sup> It would seem that in such a case, if the contract is severable, the sub-section would apply.<sup>3</sup>

In *London Plywood & Timber Co. v. Nasik Oak Extract Factory & Steam Saw Mills Co.*,<sup>4</sup> it was *held*: Where the sellers delivered to the buyers the goods they contracted to sell mixed with goods of a different description not included in the contract, the buyers are entitled to reject the whole. The fact that part of the goods had been accepted by the buyers and appropriated to the contract does not prevent the buyers relying on the right to reject.

#### (6) Sub-section (4)—trade usage or special agreement.

Sub-section (4) declares that the provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

1. (1876) 2 Ex. D. 15 followed in *Forbes v. Tullok Chand*, (1878) 3 Bom. 386.  
 2. *Aitken, Campbell & Co. v. Boullen*, (1908) Sess. Cas. 490. See also *Harnarain v. Firm Radhakrishnan Narayandas*, A.I.R. 1949 Nag. 178—A mixing of an inferior quality is not a mixing of goods of different description. See too *Barker (William) & Co. Ltd. v. Ed. T. Agius Ltd.*, (1927) 43 T.L.R. 751—Sale of 1500 tons

"briquettes, size 2 inches"; only 25 tons correspond to this description 3, the remainder being larger; the buyer may accept the 25 tons and reject the remainder; invalid exercise of rights to reject; remedy in damages. See also under S. 42 *post*.

3. See *Chalmers, Sale of Goods Act*, 16th Edn., p. 154.

4. (1939) 2 K.B.D. 343.



The quantity to be delivered is sometimes stated in the contract with the addition of words such as 'about' 'more or less' which according to trade usage may show that the seller is to be allowed a certain moderate and reasonable latitude in the performance. Thus, by usage of trade, a delivery order for about the quantity of goods sold, from a warehouse may be valid.<sup>1</sup> The seller may protect himself by using the term 'more or less' or a similar expression.<sup>2</sup> Again, parties may agree that the quantity stated shall be only a maximum, in which event the buyer will be bound to accept less than the quantity stated.<sup>3</sup> It may be open to the parties to show that in a particular trade or market certain qualifying words have got particular special meanings.<sup>4</sup>

The contract may itself provide certain limits of permissible variation which must be strictly observed.<sup>5</sup>

The quantity contracted for under a contract of sale of goods may sometimes be determined by reference to a particular standard (e.g.) a lot of goods lying at a warehouse.<sup>6</sup>

Where A agreed to sell B all the red pine spars manufactured by him "say about 600" out of a particular lot, a tender of 496 was held to be a proper performance.<sup>7</sup> The word 'cargo' is a word of reliable meaning, according as it occurs in a charter party, a policy of insurance, or a contract of sale.<sup>8</sup>

It has been held that the natural meaning of 'cargo' is the entire quantity of goods loaded on board a vessel on a particular voyage.<sup>9</sup> In a contract for sale of the remainder of a cargo 'more or less' 5,400 quarters of wheat, the buyer was held bound to accept 5,979 quarters which were found to remain.<sup>10</sup>

Similarly, in a contract of sale "200 tons 5 per cent more or less," the buyer was held bound to accept 190 tons<sup>11</sup> and the seller liable for non-delivery of 190 tons. The contention that the phrase "5 per cent more or less" operated only to recover accidental or unimportant variations from the quantity stated in the contract, was not accepted.<sup>11</sup> The quantity specified is taken, in such cases, as representing a mere anticipatory estimate. But if the term used is "not less than" it is taken as an absolute contract for delivery of the minimum.<sup>12</sup>

In *Tebbits Bros. v. Smith*<sup>13</sup>, there was sale of "quantity of salved Australian basils estimated 8/10 tons at a certain price per lb." but the

1. *Moore v. Campbell*, (1854) 156 E.R. 467 : 192 R.R. 604.

2. *Re Thornett & Fehr & Yuills*, (1921) 1 K.B. 219. See *McConnell v. Murphy*, (1873) L.R. 5 P.C. 203.

3. *Morgan v. Gath*, (1855) 159 E.R. 726 : 140 R.R. 714.

4. *Societe Anonyme & Co. v. Scholefield*, (1902) 7 Com. Cas. 112.

5. *Payne v. Lillico*, (1920) 36 T.L.R. 569; 2 per cent more or less; the buyer could reject when the goods supplied were considerably in excess.

6. *Tancred v. Steel Co. of Scotland*, (1890) 15 A.C. 125.

7. *McConnell v. Murphy*, (1873) 5 P.C. 203.

8. *Colonial Ins. Co. of N.Z. v. Adelaide*

*Marine Ins. Co.*, (1886) 12 App. Cas. 128 at p. 129.

9. *Borrowman v. Drayton*, (1876) 2 Ex. D. 15; *Kreuger v. Blanck*, (1870) L.R. 5 Exch. 179; *Forbes v. Tullockchand*, (1878) 3 Bom. 386.

10. *Harrison & Micks Lambert Co., re*, (1917) 1 K.B. 755.

11. *Re Thornett & Fehr & Yuilis Ltd.*, supra.

12. *Leeming v. Snaith*, (1851) 16 Q.B. 275; 117 E.R. 884; 83 R.R. 448. But see *Kaliyanjee v. Shorrocks*, (1910) 37 Cal. 334; 6 I.C. 924.

13. (1817) 33 T.L.R. 508. See *Gorrissen v. Perrin* (1857) 2 C.B.N.S. 681 as to distinction between 'bales' and 'packages'.



seller failed to deliver more than 6 tons 3 cwt. 2 qr. *Held*, there was a sale of specific balance of the goods which had been salvaged from a wreck and the seller was not bound to deliver a minimum quantity of 8 tons. Where the seller agreed to sell all naphtha he might make during two years, "say from 1,000 to 1,200 gallons a month" and the seller delivered 300 gallons being all that he made it was *held* that he was not liable to deliver more.<sup>1</sup> In *Doe v. Bowater Ltd.*<sup>2</sup>, there was sale of coal "up to 2,500 deep quantity 1,750/2,500 tons." It was *held* that the buyers could not demand more than 2,500 tons and the seller could not tender less than 1,750 tons. In *Tancred, etc. Co. v. Steel Company of Scotland*<sup>3</sup>, the plaintiff agreed to supply "the whole steel" required for the Fourth Bridge which also provided that "the estimated quantity of steel we understand to be 30,000 tons, more or less". *Held*, the plaintiffs were entitled to supply the whole of the steel required for the bridge, and that their right was not qualified or affected by the clause.

### (7) Determination of goods contracted for.

It is thus clear that the quantity of goods contracted for is determined by the construction of the contract. Such quantity may be specified by reference to particular circumstances or a particular standard, as for example, an entire lot deposited in a particular warehouse, all goods manufactured by the seller or required by the buyer.<sup>4</sup> If the buyer renders the ascertainment by the standard prescribed in the contract impossible, the seller is discharged of his duty to deliver the goods.<sup>5</sup> If, in such a case, a specified quantity is also mentioned with the addition of qualifying words such as 'about' or 'more or less' such quantity, unless the contract shows that it is material,<sup>6</sup> *prima facie* represents only an anticipative estimate and is not considered a term of contract.<sup>7</sup> Such an estimate however may be taken to specify a minimum quantity contracted for.<sup>8</sup> Where, however, the quantity is not specified by reference to particular circumstances or standard, the quantity of goods mentioned in the contract is material subject, where qualifying words are used to a reasonable latitude,<sup>9</sup> or where by the terms of the contract, usage of trade or otherwise, the qualifying words mean a definite latitude, to that latitude.<sup>10</sup> What is a reasonable latitude is a question of fact.

*For more details, see Benjamin on Sale, 8th Edn., pp. 702-719, where the cases on these points are collected.*

**\*38.** (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately

1. *Gwillim v. Daniell*, (1885) 2 Cr. M. & R. 61.
2. (1916) W.N. 185.
3. (1890) 15 A.C. 125.
4. *Tancred Arrol & Co. v. Steel Co., Scotland*, (1890) 15 App. Cas. 125; *Wood v. Copper Miners' Co.*, (1854) 14 C.B. 428.
5. *Pringle v. Taylor*, 2 Taunt. 150.
6. *Bourne v. Seymour*, 16 C.B. 337.
7. *Heyward v. Scougall*, 2 Camp. 56.

8. *Leeming v. Snaith*, (1851) 16 Q.B. 275.
9. *Rewer v. Sale*, 4 C.B.D. 239 C.A.; *Moore v. Campbell*, 10 Exch. 223.
10. *Societe Anonyme etc.*, *supra*.

#### \*Analogous law.

Section 31 of the English Sale of Goods Act, 1893, which is the same as section 38 of the Sale of Goods Act, 1930, with the words "no delivery or" omitted between "seller" and "defective".



paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

### Synopsis

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|--|---|
| (1) <i>Instalment deliveries—analogueous law.</i>          | <i>ment discharges contract with respect to that instalment.</i>  |
| (2) <i>Sub-section (1)—entire and severable contracts.</i> | (7) <i>Temporary suspension of deliveries.</i>  |
| (3) <i>Severable contract—sub-section (2).</i>             | (8) <i>Sections 38, 60—Contract indivisible—Performance in stages—Repudiation of part of contract—Effect—Damages and return of deposit—Contract Act, 1872, S. 73.</i> |
| (4) <i>When does breach amount to repudiation?</i>         |   |
| (5) <i>Effect of breach which amounts to repudiation.</i>  |   |
| (6) <i>Breach in respect of one instal-</i>                |   |

#### (1) Instalment deliveries—analogueous law.

This section is based on section 31 of the English Act. Sub-section (1) is in fact a corollary to the proposition set out in section 37 (1) and lays down that, in the absence of a contract, express or implied, a buyer is not bound to accept by instalments the delivery of the goods sold to him.

It was held in some of the old cases that where a contract provided for delivery by instalments either expressly or impliedly, the refusal by the seller to deliver or by the buyer to accept or pay a particular instalment was a breach which went to the root of the contract.<sup>1</sup> A contrary view was, however, held in other cases.<sup>2</sup> The latter view was followed in India also.<sup>3</sup> "The true rule in such cases is that each case should be judged on its own facts. Sub-section (2) of section 31 of the English Act gives effect to that principle. This sub-section, however, does not contain a full statement of law on the point. It only provides for a defective delivery on the part of a seller. In our opinion the rule ought to apply where the seller omits or refuses to make a delivery. We have, therefore, inserted the words 'no delivery or' after the words 'the seller makes' in sub-section (2)."<sup>4</sup>

#### (2) Sub-section (1)—entire and severable contracts.

As already noticed, in the absence of provision in the contract or of any usage to that effect, the performance of an entire contract cannot be

1. Withers v. Reynolds, (1831) 2 B. & Ad. 882; Hoare v. Rennie, (1859), 5 H. & N. 19; Honck v. Muller, (1881) 7 Q.B.D. 92.  
2. Jonassohn v. Young, (1863) 32 L.J.Q. B. 385; Simpson v. Crippin, (1872)

L.R. 8 Q.B. 14; Freeth v. Burr (1874) L.R. 9 C.P. 208.  
3. I.L.R. 4 Cal. 252; 9 Mad. 359; 18 Mad. 63; 63 P.R. 1914, p. 214.  
4. Report of the Special Committee.



divided either by the buyer or seller. If in such a case the seller tenders delivery of a part, the buyer is not bound to accept it, but if he accepts it, he does so as on a new contract and must pay for it at the contract rate.<sup>1</sup> Whether the acceptance of a part discharges all the obligations of the old contract will depend on the terms of the tender and acceptance. The buyer also cannot claim performance of an entire contract by instalments.<sup>2</sup>

The performance of an entire contract cannot be split up without mutual consent.<sup>3</sup> But a contract, though entire, may provide that it may be performed by parts or instalments, e.g. where deliveries are to be made from time to time by separate instalments either in specified quantities or as the seller finds it convenient to do. This sub-section lays down that in the absence of an agreement to the contrary, the buyer of goods is not bound to accept delivery thereof by instalments.<sup>4</sup> And conversely, he cannot call for an instalment.<sup>5</sup> Where there is an agreement (which may be either express or implied) for delivery by instalments, the contract is not split up into separate contracts for each instalment: the contract is still an entire contract for the whole quantity, though it is divisible in performance.<sup>6</sup> The seller is, therefore, liable if he fails to make up the complete quantity, and cannot recover any part of the price<sup>7</sup> unless there be a provision that instalments are to be separately paid for. If there be such a provision, he may recover the price of any instalment delivered, and the buyer is bound to accept any instalment tendered in due course of performance,<sup>8</sup> though this will not preclude him from rejecting a subsequent instalment, if he is otherwise entitled to do so<sup>9</sup> and if he wishes so to do, he may reject the contract.<sup>10</sup> But the seller still remains liable to make up the complete quantity of the goods contracted for though the fact that he makes a partial default may not justify the buyer in repudiating the contract.

In *Reuter v. Sala*<sup>11</sup>, there was a sale of 25 tons of pepper October-November shipment. The seller shipped 20 tons in November and 5 tons in December. The buyers were held entitled to reject the whole 25 tons.

There are again contracts in which each instalment is to be paid for separately, and a breach (e.g. defective delivery, neglect or refusal to deliver) regarding one or more instalments does not necessarily discharge the performance of other instalments. Here

1. S. 37 (1).

2. *Kingdom v. Cox*, (1884) 5 C.B. 522.

3. See *Claddagh S.S. Co. v. Steven & Co.*, 1919 S.C. (H.L.) 132—Contract for the sale of two ships; one ship requisitioned by Government, buyer may refuse to accept the other ship.

4. *Sadasook v. Chaitram*, A.I.R. 1926 Cal. 218; 29 Cal. W.N. 808.

5. *Kingdom v. Cox*, (1884) 5 C.B. 522; 17 L.J.C.P. 155.

6. *Mersey Steel Co. v. Naylor*, (1884) 9 A.C. 434, at 439; *Honck v. Muller* (1881) 7 Q.B.D. 92, at 106; *Ballantine v. Camp*, (1923) 129 L.T. 502; *Ganesh Das v. Ram Nath*, A.I.R. 1928 Lah. 20; (1928) 9 Lah. 148.

7. *Waddington v. Oliver*, (1805), 2 Bros. & P.N.R. 61; 127 E.R. 544; 9 R.R. 613; *Oxendale v. Wetherell*, 7 L.J.

K.B. 264; *Burn & Co. v. Morvi State*, A.I.R. 1925 P.C. 188; 90 I.C. 52.

8. *Brandt v. Lawrence*, (1876) 1 Q.B.D. 344 C.B.; *Howell v. Evans* (1926) 134 L.T. 570, 42 T.L.R. 310, engravings "to be sent to me as published, the price of each plate £10, 10s. 0d;" an instalment contract and the buyer bound to accept and pay for each plate separately.

9. *Jackson v. Rotax Motor & Cycle Co.*, (1910) 2 K.B. 937, C.A.

10. See *Borrowman v. Free*, (1878) 4 Q.B.D. 500, C.A.; *British and Beningtons Ltd. v. North Western Cachar Tea Co.*, (1923) A.C. 48, at p. 71, criticising at p. 70 *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K.B. 543 C.A. See under S. 42 *post*.

11. (1879) 4 C.P.D. 239, C.A.



the contract is severable, and each instalment is considered deliverable as if under a separate contract. These are frequently termed as instalment contracts. It is a question of the construction of the contract in each case as to whether an entire contract is to be split up for the purpose of performance only or whether there are separate and several contracts. Delivery by instalments may also be implied from the course of dealing between the parties, from the circumstances of the case or from usages of trade. Sometimes the contract specifically provides that delivery of each instalment is to be treated as under a separate contract.

Where the contract provides for each instalment to be paid for separately, the buyer must duly accept and pay for it, as already noticed above ; but the contract may still from its nature, be entire (as in the case of a contract for a book brought out in parts) ; so that the seller's failure to complete the full delivery may amount to a total failure of consideration, and entitle the buyer to return all instalments that he had received and recover all sums that he has paid ; for when the consideration is entire, by failing partially it fails entirely.<sup>1</sup> The buyer therefore is not, in such a case, relegated to a mere right to sue for damages.<sup>2</sup>

An agreement to accept delivery by instalments may be either express or may be inferred from the conduct of the parties and the circumstances of the case,<sup>3</sup> as when the buyer accepts delivery of an instalment without objection.<sup>4</sup>

In *Brandt v. Lawrence*<sup>5</sup>, where there were two contracts for sale of Russian oats, 'shipment by steamer or steamers' and payment for any shipment to be by cash on receipt of shipping documents, it was held that the shipment was intended to be in different parcels, and that the buyer was bound to accept them as they came, if they were in time.

In *Richardson v. Dunn*<sup>6</sup>, there was a sale of 200-300 tons of coal to be shipped as early as possible by a named ship or other vessel. The named ship was not available and the seller shipped 152 tons on another ship, informing the buyer that he had done so and that he had drawn on him for the price and proposing to ship the remainder later. The buyer made no reply to this communication. The ship was lost. In the action by the seller for the price it was held that the buyer had impliedly assented to the shipment of the smaller quantity as an instalment and was liable to pay for it.

Such an agreement may be inferred from the nature of the contract itself e.g. when it is obvious that the full quantity of the goods cannot be delivered in one delivery as, for instance, in the case of contract for the supply of provisions for the army and navy.<sup>7</sup>

1. *Chanter v. Leese*, (1839) 5 M. & W. 698, at p. 702 ; 51 R.R. 548, 600 Ex. Ch.

2. See section 39 of the Indian Contract Act.

3. *Brandt v. Lawrence*, supra ; *Jackson v. Rotax Motor Co.*, (1910) 2 K.B. 937, C.A. ; *Colonial Ins. Co. v. Adelaide Marine Ins. Co.* (1886) 12 App. Cas. 128, 138 P.C. ; *Howell v.*

*Evans*, (1926) 42 T.L.R. 310.

4. *Tarling v. O'Riordan*, (1878) 2 L.R. Ir. 82 C.A. at p. 86 ; *Bragg v. Cole*, (1821) 6 Moore (C.P.) 114.

5. (1876) 1 Q.B.D. 344.

6. (1841) 2 Q.B. 218.

7. *Colonial Insurance Co. of New Zealand v. Adelaide Insurance Co.* (1886) 12 App. Cas. 128 at pp. 138-139, P.C.



In *Barningham v. Smith*,<sup>1</sup> the goods were to be delivered "at the fair average rate of twenty wagons a day." It was held that "Average" instalments. the rule would seem to be that a deficiency at the end of one unit of time may be made up in the succeeding unit, provided that at the expiration of any particular time (to be determined by the jury) there is no obvious deficiency in the sum of the instalments delivered. In the latter event the seller will have committed a breach of contract, and the deficiency cannot be made up afterwards by thrusting on the buyer in arrears.

But the word "average" has sometimes been explained as meaning "about equal monthly quantities."<sup>2</sup>

It has been held under the English law that where the amount of the instalments is not specified, the *prima facie* rule would seem to be that the deliveries should be rateably distributed over the contract period; but if it can be gathered from the terms of the contract or the circumstances that rateable deliveries were not intended, it then becomes a question for the jury whether the tender of, or demand for, delivery is a reasonable one.<sup>3</sup>

In *Simson v. Gorachand*,<sup>4</sup> there was a contract for the delivery of 7500 bags of castor seeds which were to be shipped "per steamers" and then the contract stated that "2500 bags in December etc., terms cash on delivery, etc." The seller on the 12th December tendered 1690 bags arriving by a particular steamer but the buyer refused to accept the same as being less than 2500. On the 17th December the seller tendered 810 bags being the balance and the buyer refused to accept the same on the same ground. Held, that the tenders were in term of the contract and the buyer was bound to accept the same. "That so far as 2500 bags to be delivered in December, having been shipped by 'steamers' which I think, clearly means shipped by any number of steamers, provided that the instalment sent by each steamer is a reasonable one."<sup>5</sup>

If delivery of an instalment is postponed by mutual consent, then the seller should have a reasonable time to deliver the balance.<sup>6</sup>

**Section 38 (1)—Contract to supply entire quantity of goods before specific date—Buyer not paying for part of the goods supplied—Seller refusing to supply remaining goods—seller liable for breach of contract.**

There was a contract of sale of 251 mds. of ghee within a specified time by the defendant to the plaintiff. The defendant delivered part but did not deliver the residue. It was held: The defendant could not insist on the payment of the price of the ghee supplied by him before supplying

1. (1874) 31 L.T. 540.

2. *Ireland v. Merryton Coal Co.*, (1894) 21 S.C. 989. See also *Benjamin on Sale*, 8th Edn., p. 724.

3. *Calaminus v. Dowlais Iron Co.*, (1878) 47 L.J.Q.B. 575: equal monthly deliveries could not always be presented; *Brandt v. Lawrence*, supra; *Wright, Stephenson & Co. v. Adams & Co.*, (1908) 28 N.Z.L.R.

193 ("portion each month"); *Godington v. Paleologo*, (1867) 2 Ex. 193 (Delivery should be in reasonable instalments.) *Barningham v. Smith*, (1874) 31 L.T. 540.

4. (1883) 9 Cal. at p. 478.

5. Per Garth C.J. at p. 478.

6. *Tyers v. Rosedale, etc. Co.*, (1875) L.R. 10 Ex. 195. See also *Bowes v. Shand*, (1877) 2 A.C. 455.



the entire quantity of ghee as had been agreed upon. Where the defendant refuses to supply the remaining part of the ghee on the ground that he was not paid the price of the instalment of ghee supplied, he commits a breach of the contract for which the plaintiff can hold him liable.<sup>1</sup>

**(2) Severable contract—Sub-section (2).**

A contract may provide for delivery by instalments, and payment for each instalment, and be of such a nature that each delivery is really like a delivery under a separate contract, to be paid for separately. This sub-section lays down that in the case of such a contract, it is a question of fact in each case whether the failure to deliver or the defective delivery of any instalment is tantamount to a repudiation of the whole contract or whether it gives rise only to a claim for compensation and not to a right to treat the whole contract as repudiated.<sup>2</sup> Thus, in the case of such a contract, as a general rule the seller must deliver instalments according to the contract and the buyer accepts and pays for them,<sup>3</sup> but in the case of a failure by either party to fulfil his obligation in respect of one instalment, the parties may well be assumed to have contemplated a payment in damages rather than rescission of the whole contract or the breach may occur in such circumstances, or be of such a nature, as to amount to a repudiation of the contract entitling the other party to put an end to it pursuant to the provisions of section 39 of the Indian Contract Act.

Sub-section (2) of section 38 apparently applies to cases where the contract is divisible but not absolutely independent of each other. It has no application to contracts which are entire or single though for the sake of convenience the performance may be effected by instalments. In such cases breach with regard to one instalment amounts to a breach of the contract.

Where goods are deliverable by instalments, and the price of each instalment is not payable separately, although it may be calculated with reference to separate portions of the goods, the buyer may reject any instalment delivered if the full quantity of the goods be not made up,<sup>4</sup> but if he accepts any of the goods or deals with any of them as owner, he must pay for them at the contract rate.<sup>5</sup> He is also bound to do so if he retains them beyond the time appointed for complete delivery or beyond a reasonable time where no time is fixed for complete delivery.<sup>6</sup> Where the price is payable only after full delivery, or where no time of payment is specified, which amounts to the same thing, a full delivery by the seller is a condition precedent to the payment of any part of the price,<sup>7</sup> and if the buyer has not appropriated the goods so as to make him liable for the part delivered at the contract rate as above, the mere acceptance by him of an instalment is not a final acceptance of it<sup>8</sup> barring his right to treat the contract as repudiated if the seller fails to make the full delivery.<sup>9</sup>

1. *Devi Lal v. Govind Lal*, A.I.R. 1961 Raj. 283.

2. See *M.S. Sarda v. Netha Co-op. Spg. Mills*, A.I.R. 1975 A.P. 169.—Instalment delivery—Defective supply in instalment contract held inseverable—Buyer can repudiate the entire remaining contract (Sec. 37).

3. See for instance, *Howell v. Evans*, (1926) 134 L.T. 570.

4. *Oxendale v. Wetherell*, 9 B. & C. 886; *Colonial Insurance Co. v.*

*Adelaide Ins. Co.*, 12 App. Cas. 128 (138) P.C.

5. *Nicholson v. Bradfield*, L.R. 1 Q.B. 620.

6. *Oxendale v. Wetherell*, *supra*; *Waddington v. Oliver*, 2 B. & P. 61.

7. See *Chanter v. Leese*, 5 M. & W. 698, Ex. Ch.

8. Per Alderson B in *Hardman v. Bellhouse*, 9 M. & W. 596 (600).

9. *Halsbury*, 3rd Edn., Vol. 34, pp. 101, 102 and footnotes thereunder.



Where goods under a contract are deliverable by instalments, a breach by one party in connection with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But the rule is subject to qualification. Thus, if the breach is of such a kind or takes place in such circumstances as reasonably lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded.<sup>1</sup> In this case order was placed by the plaintiff with the defendant for supply of certain make of radio sets. The order was intended to be fulfilled in instalments. Sets received under first instalment were unsaleable and unmerchantable. Other instalments of sets were of the same make and specification and likely to have the same defects. It was *held* that the plaintiff's case could be brought within the exception and he was entitled to rescind contract for other instalments.

Where a quantity of goods is deliverable by instalments which are to be separately paid for, the buyer is bound to accept and pay for each instalment which is tendered in due course of performance.<sup>2</sup> But a mere refusal or failure by the buyer to pay for one or more instalments, unaccompanied by any other act, does not seem to amount to a repudiation of the contract by the buyer.<sup>3</sup> Mere request for extension of credit similarly does not seem to entitle the seller to rescind.<sup>4</sup> Even insolvency, by itself, does not entitle the seller to rescind;<sup>5</sup> though they may refuse to deliver unless he is paid for instalments already delivered and receives cash for subsequent instalments.<sup>6</sup>

As in other cases, all the circumstances will have to be considered in determining whether there has been a repudiation of contract and whether or not the buyer intends to carry out the contract further. In *Withers v. Reynolds*,<sup>7</sup> the defendant agreed to furnish the plaintiff with wheat straw, sufficient for his use as stable-keeper, from October 20, 1829, till June 24, 1830, at the rate of three loads in a fortnight, "at 33s. per load for each load of straw so delivered on his premises from this day till the 24th June, 1830." The plaintiff being in arrear for several loads, paid the defendant for all the loads except the last, saying: "You may bring your straw, but I will not pay you on delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you". It was *held*, that he had shown an intention to repudiate the contract, and that the seller might treat it as at an end. Here the plaintiff was bound to pay for each load on delivery, and as he had expressly said in effect that he would not pay on delivery, the defendant was not bound to continue the supply.

1. *Chhedilal v. Brit. Over Ltd.*, (1948) 52 C.W.N. 45.

2. *Brandt v. Lawrence*, *supra*; *Reuter v. Sala*, *supra*; *Howell v. Evans*, (1926) 134 L.T. 570.

3. See *Freeth v. Burr*, (1874) L.R. 9 C.P. 208; *Mersey Steel & Iron Co. v. Naylor Benzon & Co.*, (1884) 9 App. Cas. 484; *Payzu Ltd. v. Saunders*, (1919) 2 K.B. 581, C.A.; *Steinberger v. Atkinson & Co.*, (1915) 31 T.L.R. 110; *Sooltan Chand v. Schiller*, (1878) 4 Cal. 252; *Simson v. Virayya* (1886) 9 Mad. 359; *Sunder Singh v.*

*Krishna Mills Co.*, 63 P.R. 1914; *Ramdeo v. Cassim Mamoojee*, (1893) 21 Cal. 173.

4. *In re Phoenix Bessemer Steel Co.*, (1876) 4 Ch. Div. 108, C.A.; *Rash Behary Saha v. Nrittya Gopal Nundy*, (1906) 33 Cal. 477.

5. Cf. section 54 and notes thereunder.

6. See section 47 and notes thereunder.

7. (1831) 2 B. and Ad. 882, 36 R.R., 782. cf. *Burn & Co. v. Morvi State*, A.I.R. 1925 P.C. 188; 30 Cal. W.N. 145; 90 I.C. 52.



The buyer might be putting forward some ground in good faith for failing or refusing to pay and this will have to be taken into consideration for making any inference.

In *Union of India v. K.H. Rao*, A.I.R. 1976 S.C. 626, 630, the Supreme Court held : "This plea [under S. 38 (2) of the Act], cannot be entertained at this stage. It was not set up in the plaint. No issue was framed on this point, nor was it agitated before the courts below. As is clear from a plain reading of Section 38 itself, the question whether in case of a default of supply, the entire contract for instalment deliveries stands repudiated or not, is one of fact depending on the circumstances of the case."

#### (4) When does breach amount to repudiation ?

Though as a general rule breach with regard to a particular instalment does not amount to a repudiation of a contract, a deliberate breach of a single provision of a contract may under special circumstance, and particularly if the provision be an essential one, going to the root of the contract, amount to a repudiation of the whole bargain. "The rule of law," says Blackburn, "is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, it is a good defence to say, 'I am not going to perform my part of it when that which is at the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"<sup>1</sup> In this case there was a contract for the sale of 5,000 tons of steel, to be delivered 1000 tons monthly commencing from January, 1881, payment within three days after receipt of shipping documents. It was *held* that payment for a previous delivery was not a condition precedent to the right to claim the next delivery, and that the postponement of payment for the goods delivered under a *bona fide* mistake (*viz.*, asking the seller to obtain an order from court before payment could be made as an application for winding up was pending against the seller) did not indicate an intention to repudiate the contract so as to release the seller from further performance. But in *Ebbw Vale Steel v. Blaine Ins. Co.*<sup>2</sup>, where the contract expressly provided that the payment for each instalment should be made on due date as a condition precedent to further deliveries, it was *held* that non-payment of one instalment justified refusal to make any further deliveries. In *Payzu Ltd. v. Saunders*<sup>3</sup>, failure to make punctual payment for the first instalment was held not to amount to a repudiation of the contract, nor did it go to the root of the contract. In *Rash Behary v. Nrittya*<sup>4</sup> there were two contracts. It was *held* that failure to take delivery under the first contract did not justify the seller in rescinding the second contract.

Where the seller continued to deliver after default by buyer to pay and then repudiated the contract, it was *held* that there was acquiescence on the part of seller in the continuance of the contract and he could not repudiate.<sup>5</sup> In *Freeth v. Burr*,<sup>6</sup> the defendant contracted to sell to the

1. *Mersey Steel & Co. v. Naylor & Co.* (1884) 9 App. Cas. 434, at p. 443 ; *Munro & Co. v. Meyer*, (1930) 2 K.B. 312 at p. 332 ("each delivery to be treated as a separate contract and failure to give or take delivery shall not cancel the contract as to further

deliveries").

2. (1901) 6 Com. Cas. 33.

3. (1919) 2 K.B. 581.

4. (1906) 33 Cal. 477.

5. *Sundar Singh v. Krishna Mills Co.*, 63 P.R. 1914 : 23 I.C. 91.

6. (1874) L.R. 9 C.P. 208, 43 L.J.C.P. 19.



plaintiffs 250 tons of pig iron, half to be delivered in two, remainder in four weeks, payment net cash fourteen days after delivery of each parcel. The delivery of the first parcel of 122 tons was not completed for nearly six months, in spite of repeated demands by the plaintiffs. The plaintiffs thereupon refused to pay for it, erroneously claiming to set off the debt against any possible liability of the defendant; but still urged delivery of the second parcel. The defendant treated the refusal to pay as an abandonment of the contract, and declined to deliver any more. The price of the first parcel was ultimately paid, and it was not suggested that the plaintiffs were unable to pay. The plaintiffs sued for the non-delivery of the second parcel.

*Held*, that the refusal to pay was not, under the circumstances, to justify the defendant in treating the contract as abandoned by the plaintiffs, and he was liable for non-delivery of the second instalment.

Coleridge C. J. said :

"In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an *intention to abandon* and altogether to *refuse performance* of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest .....I think it may be taken that the fair result of them is as I have stated .....Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

In *Maples Flock Co. v. Universal Furniture Products*,<sup>1</sup> the Court of Appeal in applying the sub-section laid down two tests, *viz.*, (i) the quantitative ratio which the breach bears to the contract as a whole and (ii) the degree of probability that such a breach will be repeated. Therefore, it is always a question depending on the contract and the circumstances of the case whether the breach of contract is a virtual repudiation of the contract *in toto* or a severable breach of a part only such as to give rise to claim for compensation.<sup>2</sup>

On the question whether a partial breach is a repudiation, the principle stated by Lord Coleridge in *Freeth v. Burr* was accepted as the true test and Lord Selborne observed :<sup>3</sup>

"You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its further performance by the conduct of the other. You must examine what the conduct is, so as to see whether it amounts to a renunciation to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

Halsbury observes<sup>4</sup> : "In contracts for the sale of goods where delivery is to be made by instalments to be separately paid for, the consi-

1. (1934) 1 K.B. 148. But see *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.*, (1971) 2 All E.R. 216.

2. *Taylor v. Oakes*, (1922) 127 L.T. 267 following *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K.B. 543,

C.A. cited under S. 42 *post*; (cf.) *Munro v. Meyer*, (1930) 2 K.B. 312.

3. *Mersey Steel & Iron Co. v. Naylor*, (1884) 9 A.C. at 438, 53 L.J.Q.B. 497.

4. *Laws of England*, 3rd Edn., Vol. 34, p. 106, and the authorities cited therein.



deration is not entire ; it has been divided, and consequently a breach as regards one or more instalments of the goods is not necessarily the breach of a condition precedent to the liability of the other party to accept or deliver the remainder. In such a case each delivery is really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties may well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract. The party therefore who commits a breach which is merely partial is allowed by law to aver that he is ready and willing to perform the rest of the contract, subject to compensating the other party for the partial breach."

In *Dominion Coal Co. v. Dominion Iron Steel Co.*,<sup>1</sup> the coal company agreed to supply the steel company with "all the coal the steel company might require for use in its work" and all the coal supplied "should be freshly mined and of the grade known as run-of-mine, reasonably free from stone and shale". After the contract had been carried out for some time, the steel company then requiring 80,000 tons a month, 153 car-loads were rejected as not according to contract, the steel company writing to the coal company that "the coal contained an undue percentage of shale and slate and sulphur ; and was unsuitable for their requirements and was not in accordance with the contract," and the coal company was notified that all coal delivered must be freshly mined run-of-mine coal suitable for the steel company's purposes. To which the coal company replied, "Your conduct in refusing to accept delivery of coal furnished and to be furnished constitutes a clear repudiation on your part of your obligations under the contract, and renders further performance on our part impossible. We, therefore, formally notify you that the contract mentioned is at an end."

*Held*, that the coal delivered was not according to contract and was rightly rejected, and that the coal company was not entitled to repudiate the contract, but that the steel company were entitled to repudiate it. Here the buyers committed no breach, and, therefore, the seller's repudiation was wrongful.

In the case of a contract for the sale of goods to be delivered in stated instalments, in the absence of anything to the contrary in the contract, the tests to be applied in deciding question whether the breach of the contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to claim for compensation, but not to a right to treat the whole contract as repudiated, are firstly, the quantitative ratio which the breach bears to the contract as a whole, and secondly, the degree of probability that such a breach will be repeated.<sup>2</sup>

In *Khettra Mohan Dey v. Benode Behary*,<sup>3</sup> the contract was held to be a single contract for 300 tons with a subsidiary agreement that deliveries were to be made and paid for by two monthly instalments ; the buyer failed with regard to the first instalment which covered no less than one-half at the outset of the contract. *Held*, it would be putting upon the defendant a different contract if he were allowed to insist upon the delivery of the second half.

In *Volkart Bros. v. Rutnavelu*,<sup>4</sup> "shipment at monthly intervals" was construed to mean at intervals of one month more or less regard being

1. (1909) A.C. 293, 78 L.J.C.P. 115 (P.C.).

2. *Chunni Lal Mansa Ram v. Sheo Prasad Banarsi Das*, A.I.R. 1943 All.

370 : 210 I.C. 55 : I.L.R. (1943) All. 752.

3. (1929) 34 C.W.N. 33.

4. (1892) 18 Mad. 63.



had to the time which it might be reasonable to allow to the seller for finding a steamer available for the required shipment.

Where the stipulation as to the quantity of goods deliverable by stated instalments is qualified by the use of some such words as 'about' or 'more or less' the question whether the qualifying words apply to the whole quantity sold or to the amount of each instalment is a question, solution of which depends on the construction of the contract itself.<sup>1</sup>

In *Ratilal J. Kothari v. Lakhmichand Srinivas*,<sup>2</sup> parties to a contract agreed to deliver and take 1,500 bags of corn in three instalments of 500 bags each. When the first instalment was defaulted, a suit was filed in respect of that instalment; when the second instalment was defaulted, similar action was taken. In respect of the third instalment when a suit was filed, it was contended that the cause of action for the second and third suits was the same and hence the third suit was barred by Order 2, Rule 2, Civil Procedure Code. *Held*, that looking to the terms of the contract, the intention of the parties and the circumstance in that objection on similar grounds was not taken in the second suit, the causes of action for default of each instalment were separate and that the suit was not barred.

In *Vishnu Sugar Mills v. Rameshwar Jute Mills*, A.I.R. 1970 Pat. 323, delivery was to be by stated instalments. There was defective delivery in the first instalment. The Court held: "On the facts and in the circumstances of this case, therefore, I have unhesitatingly come to the conclusion that the breach of contract on the part of the respondent company, assuming it was a breach as I have assumed above in regard to the supply of the 20,000 bags, was not a repudiation of the whole contract; it was a severable breach which could have given rise to a claim for compensation only but did not give rise to a right to treat the whole contract as repudiated within the meaning of Section 38(2) of the Act. That being so, the courts below, in my opinion, have rightly held that the appellant did commit breach of contract in respect of the balance of 40,000 bags which were to be supplied in November and December, 1957. The suit for damages to the tune of Rs. 3100 has rightly been decreed by the courts below. No counter claim on any account has been made by the appellant in regard to the severable breach in relation to the supply of 20,000 bags in the first instalment."<sup>3</sup>

The following observations of Wright J. in *Munro (Robert A.) & Co., Ltd. v. Meyer*, (1930) 2 K.B. 312, at page 331 were duly considered:

"My conclusion is that in such circumstances the intencumtion of the seller must be judged from his acts and from the deliveries which he in fact makes, and that being so, where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated."

The contract in this case *inter alia* provided that "each delivery or shipment shall be treated as a separate contract, and the failure to give

1. *Societe Anonyme 'L' Industrialee Russo-Belge v. Schoolefield*, 7 Com. Cas. 114 C.A.
2. A.I.R. 1938 Rang. 364.
3. *Millar's Karri and Jarrah Co. v. Veddel and Co.*, (1908) 100 L.T. 128,

and Halsbury's Laws of England, 3rd Edn., Vol. 34, p. 109 and *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.*, (1934) 1 K.B. 148 referred to.



or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments."

It may be observed that the rule in English law was originally very strict as is clear from *Withers v. Reynolds*. In *Hoare v. Rennie*<sup>1</sup> and *Honck v. Muller*<sup>2</sup> it was held in similar circumstances that a failure to deliver or pay for a particular instalment was a breach which went to the root of the contract. But the rigidity of the above view was relaxed subsequently, as we have already seen, so that a mere failure to pay for, or deliver one instalment will not discharge the seller or buyer from his obligations, unless it amounts to repudiation and reasonably leads to the inference that similar breaches will be committed in regard to subsequent deliveries.<sup>3</sup>

It has been held under the English law that where the passing of the property in specific goods is made dependent upon full payment of a price payable by instalments, the buyer may at any time pay the outstanding balance, even if it is not yet due, and the seller must then appropriate the payment to the goods.<sup>4</sup>

#### (5) Effect of breach which amounts to repudiation.

Where the breach in fact amounts to a repudiation, the other party may, as provided by section 60, accept the repudiation and rescind, and bring his action for damages; and the party in default cannot rely on the fact that all conditions precedent have not been performed, for instance, that no further goods were tendered by the seller.<sup>5</sup> He cannot also assert that if he had not repudiated, the other party would not have been in a position to carry out his contract. In *Taylor v. Oakes*,<sup>6</sup> there was a contract for the sale of hatter's fur, deliverable by instalments. The buyers accepted an instalment though owing to some defects in the fur they might, if they had discovered the defects have rejected it. Afterwards, for reasons unconnected with the first instalment, they gave notice that they would not accept further deliveries, and no further deliveries were tendered by the sellers. Held, that the defective delivery was, in the circumstances, a severable breach which would not have entitled the buyers to rescind the contract and refuse to accept further deliveries, and their conduct was a wrongful repudiation of the contract. It was, therefore, no defence to the buyers to say that if they had not repudiated, the sellers would have tendered in the next delivery fur of the same kind as that which they had delivered in the first instalment, and the buyers would have been entitled to reject it.

In *Millar's Karri and Jurrah Co. v. Weddel*,<sup>7</sup> on a contract, for the sale of blue gum timber deliverable by two shipments, where the first

1. (1859) 157 E.R. 1083, 120 R.R. 453; sale of 2000 tons, "the thing bargained for being the whole quantity of iron and no less," first instalment consisting of two-third of the total refused by the buyer. The buyer held barred to ask for other instalments.

2. (1881) 7 Q.B.D. 92; equal instalments but the first one much smaller than was provided for. Buyer refused to accept the same. Buyer could repudiate the whole contract.

3. See also *Millar's Karri Co. v. Weddel* (1909) 100 L.T. 128; *Bloomer v.*

*Bernstein*, (1874) 9 C.P. 588.

4. *Lancs. Waggon Co. v. Nuttall* (1879), 42 L.T. 465 C.A.; *Croft v. Lumley* (1858), 6 H.L. Cas. 672; See *Chalmers*, 16th Edn., p. 157.

5. *Cort v. Ambergate Ry. Co.*, (1851) 7 Q.B. 127, 85 R.R. 369; *Ripley v. McClure*, (1850) 5 Ex. 140.

6. (1922) 127 L.T. 267, C.A.

7. (1908) 100 L.T. 128; 14 Com. Cas. 25. Cf. *Ballantine & Co. v. Cramp & Bosman* (1923) 129 L.T. 502 (sale of meat to be shipped by instalments).



instalment was not according to the contract, it was *held* that "if a partial breach is of such a kind or takes place in such circumstances, as reasonably to tend to the inference that similar breaches will be committed in relation to subsequent deliveries the whole contract may then and there be regarded as repudiated, and may be rescinded," whether the breach be in payment by the buyer, or delivery by the seller. It was also pointed out that a repudiation may be inferred from acts, notwithstanding that the party committing the breach contended "that he was performing the contract, and might in fact be intending to perform the remainder of it." In that case there was a contract for the sale of 1100 pieces of timber to be delivered in two instalments, payments to be made against delivery of shipping documents. The shipping documents in respect of both shipments arrived before the arrival of the goods and were duly taken up by the buyers. When the first instalment arrived the buyers examined the timber and found it to be of very inferior quality and refused to accept it and demanded the money back intimating their intention to refuse to take the second shipment upon the ground that the first shipment was such departure from the contract as to justify a refusal to accept either instalment. It was *held* that from the circumstances an inference could be drawn that the second instalment would also be bad and that the buyers were justified in repudiating the whole contract.

The existence of a clause which frequently occurs in such contract, that "each delivery or shipment shall be treated as a separate contract; and the failure to give or take any deliveries or shipment shall not cancel the contract as to future deliveries or shipments," will not suffice to deprive the other party of his right to rescind.<sup>1</sup>

**(6) Breach in respect of one instalment discharges contract with respect to that instalment.**

The effect of a breach by either party in making or taking delivery of an instalment is to discharge the contract to that extent, subject to the defaulting party's liability to pay damages. Its delivery cannot afterwards be enforced or demanded.<sup>2</sup>

**(7) Temporary suspension of deliveries.**

Where, by agreement, deliveries are subject to be suspended in a specified event, they must be resumed within reasonable time after the event has ceased to operate, unless the change of circumstance is such that, to treat the contract as subsisting, would be to force upon the parties a substantially different contract. In the latter event the contract is dissolved on both sides.<sup>3</sup>

**(8) Sections 38, 60—Contract indivisible—Performance in stages—Repudiation of part of contract—Effect—Damages and return of deposit—Contract Act, 1872, S. 73.**

Where the contract is one and indivisible though the performance is stipulated to be made in stages then the question whether repudiation of a

1. Robert A. Munro & Co. v. Meyer, (1930) 2 K.B. 312, at p. 332.  
2. See Simpson v. Crippin, (1872) L.R. 8 Q.B. 14; compare Ireland v. Marryton Coal Co., (1894) 21 S.C. 989,

3. Benjamin on Sale, 8th Edn., p. 735; Metropolitan Water Board v. Dick, Ker & Co., (1918) A.C. 119; 87 L.J. K.B. 370,



part of the contract would amount to repudiation of the whole contract has to be decided with reference to the contract as a whole.

The defendant agreed to supply 4000 maunds of sabai grass and received Rs. 1,000 as deposit. One of the stipulations among others was that the defendant should go on supplying sabai grass, and receiving the price from time to time, while the plaintiff, in his turn, was to supply wagons according to the defendant's requirements every month. In the event of the plaintiff's failure to supply the wagons, he was bound to take charge of the goods lying in the godown of the defendant on payment of the entire price due on the same.

The contract was agreed to be performed by 30-6-1945. During the course of the performance of contract even when requested, the plaintiff put off the supply of wagons, for taking delivery. Whereupon the defendant intimated to the plaintiff that he was going to sell the goods to other persons and make the plaintiff responsible for the loss incurred in the transaction. The present suit was filed by the plaintiff alleging breach by the defendant and claiming recovery of damages amounting to Rs. 847-7-0. The plaintiff also claimed recovery of the sum of Rs. 1,000 deposited by him with the defendant. It was *held* :

(1) The plaintiff having failed to accept delivery of more than half the stipulated quantity of goods was clearly in breach of the entire contract and the defendant was justified in refusing to abide by the terms of the contract and the plaintiff was not entitled to any compensation on the ground of breach by the defendant.

(2) The contract was silent as to what was to happen to the sum of Rs. 1,000 in the event of a breach of contract. The equitable rule in such case would be that earnest money was forfeited in order to cover possible loss that may be incurred by the party not guilty of breach. In this case, however, the defendant did not allege that he had suffered any loss on account of the plaintiff's failure to perform his part of the contract. Hence, the plaintiff should be held entitled to get a refund of the sum of Rs. 1,000 deposited by him with the defendant.<sup>1</sup>

**39.** (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer, as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or

1. *Sriram Agarwalla v. Sagarmal Modi*,

A.I.R. 1957 Orissa 8.



damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

### Synopsis

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|--|--|
| (1) <i>Delivery to wharfinger or carrier—analogueous law.</i>              | (4) <i>Liabilities of carrier.</i>       |
| (2) <i>Effect of delivery to wharfinger or carrier—sub-section (1).</i>    | (5) <i>Sea transit—sub-section (3).</i>  |
| (3) <i>Seller's duty on delivering goods to a carrier—sub-section (2).</i> | (6) <i>C.I.F. contract—incidents of.</i> |
|  | (7) <i>Place of sale.</i>                |
|  | (8) <i>F.O.R. contract—incidents of.</i> |
|  | (9) <i>Situs of sale.</i>                |

#### (1) Delivery to wharfinger or carrier—analogueous law.

This section is based on section 32 of the English Sale of Goods Act, 1893, and old section 91 of the Indian Contract Act, 1872 (See Appendix A and Appendix B). With reference to it the Special Committee observed :

“This clause is a combination of section 32 of the English Act and section 91 of the Indian Act. In England it has been well settled for more than a century that if a tradesman orders goods to be sent by a carrier, though he does not name any carrier, the moment the goods are delivered to the carrier it operated as a delivery to the purchaser (Pollock and Mulla's Contract Act citing *Dutton v. Solomonson*, 3 B. & P. 512). It is also well established that it is the seller's duty to do whatever was necessary to secure the responsibility of the carrier for the safe delivery of the goods, and to put them into such a course of conveyance, as that in the case of a loss the buyer might have his indemnity against the carriers [*Clarer v. Hutcains*, (1811) 14 East 475]. These two rules have been embodied in section 91 of the Indian Act and elaborated in section 32 of the English Act. Section 91 of the Indian Act refers to a carrier or a wharfinger also. The reason appears to be that delivery of goods to a carrier or wharfinger was treated as standing on the same footing [*Buckman v. Levi*, (1813) 3 Camp. 414]. The English section does not refer to a wharfinger. In England there are special statutory provisions relating to wharfingers. As the rule as to wharfingers in section 92 has been in existence since 1872 in India, we consider it desirable to include it in the present clause.”



**Section 39 (1)—Delivery of goods to carrier for transmission to buyer—Consignment in seller's name and delivery against payment at buyer's place—Contract is complete at buyer's place and not by delivery to carrier at seller's place—Court at buyer's place has jurisdiction to try the suit.**

In *Fertilizers Corporation of India Ltd. v. Tata Iron Steel Co. Ltd.* (A.I.R. 1965 Punj. 143), in a contract of sale of goods, the goods were delivered to the carrier at T for the purpose of transmission to the buyer at N but the invoice of the consignment mentioned seller as consignee and the delivery was to be made against payment through a bank at N. It was held: The court at N had jurisdiction to try the suit for short delivery of goods as (i) the delivery to the carrier at T could not be said to be the delivery to the buyer, and (ii) N, being the place where goods were to be delivered against payment was the place of performance. The delivery and the payment of price of goods at N constituted part of the cause of action.

**(2) Effect of delivery to wharfinger or carrier—sub-section (1).**

The sub-section lays down that where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, *for the purpose of transmission to the buyer*, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer. It does not apply where there is no contract of sale at the time of delivery, for instance, where goods are delivered to a carrier for transmission to a person on approval or on sale or return.<sup>1</sup>

The effect of the section is to make the carrier or wharfinger *prima facie* the agent of the buyer to take delivery,<sup>2</sup> but the carrier or wharfinger is not the buyer's agent to accept the goods.<sup>3</sup> As has already been noticed,<sup>4</sup> delivery of the goods to a carrier for the purpose of transmission to the buyer, without reserving the right of disposal amounts to an unconditional appropriation of the goods to the contract.

The fiction of S. 39 (1) has been created for the purpose of section 39(2) to fix on whom the loss is to fall in case the goods are damaged in course of transit. This fiction certainly has to be ignored where no such question arises and the matter has to be decided on the factual basis where the goods are actually delivered.<sup>5</sup>

The presumption created by this sub-section is, however, rebuttable. Thus, the seller may reserve the right of disposal,<sup>6</sup> as by taking a bill of lading to his own or a third person's order, in which case the delivery is not to the buyer, but to the person indicated by the bill of lading.<sup>7</sup>

1. Cf. *Swain v. Shepherd* (1832) 1 Mood. & R. 223 : 42 R.R. 782.

2. Cf. *Vale v. Bayle*, (1775) 1 Cowp. 295 : *Dawes v. Peck*, (1799) 8 Term Rep. 330 ; 4 R.R. 675 ; *Dunlop v. Lambert*, (1838) 6 Cl. & Fin. 600, 620, 49 R.R. 848, 157 ; *Wait v. Baker* (1848) 2 Exc. 1, at p. 7 ; 77 R.R. 469, 474.

3. *Hanson v. Armitage*, (1822) 5 B. & Ald. 557, 24 R.R. 478 ; *Meredith v. Meigh*, (1853) 2 E. & B. 364, 65 R.R. 633 ; see also judgment of Blackburn

J. in *Calcutta Co. v. De Mattos*, (1860) 139 R.R. 752 ; 32 L.J.Q.B. 328.

4. See section 23 (2) ante.

5. *Ramakrishna Commercial Society Ltd. v. State of Andhra*, A.I.R. 1961 A.P. 86 (F.B.) ; (1960) 2 Andh. W.R. 244 (F.B.).

6. Section 23 (1) ante.

7. Per Cleasby B. in *Gabarron v. Kreeft*, (1857) L.R. 10 Ex. 274, at 285 ; 44 L.J. Ex. 238 ; see also *Wait v. Baker*, (1848) 9 Ex. 1, at 7, 8 ; 17 L.J. Ex. 307 ; 76 R.R. 469.



So also if the seller should sell goods undertaking to make the delivery himself at a place other than that where they are when sold, thus assuming the risk of carriage, the carrier is the seller's agent,<sup>1</sup> but the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods *necessarily* incident to the course of transit."<sup>2</sup> Again, while goods are in the hands of a carrier as such, they are liable to be stopped in transit.<sup>3</sup> The parties can well make their own arrangements as the terms on which the goods are to be delivered as the rules stated above apply in the absence of any contract to the contrary.<sup>4</sup>

In *A. M. Mohammad Ishak v. State of Madras*,<sup>5</sup> the assessee under the Madras General Sales Tax Act, 1939, was a registered manufacturer of and a licensed dealer in groundnut oil carrying on business in Pollachi. The sale was to Messrs Tata Oil Mills Co. Ltd. and was conducted in the following manner: The containers were supplied by the purchasers. These were filled in at the assessee's mills. The sellers loaded the containers and obtained railway receipts in the name of the buyers as consignors. On the instructions of the buyers all the oil sold under the contracts was routed to Ernakulam where it was cleared by the buyers and the commodity was consumed in the latter's mills. The railway receipts were, with the relative invoice, handed over at Coimbatore to the buyers where they had an office and the sellers received a good portion of the price. The balance was paid after weights were checked and fatty acid tests were carried out by the buyers at Ernakulam. It was *held*: As the carrier was constituted an agent of the buyer for accepting delivery of the goods on his behalf the goods had actually been delivered to the buyer at Pollachi within the Madras State and therefore the tax liability had accrued and this was not altered or affected by reason of the subsequent despatch of the goods at the instance of the buyer to Ernakulam outside the State. The circumstance that the weight of the oil as well as the fatty acid contents were checked at Ernakulam and it was only thereafter that the balance of price was paid to the assessee did not militate against the buyer having taken delivery of the goods at Pollachi when they were handed over to the buyer's agent, *viz.*, the carrier.

The use of the words "*prima facie*" shows that even if there be delivery to the carrier for transmission to the buyer, circumstances may exist which would prevent such delivery from amounting to delivery to buyer. Where goods are delivered by the seller to the railway company and the railway receipt is made out in the name of the seller as consignee, the goods are transmitted to the seller and not to the buyer. It cannot be said that the railway has been directed to carry the goods to the buyer and that the seller merely retained some right of disposal. In such a case delivery to the railway company cannot be deemed to be delivery to the buyer.<sup>6</sup>

1. *Dunlop v. Lambert*, (1838) 6 Cl. & F. 600; 46 R.R. 143 (H.L.).  
 2. See section 40 post.  
 3. See sections 50 and 51 of the Act.  
 4. See *Alagappa Chetty & Co. v. Roop*

*Chand*, (1929) 57 M.L.J. 110.  
 5. A.I.R. 1955 Mad. 502.  
 6. *Jagdish Prasad Pannalal v. Produce Exchange Corporation Ltd.*, A.I.R. 1946 Cal. 245; 8 C.L.J. 170.



In *Lakshmana Iyer v. Pachiappa Mudadliar*,<sup>1</sup> it has been held : Where the seller took the railway receipt in respect of the consigned goods in his name and endorsed it in favour of the buyer and forwarded the same to them and also delivered the goods to the carrier railway for the purpose of transmission to the buyer, the property in the goods passed to the buyer and the buyer cannot hold the seller liable for the value of the missing goods.

In *Union of India v. National Coal Development Corporation, Ltd.*,<sup>2</sup> certain goods were consigned by a Calcutta firm on S.E. Railway to N. C. D. C. Karba in M. P. Goods were, however, not delivered and N. C. D. C., the consignee, named in R/R sued the railway for damages.

Railway receipt in name of buyer as consignee. It was pleaded that the ownership of the goods had not passed to the N.C.D.C. and the suit was not maintainable, the contract of sale being for supply of unascertained goods. It was held : The suit was maintainable. When such contract is made, title to the goods passes upon their appropriation to the contract of sale. Such appropriation was effected when the suppliers separated the goods contracted from the general mass of property, namely, their stock of such goods lying in the godown. Under section 39 of the Act, where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier for the purposes of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

The words in this sub-section 'whether named by the buyer or not' should be read subject to the preceding words, 'in pursuance of the contract' so that if the buyer names a particular carrier, the seller must deliver to him, otherwise there will be no proper delivery.<sup>3</sup> If the buyer has given any express instructions to the seller with regard to the mode of transmission consistent with the terms of the contract, it is the seller's duty to carry them out ; and if he fails to do so, the goods remain at his risk during the transit.<sup>4</sup> If the instructions are properly carried out the risk is with the buyer.<sup>5</sup> "It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance ; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent."<sup>6</sup>

Even where the seller delivers to the wrong carrier, it is apprehended that the buyer may, by his negligence, be compelled to treat the delivery

1. A.I.R. 1961 Mad. 343 : (1961) 2 Mad. L.J. 75. See also *Firm Shah Chandanmal Fatehraj v. Hazarilal*, A.I.R. 1962 Raj. 122 (cited at p. 469 ante)—Bilticut transaction—Nature and incidents of.  
2. 1972 M.P.L.J. 32 : (1972) Jab. L.J. 96. See Yearly Digest, February 1972 issue, column. 420.  
3. *Vale v. Bayle*, (1775) 1 Cowp. 29.  
4. *Ullock v. Reddelein*, (1828) Dans &

Lloy 6 ; 5 L.J. (O.S.) K.B. 208.  
5. *Vale v. Bayle*, supra.  
6. *Dunlop v. Lambert*, (1838) 6 Cl. and Fin. 609 at p. 620 ; 49 R.R. 143, 157. See also *State of Bihar v. Bengal Chemical & Pharmaceutical Works Ltd.*, A.I.R. 1954 Pat. 14 ; *Sohan Singh v. Union of India*, F.A. No. 11 of 1950, 15-7-1952 (Assam) (1953) Yearly Digest, Column 584 cited at p. 431 ante.



as valid, e.g. where he makes an unreasonable delay in notifying to the seller the non-arrival of the goods by the carrier named.<sup>1</sup> In *Cooke v. Ludlow*,<sup>2</sup> the buyer living near Bristol ordered goods of the seller to be sent from London by any conveyance for Bristol. The seller sent the goods to a wharf where he was informed that they would be conveyed to Bristol by the ship 'Commerce' and accordingly notified the buyer that they would be sent by that ship. That ship, however, was fully laden and unknown to the seller, the goods were sent by another ship and were subsequently lost. The buyer was held liable to pay the price of the goods.

The rule laid down in this sub-section is, however, a *prima facie* rule and may be modified by express contract.<sup>3</sup>

In *Association Cement Companies Ltd. v. State of Andhra Pradesh*,<sup>4</sup> it was held: To be an outside sale in order to attract the exemption contemplated by the Explanation to Art. 286 (1) of the Constitution it is not enough that the goods were for the purpose of consumption outside the State. The further requirement is that the goods should have been actually delivered outside the State. If under the terms of the contract, the goods are actually delivered to the buyers within the limits of the State, there could not possibly be a further delivery of the same goods again at the places of destination outside the State. Thus where the goods were delivered to a carrier (Railway) within the State the carrier is constituted an agent of the buyer for accepting delivery of the goods on his behalf with the result that the goods are actually delivered within the State.

### (3) Seller's duty on delivering goods to a carrier—sub-section (2).

"Delivery of goods to a carrier or wharfinger," says Lord Ellenborough, "with due care and diligence is sufficient to charge the purchaser, but he has a right to require that in making this delivery, due care and diligence shall be exercised by the seller."<sup>5</sup> By this sub-section the seller is bound, when delivering to a carrier, to take the usual precaution for ensuring safe delivery to the buyer, so that in case of default by the carrier the buyer may have his remedy against the carrier. The seller is not bound to provide against every contingency; his contract with the carrier must be a reasonable one, having regard to the nature of the goods and the circumstances of the case.

In *Clarke v. Hutchins*,<sup>6</sup> the seller, in delivering goods to a trading vessel, neglected to apprise the carriers that the value of the goods exceeding £5, although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost and in the seller's action for goods sold and delivered, it was held that the seller had not made a delivery of goods, not having "put

1. *Cooke v. Ludlow*, (1806) 2 B. & P.N.R. 119; see Benjamin on Sale, 8th Edn., p. 738.

2. *Supra*.

3. See *Dunlop v. Lambert*, *supra*; *Calcutta Co. v. De Mattos*, (1893) 32

L.J.Q.B. 322, at p. 328; *Sadasook Kothari v. Chaitram*, A.I.R. 1926 Cal. 218; 88 I.C. 913.

4. A.I.R. 1962 A.P. 522.

5. *Buckman v. Levi*, (1813) 3 Camp. 414.

6. 14 East 475; 13 R.R. 283.



them into such a course of conveyance as that, in case of loss, the defendant might have his indemnity against carriers." In *Venkatachalam v. Hutchins*<sup>1</sup>, commission agent was not held liable for despatching goods uninsured which was customary.

A seller cannot claim a decree against the buyer unless he can establish that he has placed him *i.e.* the consignee of the goods, in a position to claim delivery thereof from the carrier. A delivery to the carrier would be tantamount to a delivery to the purchaser only if this is done. The mere delivery to carrier without taking a receipt from him and without intimating his name to the consignee or without sending the receipt taken from the carrier to the consignee will not entitle the seller to claim the price of the goods from the purchaser. It is only on proof of these two matters in addition to the delivery of the goods to the carrier that the seller can claim a decree against the buyer. This will not be the case if the carrier be the nominee of the purchaser in which case the mere proof of delivery of the goods to such carrier would entitle the seller to claim the price of the goods from the purchaser.<sup>2</sup>

In a case under the old corresponding section 91 of the Indian Contract Act, it was held that where the contract provides that goods shall be sent at "owner's risk," the property passed to the buyer on delivery to the carriers.<sup>3</sup>

As the seller's duty under this sub-section is only to act reasonably in the circumstance to provide against loss or damage in transit, it is conceived that he is under no liability to enter into such a contract with the carrier as will insure an indemnity to the buyer in all events as *e.g.* against loss or damage by the Act of God, or other perils excepted in the case of carrier.<sup>4</sup>

In *Sriraganaikulu v. Venkatasubbarao*,<sup>5</sup> it was held :

Ordinarily, when a person chooses another for doing any work, the presumption is that he has constituted the latter as his own agent ; but in dealing with sale and delivery of goods there is a specific provision, S. 39 of the Sale of Goods Act, which provides that, when the seller has the authority to or been required to send goods to the buyer, he can choose a carrier on behalf of the buyer whether the carrier has been named or not by the buyer. In other words, whenever there is an authority or request to send goods, there is the implied authority to make, on behalf of the buyer the choice, of a person or agent to carry the goods. There is the further provision that when entrustment is thus made by the seller to the carrier, it would amount to delivery to the buyer himself *prima facie*. In other words, this inference should follow unless there be something in the authorisation or the request made by the buyer to the contrary. It is open to him to stipulate that the responsibility of the delivery of the goods would last till actually delivery is effected to the buyer himself. What is provided for in S. 39 (1) is only a presumption and it is rebuttable by the actual terms of a contract.

1. 47 M.L.T. 312.

2. *Firm Narain Singh Tehl Singh v. Firm Tulsi Ram SurajPrakash*, A.I.R. 1937 Lah. 785.

3. *Alagappa v. Roopchand*, A.I.R. 1929

Mad. 685 : 117 I.C. 130 : (1929) 57 Mad. L.J. 110.

4. See *Halshury, Laws of England*, 3rd Edn., Vol. 34, p 108 (f.n.g.).

5. 1958 Andh. L.T. 1155.



#### (4) Liabilities of carriers.

In India, in certain cases, the liabilities of carriers have been limited by special legislation. The most important of these are :

Section 3 of the Carriers Act, 1865, which is as follows :

"No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof."

"Common carrier" is defined by section 2 of the Act as denoting a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation for all persons indiscriminately.

Sections 72, 73 and 74 of the Indian Railways Act, IX of 1890, as amended by the Indian (Railways) Amendment Act, XXXIX of 1961, are as follows :

"72. Execution of forwarding notes in respect of animals of goods carried on a railway.—Any person delivering to a railway administration any animals or goods to be carried by railway shall,—

(a) if the animals or goods are to be carried by a train intended solely for the carriage of goods, or

(b) if the goods are to be carried by any other train and consist of articles of any of the following categories, namely :

(i) articles carried at owner's risk rates

(ii) articles of a perishable nature

(iii) articles mentioned in the second Schedule

(iv) articles in a defective condition or defectively packed

(v) explosives and other dangerous goods

execute a note (in this Act referred to as the forwarding note) in such form as may be prescribed by the railway administration and approved by the Central Government, in which the sender or his agent shall give such particulars in respect of the animals or goods so delivered as may be required.

73. General responsibility of a Railway administration as a carrier of animals and goods.—Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit, of animals or goods, delivered to the administration to be carried by railway, arising from any cause except the following, namely :

(a) act of God ;

(b) act of war ;

(c) act of public enemies ;

(d) arrest, restraint or seizure under legal process ;

(e) orders or restrictions imposed by the Central Government or a State Government or by any officer or authority subordinate to the Central Government or a State Government authorised in this behalf ;

(f) act or omission or negligence of the consignor or the consignee or the agent or servant of the consignor or the consignee ;

(g) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods ;

(h) latent defects ;

(i) fire, explosion or any unforeseen risk :



Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods.

**74. Responsibility of a railway administration for animals or goods carried at owner's risk rate.**—(1) When any animals or goods are tendered to a railway administration for carriage by railway and the railway administration provides for the carriage of such animals or goods either at the ordinary tariff rate (in this Act referred to as the railway risk rate) or in the alternative at a special reduced rate (in this Act referred to as the owner's risk rate) the animals or goods shall be deemed to have been tendered to be carried at owner's risk rate, unless the sender or his agent elects in writing to pay the railway risk rate.

(2) Where the sender or his agent elects in writing to pay the railway risk rate under sub-section (1), the railway administration shall issue a certificate to the consignor to that effect.

(3) When any animals or goods are deemed to have been tendered to be carried or are carried, at the owner's risk rate, then, notwithstanding anything contained in section 73, the railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit, of such animals or goods, from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the railway administration or any of its servants."

Where the ordinary precaution which the seller should take, *viz.*, to declare to the Railway about the goods which come under the excepted articles enumerated in the 2nd Schedule to the Railways Act, 1890, and the value of which exceeded Rs. 300, has not been taken, he is not entitled to any damages in respect of such goods from the Railway. The liability of the buyer is, therefore, exempted under clause (2) of S. 39 of the Act.<sup>1</sup>

There is no invariable rule that in the case of all F.O.R. contracts it is not sufficient to reach the goods to a railway station, but that the goods must also be loaded in the wagons. It is really a question of contract or of usage of the railway concerned.<sup>2</sup> In the case of delivery of goods F.O.R., for the passing of property in goods to the buyer, the effect of the entire agreement must be looked into.<sup>3</sup>

For duties of seller and buyer in a C.I.F. contract, seller's obligation to obtain import licence to enable buyer to clear goods and effect of failure to tender documents, see *Narayanaswami Chetti v. Soundararajan Co. Ltd.*<sup>4</sup> cited at p. 531 *ante*.

#### (5) Sea transit—sub-section (3).

As regards transit by sea, sub-section (3) lays down that in the absence of any agreement to the contrary, where goods are sent by the seller to the buyer by a route involving sea transit, *in circumstances in which it is usual to insure*, the seller shall give such notice to the buyer

1. *Siddaya v. Muthayanna*, A.I.R. 1957 Mad. 183.

2. *Dominion of India v. Bhikraj Jaipuria*, A.I.R. 1957 Pat. 586.

3. *Assam Oil Co. Ltd. v. The Assam*

*Board of Revenue and others*, I.L.R. (1966) 18 Assam 209. See *Yearly Digest*, 1970 Column. 2821.

4. A.I.R. 1958 Mad. 43.



as may enable him to insure them during their sea transit, and if the seller fails so to do, goods shall be deemed to be at his risk during such sea transit.

The rule contained in this sub-section and the corresponding provision of the English Act is borrowed from the Scottish law. Mr. Bell, summing up the Scotch cases, says: "In delivering goods on ship-board the seller is bound not only to charge the ship-master or shipping company with them effectually, but though not bound to insure, he must give such notice as to enable the buyer to insure."<sup>1</sup> Where goods are forwarded by sea by an agent to his principal, it seems to be the duty of the agent to insure, in the absence of any agreement or course of dealing.<sup>2</sup>

The rule contained in this sub-section is very general and its exact scope is not very clear. It obviously does not apply to a c.i.f. contract (as in such a contract the seller is bound to insure), under which it is the obligation of seller to effect the insurance, nor to an ex-ship contract as in that case the buyer has no insurable interest in the goods while at sea.<sup>3</sup> The question whether it applies to f.o.b. contract also came for consideration in *Wimble v. Rosenberg*.<sup>4</sup> In that case the contract was for 200 bags of Aracan rice f.o.b. Antwerp, to be shipped as required by buyers, cash against bill of lading. On August 9, the buyer instructed the sellers to ship to Odessa. The goods were shipped on August 24, the ship sailed on the 25th, and was lost on the 26th. On the 29th the bill of lading was presented, which was the first intimation of the shipment the buyer received. In an action for the price, the buyers set up the terms of section 32(3) of the English Act, having received no notice to insure. *Held*, by Bailhache J., that in any ordinary f.o.b. contract, which he held the contract to be, that is to say, where shipment is to be made on a ship nominated by the buyer, no notice to insure is necessary, as in his opinion, in such a contract the seller is not "authorised or required to send" the goods to the buyer. The seller performs his duty when he puts the goods on board.

On appeal the Court of Appeal were divided in opinion: Vaughan Williams L.J. holding that the sub-section applied and the sellers had not given such notice as to enable the buyers to insure; Buckley L.J. that the sub-section applied, but the buyers had sufficient information to enable them to insure, so there was no obligation on the sellers to give notice; and in any case the contract itself was sufficient notice; Hamilton L.J. that the sub-section did not apply to a f.o.b. contract and if it did, the contract itself gave sufficient notice.

In *Northern Steel Co. v. Batt*,<sup>5</sup> the decision of the majority in the preceding case that section 32(3) of the English Act covers f.o.b. contract, was, with doubt, followed and on the facts of the case it was *held* that there had been no failure on the part of the sellers. On August 26, they had informed the buyers of the sailing of the ship on the 24th, and the buyers knew this fact on September 6, twelve days before the loss of the

1. Law of Sale, p. 89; see also Brown's Sale of Goods Act, 1893, pp. 161-164; *Wimble v. Rosenberg*, (1913) 3 K.B. 743, C.A.

2. *Smith v. Lascelles*, (1788) 2 Term R,

187: 1 R.R. 457.

3. See *Wimble v. Rosenberg*, *supra*.

4. (1913) 1 K.B. 279; (1913) 3 K.B. 743, C.A.

5. (1917) 33 T.L.R. 516 (C.A.).



goods. At the date they knew all facts material to insurance and the evidence showed they could have insured.

The usual contracts of sale which involve the carriage of goods by sea are three, namely c. i. f., f. o. b. and ex-ship, and for the incidents of these contracts see Appendix.

In a C.I.F. contract, the purchaser is bound to accept the documents which represent the goods and honour the draft. He is not entitled to raise at that stage any question as to whether the goods are in accordance with the contract or not. If, after taking delivery of the goods, it is found that they are not in accordance with the contract, then of course the purchaser has a right to reject the goods and to pursue his remedies against the seller. Therefore, the plea that the goods were not in accordance with the contract, though open to consideration in the counter-claim of the purchasers is not admissible as a defence to the action of the sellers for damages for wrongful refusal to accept the documents and to honour the drafts. They cannot say that they were not bound to honour the hundies because the goods were not in accordance with the contract. Refusal of document amounts to breach of contract and makes them liable for damages.<sup>1</sup>

As already observed, it is open to the parties to enter into a contract to the contrary and by usage a term may be inferred authorising the seller to send goods at buyer's risk uninsured.<sup>2</sup>

Contract to the contrary.

#### (6) C.I.F. contract—incidents of.

In *M/s. Raj Spinning Mills v. A. & G. King Ltd. Raglan Mills, England*,<sup>3</sup> it was held: Under a c.i.f. contract, the vendor is bound by his contract to do the following things : First, to make out an invoice of the goods sold; second, to ship at the port of shipment goods of the description contained in the contract; third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price : 1920 A.C. 144, Foll.

The buyer's right to reject the goods however remains unimpaired if upon arrival they were found upon examination not to be in conformity with the contract.

Where the letter of confirmed credit in regard to a c.i.f. contract for the purchase of a standing spinning plant in England, mentions only the shipping documents and makes no mention at all of the invoices etc. relating to dismantling, packing and other charges, the buyer is bound

1. *Gulamali Abdul Hassain & Co. v. K.P.M.S. Mohammed Yusuf & Bros.*, A.I.R. 1954 Mad. 268 : (1953) 1 Mad. L.J. 504.

2. *Alagappa v. Roopchand*, A.I.R. 1920 Mad. 685 : 57 M.L.J. 110 : 117 I.C. 136.

3. A.I.R. 1959 Punj. 45.



according to the contract to honour the bills sent for dismantling etc., sent along with the shipping documents and the buyer is not entitled to refuse to carry out his part of the contract and if he had any complaint on account of any excess in the charges made for dismantling, packing etc., it was open to him to make a claim for a refund of any such charges.

### (7) Place of sale.

The Sale of Goods Act does not deal with the question of situs of a sale. Any reference, therefore, to the provisions of the Sale of Goods Act for the purposes of ascertaining the situs of the sale for the purposes of sales tax will be irrelevant. When can the sale be regarded as an inside sale or an inter-state sale will not depend only upon the question as to where the title actually passes.

The constructive delivery contemplated under S. 39 of the Act is only relevant for the purposes of ascertaining the rights and liabilities of the purchaser and the seller *inter se*. It cannot fix the situs of the sale for the purposes of taxation.

Thus, where the contract for sale took place in Calcutta, the price was to be paid in Calcutta, the goods were to be delivered outside the State of Assam for the purpose of consumption, even if the goods at the time of contract existed within the State of Assam and the title to the goods passed in Assam under the Sale of Goods Act, it cannot be said that it is an inside sale.<sup>1</sup>

### (8) F O.R. contracts—incidents of.

The essential incident of F.O.R. contract is that the seller undertakes to deliver the goods into railway wagons or at the station (depending on the practice of the particular railway) at his own expense. These contracts differ from the ordinary inland contract of sale only in respect of the place at which delivery is to be made, and *prima facie* fixes the point at which the property passes and the risk falls upon the buyer and the price becomes payable.

The normal rule in F. O. B. contracts is that the property is intended to pass and does pass on the shipment of the goods and that in the absence of special agreement, the property in the goods does not pass until the goods are actually put on board. The same rule would apply to F.O.R. contracts. The property in the goods does not pass until they are actually put on rail.<sup>2</sup>

When after inspection and approval of goods by inspectors of buyer, the seller is to do packing, send invoice notes to consignee, consign goods to railway and send railway receipt to consignee, delivery takes place when

1. Surma Match & Industries (Private) Ltd. v. Commissioner of Taxes, Assam, A.I.R. 1960 Assam 28. See also Batchu Subba Rao & Co. v. Commercial Tax Officer, East Godavari, Kakinada, A.I.R. 1960 Andhra Pra. 196 ; Capco Ltd. v. Sales Tax Officer,

A.I.R. 1960 All. 62 ; R.C. Society Ltd. v. State of Andhra, A.I.R. 1961 A.P. 86.

2. Swastika Scientific Engineering Co., Ambala Cantt. v. Union of India, 63 P.L.R. 653.



goods are delivered to railway and not when they are inspected and approved by inspectors.<sup>1</sup>

**(9) Situs of sale.**

The assessee company carrying on business of importing and selling goods and having its head office at Calcutta and branches at various places in India, supplied goods to the buyers in Uttar Pradesh, on contracts F.O.R. Calcutta, Madras and Bombay. On being assessed to sales tax by U.P. Government, the validity of the assessment was challenged on the ground that the sales having been effected by railway transport outside U.P., they were not under Art. 286 (1) of the Constitution of India, subject to tax by the U.P. Government. It was *held*: The delivery to the railway administration outside U.P. was only constructive and the actual delivery was at the stations in U. P. where the buyers received the goods from railway. The sales, therefore, must be deemed to have taken place in U.P. The fact that the carriage of goods from the company's godown's was shared between two carriers, one, who carried it to railway station and the other, railway administration which transported them to the station in U.P., made no difference.<sup>2</sup>

*Miscellaneous cases*

**(i) Section 39 (1)—Madras General Sales Tax Act, 1939, S.3. Explanation to Article 286(1)(a) of the Constitution of India.**

In *Shree Bajarang Jute Mills Ltd., Guntur v. State of A.P.*, A.I.R. 1966 S.C. 376 the Supreme Court held:

To attract the Explanation to Art. 286 (1) (a), the goods have to be actually delivered as a result of the sale for the purpose of consumption in the State in which they are delivered. But the expression "actually delivered" in the Explanation, in the context in which it occurs, can only mean physical delivery of the goods or such action as puts the goods in the possession of the purchaser; it does not contemplate mere symbolical or notional delivery, *e.g.* by entrusting the goods to a common carrier or even the delivery of documents of title like railway receipts.

The rule contained in S. 39 (1) of the Sale of Goods Act, 1930, merely raises a *prima facie* inference that the goods have been delivered if the conditions prescribed thereby are satisfied. It has no application in dealing with constitutional provision, which while imposing a restriction upon the legislative power of the States, entrusts exclusive power to levy sales tax to the State in which the goods have been actually delivered for the purpose of consumption.

**(ii) Section 39 (1)—Bengal Finance (Sales Tax) Act, 1941, S. 2(g)—Explanation—Meaning of "actual delivery."**

In *S. K. Roy v. Addl. Member, Board of Revenue, West Bengal*, (A.I.R. 1967 Cal. 338) it has been *held*: The words 'actual delivery' in the Explanation to S. 2 (g) of the Bengal Finance (Sales Tax) Act, 1941, mean

1. *Swastika Scientific Engineering Co., Ambala Cantt. v. Union of India*, 63 P.L.R. 653.

2. *M/s. Capco Ltd. v. The Sales Tax Officer & another*, A.I.R. 1960 All. 62.



physical delivery of the goods at the place of destination and not any constructive delivery to the common carrier. The words '*prima facie* deemed' occurring in S. 39 (1) of the Sale of Goods Act, 1930, do not lead to the conclusion that delivery to the common carrier would constitute actual delivery to the buyer.

Where goods loaded in the Railway wagons in Bihar were actually delivered in West Bengal for consumption in West Bengal, the sale was held to have taken place within West Bengal.

**(iii) Section 39—Art. 286 (1) (a), Explanation of the Constitution (before its amendment by 6th Amendment in 1956)—C.P. & Berar Sales Tax Act, 1947, S. 27-A.**

Where there is sale of timber F. O. R. certain place in the State, and there is delivery of goods and passing of property at the place, mere despatch to various destinations according to purchaser's instructions does not make it outside sale.

[*C, P. Timber Works, Kanpur, U.P. v. Commr. of S. T., M.P.*, (1964) M.P.L.J 620].

**(iv) Section 39—Railways Act, 1890, S. 72.**

Where the consignor delivers goods to the railway for delivery to the consignee and loss is caused by non-delivery, the consignee to whom property in goods has passed alone can sue for loss.

[*Yacob Rowther Sons, Mettupalayam v. Union of India*, A.I.R. 1965 Mad. 152].

**40.** Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Risk where goods are delivered at a distant place.

**Risk where goods are delivered at a distant place.**

The section is based on section 33 of the English Act, which is practically the same as this section. There was no corresponding provision in the Indian Contract Act.

Alderson B. observed in *Bull v. Robinson*<sup>1</sup>:

"A manufacturer who contracts to deliver manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission"

1. (1854) 10 Ex. 342, at p. 346, 102 R.R.



In this case hoof iron was despatched in a clean and bright condition from the seller's premises but became rusted at the destination; it was held that the rusting was a necessary incident of transit.

Where the seller undertakes to deliver the goods at some distant place at his own risk, the risk of transit is by this rule, distributed between the seller and the buyer. As the seller undertakes only extraordinary risk of loss or deterioration as is not incidental to the ordinary course of transit or is not contemplated or is not capable of contemplation by the parties at the time of the contract, the risk of ordinary deterioration of the goods due to the transit which is always in contemplation of the parties who are aware of the nature of the goods and of the ordinary incidents of transmission is not covered by such undertaking unless the seller specially undertakes to bear such risk also. The reason of the rule is apparent. Where the goods are transmitted by the buyer to the seller they must naturally undergo such deterioration during transmission as incidental to their nature and ordinary circumstances attending such transmission. The seller by mere undertaking to deliver the goods at a distant place takes the risk of accidents but not of such incidental deterioration which no precaution on his part can prevent and which being the effect of time and wear and tear of voyage must befall the goods in any event whether they were transmitted by the buyer or the seller. The buyer, therefore, is not entitled by this rule to refuse to accept delivery on the ground of their deterioration during transit if the deterioration is such as would have naturally resulted even if he himself would have transmitted them, *i.e.*, which is the natural result of the time which was spent during transit and of the wear and tear of carriage. The seller must, however, bear the risk of any extraordinary or unusual deterioration during transit.<sup>1</sup>

The rule contained in the section is not confined to the case of a manufacturer<sup>2</sup>; it is, however, limited by the rule that perishable goods which are consigned to a distant place are not merchantable unless they are in a condition to remain saleable for a reasonable time<sup>3</sup>; or in other words, in the case of perishable goods, the seller must be deemed to warrant that the goods will be in a merchantable condition for reasonable time after the transit. In this case the buyer was held entitled to reject rabbits which arrived in Brighton in an unsaleable condition though they were saleable when sent off from London and were sent in the ordinary course and nothing unusual happened in the course of the transit.

Under section 26 *ante* the goods remain at the seller's risk until the property therein is transferred to the buyer, and the risk *prima facie* passes

1. Bull v. Robinson, *supra*; Walker v. Langdale's Chemical Manure Co., 11 Macph. 906.
2. See Chalmers, Sale of Goods Act, 16th Edn., p. 160; Winnipeg Fish Co. v. Whitman Fish Co., (1909) 41 Can. S.C.R. 45; sale of fish which was held to be deteriorated from some unusual and exceptional cause the risk of which was on the seller.
3. Beer v. Walker, (1877) 46 L.J.C.P. 677, 37 L.T. 278; cf. Ollett v. Jordan, (1918) 2 K.B. 41, at p. 47. See also

Burrows v. Smith, (1894) 10 T.L.R. 246; Broome v. Pardess Co-operative Society, (1940) 1 All E.R. 603; Mash & Murrell v. Joseph I. Emmanuel Ltd., (1961) 1 All E.R. 485; reversed on an issue of fact (1962) 1 All E.R. 77; Cordova Land Co. Ltd. v. Victor Brothers Incorporated (1966) 1 W.L.R. 793; Oleificio Zuchchi S.P.A. v. Northern Sales Ltd., (1965) 2 Lloyd's Rep. 496, at pp. 517, 518. See Chalmers, Sale of Goods Act, 16th Edn., p. 160 f.n. (e).



with the property. The present section, therefore, must be taken as applying only to cases where the property has passed to the buyer before delivery.

In accordance with section 62, the rule laid down in this section may be overridden not only by express agreement, but by usage or course of dealing between the parties also.

It may be noted that whether the phrase "at the seller's risk" applies to all risks or only to *unusual* risks depends upon the facts of the particular case.

**41.** (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

### Synopsis

- |  |   |
|--|---|
| (1) <i>Buyer's right of examining the goods.</i>                         | (3) <i>Sub-section (2)—seller must give opportunity of examining goods.</i> |
| (2) <i>Sub-section (1)—buyer has right to inspect before acceptance.</i> | (4) <i>Time and place of examination.</i>                                   |

#### (1) Buyer's right of examining the goods.

This section reproduces section 34 of the English Act. Sub-section (1) enacts the well-established proposition that no acceptance can properly be said to have taken place until the buyer has had an opportunity of rejection. "Suppose," says Lord Bramwell, "I order a certain quantity of lime to be taken to a farm, and I am not there to object, and nobody else is there to object to it, I shall not be at liberty afterwards to say: 'These goods have not been accepted and received by me; they have been as much as it was possible, unless I had chosen to be there to make objection. So on the other hand, if I go to a shop for an article I have previously ordered, and it is delivered to me wrapped up, though I cannot see what it is, there cannot be the slightest question that I have received and accepted the goods, if they turn out to be in conformity with the order, yet nobody can say that I shall not have a right to object to them afterwards, if they are not in conformity with the contract.'"<sup>1</sup>

1. *Castle v. Swooner*, (1860) 5 H. & N. 281. See S.C. 30 L.J. Ex. at p. 315

Ex. Ch.



The rule stated in sub-section (2) is a corollary to the above rule and was applied in *Isherwood v. Whitmore*.<sup>1</sup> In that case, the defendants, having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, but on application to inspect the goods were shown two closed casks said to contain them. It was *held* that no sufficient opportunity was given to the buyer to examine the goods and the plaintiff, therefore, had not made a valid offer of delivery.

While sub-section (1) applies only to cases where delivery has already been made, sub-section (2) applies where delivery is incomplete in the sense that it is only being tendered.

Section 41 makes a distinction between the delivery of the goods to the buyer and his acceptance of the same after examination. There is, however, no provision for the buyer to refuse to receive the goods. He may receive the articles and yet not accept them.<sup>2</sup> In this case, A through his agent B, contracted by a written agreement with C to sell cotton *saries* of certain denomination. The contract was not by sample and the denomination had no significance other than that the goods should be of merchantable quality. The goods were delivered to C but even before it, C sent a notice to B demanding a guarantee from him that the goods contained in the parcel were according to the samples shown and intimating his refusal to receive the goods unless such guarantee was forthcoming. The question was whether A was guilty of non-performance or whether the contract was rescinded by C earlier by notice. It was *held* : (i) There was delivery of goods to the purchaser under the terms of the contract and the only right of the purchaser thereafter was the right to examine the goods as provided for under S. 41 of the Act; (ii) under S. 229, Contract Act, A was justified in treating the contract as cancelled in view of the unequivocal notice ; (iii) the threat to refuse acceptance was a notice to the seller that C had dispensed with the performance of the promise made to him, as in those circumstances A could rightly put an end to the contract under S. 39 of the Contract Act ; (iv) C could not recover damages for the breach of a promise touching the performance of a thing that he had wholly dispensed with.

Where the Food Inspector took sample of milk in exercise of his statutory powers but the milk had not become property of the accused at the time when the sample was taken by the Food Inspector, the accused was not guilty.<sup>3</sup>

## **(2) Sub-section (1)—buyer has right to inspect before acceptance.**

When goods are delivered to a buyer in performance of the seller's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing, and acceptance another. The buyer is entitled before acceptance to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract. This is the rule laid down in sub-section (1). "No acceptance can be properly said to take place before the purchaser has had an opportunity of rejection" and

1. (1843) 11 M. & W. 347.

2. Mahadev Ganga Prasad v. Gouri Shankar, I.L.R. (1949) 1 Cut. 453 :

A.I.R. 1950 Orissa 42.

3. State v. Rattan Lal, A.I.R. 1964 Him. Pra. 10.



"a right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract, and no complete and final acceptance so as irrevocably to vest the property in the buyer can take place before he has exercised or waived that right."<sup>1</sup>

Thus the effect of sub-section (1) is that in cases where there has been no previous examination for the goods, "the mere fact that the buyer has taken delivery of them does not amount to an acceptance until he has had a sufficient period for examining them to see whether they are or are not in accordance with the contract."<sup>2</sup>

Under section 17 (2), where goods are sold by sample, it is a condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and if it is not given him, he may rescind the contract.

Sections 41, 16 and 17 of the Act show that even after the buyer had a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and even when such an examination has taken place, it might still be open to the buyer to reject the goods where they were not in conformity with the contract, because of some defect, which was not apparent on such examination.<sup>3</sup>

In *Heilbutt v. Hickson*,<sup>4</sup> the plaintiffs, merchants in London, contracted on behalf of correspondents at Lille in France, with the defendants, manufacturers of shoes, for the purpose of 30,000 pairs of black army shoes *as per sample*, to be delivered free at a wharf in weekly quantities *to be inspected and quality approved before shipment*; payment in cash on each delivery. The plaintiffs appointed a skilled person to inspect the shoes and a number were rejected and a large number inspected and approved. Before the first delivery, even one shoe was cut open at the asking of the plaintiffs' agent but there was no paper found in the sole. The plaintiffs accordingly accepted and paid for 4,950 pairs, which were shipped to Lille, where they arrived. When the French authorities examined the samples at Lille, they discovered that in many cases they contained paper and the French authorities accordingly rejected all the boots. It was *held* that the buyers had not accepted the boots and were entitled to recover the money which they had paid for them. The argument followed was that the boots contained paper in the soles, a defect which rendered them useless for military purpose but could not be disclosed by any examination which was practicable at the wharf in London.

The buyer of a parcel of wheat by sample has a right to inspect the whole in bulk at any proper and convenient time, and can rescind the contract if the seller refuses it.<sup>5</sup> It has also been *held* that to determine inferiority in quality it is not necessary to examine the entire bulk; an

1. Per Willes J. in *Bog Lead Mining Co., v. Montague*, (1861) 10 C.B. (N.S.) 481; 128 R.R. 797.  
2. *Hardy & Co. v. Hillerns and Fowler*, (1923) 1 K.B. 658 at p. 663, per Greer J., affirmed (1923) 2 K.B. 490 at p.

495.

3. *Beharilal Baldeoprasad, in re*, A.I.R. 1955 Mad. 271.

4. (1872) L.R. 7 C.P. 438; 41 L.J.C.P. 228.

5. *Lorymer v. Smith*, (1822) 1 B. & C. 1.



examination of a fair number of samples taken from different portions of the bulk is sufficient for the purposes.<sup>1</sup>

In *Khan v. Duche*<sup>2</sup>, where the defect was by mistake not discovered on inspection, it was *held* that the buyer could sue for damages. In *Sanders v. Jameson*<sup>3</sup>, a custom of Liverpool corn market, *viz.* when corn is sold by sample, if the buyer does not on the day corn is sold, examine the bulk and reject, he cannot reject it afterwards or refuse to pay the whole price, was held to be reasonable.

In *Pettitt v. Mitchell*,<sup>4</sup> there was sale of goods at an auction. The goods were open to inspection for two days before the sale and by the printed conditions of the sale the buyer was to pay a deposit and remove the goods with all faults, imperfections or errors by a specified date and to pay the balance of the purchase price before taking them away. It was *held* that the buyer was not entitled to examine the goods before paying the balance of the price.

**(3) Sub-section (2)—seller must give buyer opportunity of examining goods.**

Sub-section (2) lays down that in the absence of an agreement to the contrary, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. Thus the seller cannot, unless there is an agreement to the contrary, claim that his tender of delivery is a performance of the contract on his part so as to enable him to sue the buyer for the price or for damages for non-acceptance, if he has not made it in such circumstances that the buyer has had a reasonable opportunity of examining the goods in order to ascertain whether the thing tendered really was what it purported to be.<sup>5</sup> It may be noted that this is but an instance of the general rule laid down by section 38 of the Indian Contract Act, and sub-section (2) is only another way of expressing it.

The Act contemplates only reasonable opportunity of examining ; it is the buyer's business to verify, not the seller's to supply further proof that the goods are according to contract. Moreover, the goods need not be in the seller's actual possession ; control is enough.<sup>6</sup> The buyer is not entitled to continue inspecting and examining the goods until the expiration of period for delivery. There must be some limit to the buyer's right to inspect, and a reasonable opportunity is the limit alike for vendor and purchaser.<sup>7</sup> In *Thornett v. Beers*<sup>8</sup>, the buyer was given every facility to examine and in fact went to the place to examine the goods but being pressed for time he did not have the barrels opened but merely looked at

1. *Boisogomoff v. Nahapiet Jute Co.*, (1902) 29 Cal. 323.  
 2. (1905) 10 Com. Cas. 87.  
 3. (1848) 2 C. & K. 557.  
 4. (1842) 4 Man. & G. 819.  
 5. *Isherwood v. Whitmore*, *supra* ; cf. *Startup v. Macdonald*, (1843) 6 Man. & Gr. 593. at p. 610, 64 R.K. 810 (question of the responsibility of the hour of delivery).

6. See Pollock and Mulla, Contract Act, 7th Edn, pp. 256 and 257; *Arunachalam Chettiar v. Krishna Ayyar*, A.I.R. 1925 Mad. 1168 : 90 I.C. 481. As to reasonable opportunity see *Ruttonsey v. Jamnadas*, (1882) 6 Bom. 692.  
 7. *Ruttonsey v. Jamnadas*, *supra*.  
 8. (1919) 1 K.B. 486. See also *Bragg v. Villanova*, (1923) 40 T.L.R. 124.



the outside of the barrels. It was *held* that the buyer had examined the goods within the meaning of S. 14 (2) of the English Act.

It follows that the tender must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.<sup>1</sup> A tender made at such a late hour of the appointed day as to leave no time to the buyer to examine the goods is not a good tender.<sup>2</sup> Likewise, the buyer must ask for inspection at a convenient time.<sup>3</sup>

The right of examination may be waived by the buyer by express agreement, course of dealing or usage.<sup>4</sup> Thus where the goods are to be delivered at a particular place, and there is nobody present on behalf of the buyer to examine them, he will be deemed to have waived his right of examining the goods.<sup>5</sup>

The right of inspection is excluded in a c.i.f. contract, where payment is to be made against the delivery of the shipping documents. The seller is under no obligation to afford the buyer an opportunity of examination before payment on tender of the documents, for delivery of the bill of lading is delivery of the goods themselves, and the seller's only obligation is to tender the bill within a reasonable time, and he is not bound to await the arrival of the ship or lading of the goods.<sup>6</sup>

A waiver of examination does not deprive buyer of his right to damages.<sup>7</sup> If the buyer does any act amounting to unequivocal acceptance, he cannot afterwards reject the goods.<sup>8</sup>

The section requires there must be a request for inspection by the buyer.

#### (4) Time and place of examination.

*Prima facie* the time and place of examination are the time and place of delivery.<sup>9</sup> If A agrees to deliver goods to B at Calcutta, the place of inspection is Calcutta, even though A knows B intends to ship them to New York, unless Calcutta is not suitable for inspection, having regard to the nature of the goods and the way in which they are packed.<sup>10</sup> This general rule may, however, be displaced by the circumstances of the case, as in the case where the original place of examination is changed by agreement,<sup>11</sup> or in the case where effective examination is impossible at the place

1. See section 38 (2), Indian Contract Act.

2. *Startup v. Macdonald*, (1843) 6 Man. & Gr. 593 ; 64 R.R. 810.

3. *Lorymer v. Smith*, (1822) 1 B. & C. 1.

4. See section 62, post.

5. *Castle v. Sworder*, supra.

6. *Clemens Horst Co. v. Biddell Bros.*, (1912) A.C. 18 ; 81 L.J.K.B. 49 ; cf. *Polenghi Brothers v. Dried Milk Co.*, (1904) 92 L.T. 64.

7. *Khan v. Duche*, (1905) 10 Com. Cas. 87.

8. See section 42, post.

9. *Perkins v. Bell*, (1893) 1 Q.B. 193, C.A., sale by sample, where the goods were to be delivered at the Railway station ; *Nagardas v. Velmahomed*, A.I.R. 1930 Bom. 249 ; 126 I.C. 312 ; *In re Andrew Yule & Co.*, A.I.R. 1952 Cal. 879 ; 59 Cal. 928 ; 140 I.C. 877.

10. *In re Andrew Yule & Co.*, supra.

11. *Heilbutt v. Hickson*, supra ; see also *Saunt v. Belcher & Gibbons*, (1920) 90 L.J.K.B. 541 ; remarks of Greer J. in *Hardy & Co. v. Hillerns*, (1923) 1 K.B. at p. 655.



of delivery.<sup>1</sup> Where the goods contain a latent defect, not discoverable by ordinary diligence at the place of delivery, the buyer may, notwithstanding an examination of the goods at the place of delivery on a subsequent inspection, reject the goods, if they do not answer to the contract description.<sup>2</sup> In *Grimoldby v. Wells*<sup>3</sup>, there was sale of tares by sample. The goods were sent part of the way in a cart belonging to the seller and then placed in a cart belonging to and sent by the buyer who stored them in his barn where he examined and rejected them. It was *held* that he was entitled to do so and that the place of the inspection was not the place of delivery.

In order to postpone the place for inspection it is necessary that there should be the two elements; the original vendor must know, either because he is told, or by necessary inference, that the goods are going further on, and the place at which he delivers must either be unsuitable in itself, or the nature or packing of the goods must make inspections at that place unreasonable.<sup>4</sup>

The parties also may make such terms as they please as to the place and method of the examination which may materially affect other terms of the contract.<sup>5</sup>

### Miscellaneous

**Sections 41, 42, 59—Section 42 is independent of S. 41—Acceptance of goods sold.**

See under "section 59" *post*.<sup>6</sup>

**42.** The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Acceptance.

### Synopsis

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|---|--|
| (1) <i>Acceptance.</i>  | <i>reasonable time without intimating to the seller their rejection.</i> |
| (2) <i>Express acceptance.</i>  |  |
| (3) <i>Acceptance implied from the acts or conduct of the buyer.</i>      | (5) <i>Grounds of rejection.</i>   |
| (4) <i>Acceptance implied from retaining the goods after the lapse of</i> | (6) <i>When right of rejection may be excluded.</i>                      |

1. *Boks v. Rayner and Co.*, (1921) 37 T.L.R. 519, affirmed ib 800 C.A.; *Scaliaris v. Ofverberg and Co.*, (1921) 37 T.L.R. 307, C.A.; *Bragg v. Villanova*, (1923) 40 T.L.R. 154.  
 2. *Heilbutt v. Hickson*, *supra*; *Grimoldby v. Wells*, (1875) L.R. 10 C.P. 391.  
 3. (1875) L.R. 10 C.P. 391.  
 4. *Saunt v. Belcher and Gibbons*, (1921) 90 L.J.K.B. 541.

5. *Potts & Co. Ltd. v. Brown, Macfarlane & Co. Ltd.* (1925) 30 Com. Cas. 64 (in result there was an extension of time for delivery); *Ruben v. Faire*, (1949) 1 All E.R. 215 (buyers requesting vendor to forward goods to sub-purchaser lost their right to reject the goods) cited at p. 366 *ante*.  
 6. *Shah Mohanlal Manilal v. Dhirubhai Bavajibhai*, A.I.R. 1962 Gujarat 56.



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|---|---|
| (7) Allowance for inferiority.          | (10) Effect of acceptance—breach of warranty. |
| (8) Right to reject after payment.      | (11) Time limit for complaint.                |
| (9) Passing of property and acceptance. | (12) Innocent misrepresentation.              |

### (1) Acceptance.

Acceptance is something more than mere receipt of taking possession or delivery of the goods. It implies the final assent on the part of the buyer that he has taken the goods under and in performance of the contract of sale. There is no acceptance if the buyer refuses to assent whether rightfully or not though if he refuses to assent wrongfully he may be liable in an action for damage. The above rules indicate what acts and conduct of the buyer amount to acceptance.

Section 42 of the Act is based on section 35 of the English Sale of Goods Act, 1893.<sup>1</sup> It provides that the buyer shall be deemed as having accepted the goods in the following cases, *viz.* :

(1) When he intimates the seller that he has accepted them<sup>2</sup> as he may do by actually selecting the goods or directing delivery to be made to third parties.<sup>3</sup> Surely this is the most effective evidence of acceptance.

(2) When the goods have been delivered to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller, or in other words, when the buyer deals with the goods as if the seller has ceased to be their owner.

(3) Where the buyer retains the goods beyond a reasonable time without intimation of rejection, he is deemed to have accepted them. What is a reasonable time is a question of fact in each case.

The buyer is bound to accept the goods if they are in terms of the contract, and if he refuses to do so, he will be liable for damages. But, as already noticed under S. 41 *ante*, the buyer is entitled to have a reasonable inspection of the goods (if he has not examined them before) to ascertain if they are in conformity with the contract. If there is a breach of a condition on the part of the seller, the buyer is not bound to accept the goods. But the buyer in such a case may waive the breach of condition and accept the goods and may claim compensation for the breach.

Section 42 is independent of S. 41 of the Act.<sup>4</sup>

In *K. C. N. Gowda and Bros. v. Molakram Tekchand and Sons*<sup>5</sup>, it was held: Where the contract was for the supply of 19 bales of yarn in the manner indicated in the contract but what was delivered was only 14 bales and even then the said 14 bales were not sent in the manner

Breach of contract—Acceptance of performance—What amounts to.

1. This section of the English Act has been amended by S. 4(2) of the Misrepresentation Act, 1967 (See Appendix A). This will relate to any contract made on or after 22nd April, 1967. See Chalmers, *Sale of Goods Act*, 16th Ed., p. 162. So far there is no corresponding amendment in the Indian Act.  
2. *Saunders v. Topp*, (1849) 4 Exch. 390; 80 R.R. 694; see *Varley v. Whipp*,

(1900) 1 Q.B. 513 (buyer complaining about the goods and returning them; held, no acceptance).  
3. *Cusack v. Robinson*, (1861) 1 B. & S. 299, 124 R.R. 566; *Haridas v. Kalumull*, (1903) 30 Cal. 619.  
4. See *Shah Mohanlal Manilal v. Dhirubhai Bhavajibhai*; A.I.R. 1962 Guj. cited under S. 59 post.  
5. A.I.R. 1958 Mys. 10,



indicated in the contract, it must be held that the seller had not performed the contract. From the fact that the buyer on being intimated of the despatch of the goods replied that he would require 8 to 10 days to retire the draft and that he would not pay over due interest or that he asked for a reduction of the amount will not amount to an acceptance of the goods by him within the meaning of S. 42 of the Act. The reply of the buyer cannot be held to contain any intimation of the acceptance of the goods as required by that section.

### (2) Express acceptance.

This takes place when the buyer intimates to the seller that he has accepted the goods. In such cases no difficulty arises. When the buyer having full opportunity of examining the sheep selected and ordered them to be delivered at his field, it was *held* that there was acceptance.<sup>2</sup>

### (3) Acceptance implied from the acts or conduct of the buyer.

Acceptance may be implied from the acts or conduct of the buyer e.g. acts of ownership or retention after a reasonable time.

These include any act in relation to the goods which is inconsistent or which indicates that the buyer is treating the goods as his own. It is a question of intention in each case but the intention is to be judged from the acts and conduct of the buyer and not merely by the words which have been used.

In *Hardy v. Hillerns*<sup>3</sup> (c.i.f. contract) there was a sale of wheat. The buyers without inspection resold and despatched part of the wheat to sub-buyers. Subsequently, after two days, having discovered that the wheat was not in accordance with the contract, the buyers gave notice to the sellers that they rejected it and this notice was given within a reasonable time. The buyers, however were held to have accepted the wheat and therefore the notice of rejection was ineffectual.

Applying the above decision, it was held in *Breckwoldt v. Hanna* (1963) 5 W. L. R. 356 : Once the buyer has clearly rejected the goods and rescinded the contract, a subsequent inadvertent act on his part inconsistent with the seller's ownership of them cannot amount to an acceptance and give new life to a contract already at an end.

Goods being tendered by the seller, the buyer took no steps to inspect the goods but by an endorsement on the delivery order directed the goods to be delivered to a third party to whom the buyer had sold the goods. The third party inspected the goods and ordered them to be delivered to this buyer who refused to accept. It was *held* that the buyer exercised a right of a proprietary character and so could not reject.<sup>4</sup>

In *Gan Kim v. Rally Bros.*,<sup>5</sup> there was a sale of goods (Burma catch) to be delivered in Calcutta by the vendors who knew that it was meant

1. A.I.R. 1958 Mys. 10.

2. See *Saunders v. Topp*, (1849) 4 Exch. 390; *Khoyee & Co. v. Gordon Woodroffe & Co.*, A.I.R. 1937 Mad. 40 : 166 I.C. 313 (Delivery of skins—buyer putting them into work—held acceptance).

3. (1923) 2 K.B. 490.

4. *Haridas v. Kalumull* (1903) 30 Cal. 649.

5. (1886) 13 Cal. 237 P.C. See also *Wallis v. Pratt* (1911) A.C. 394 cited at page 262 ante.



for the export market; delivery and acceptance followed upon a searching examination by the purchaser. In the course of the examination some goods were rejected, other catch substituted, and extra allowance made for weight. The purchaser despatched the goods to their buyers in America under forward contracts. The buyers in America accepted part of the goods and rejected the rest as they were not of contract quality. Upon that, the purchasers in Calcutta sued their sellers for breach of warranty. *Held*, the presumption of the performance that arose from such acceptance (after searching examination) was not rebutted by sufficient cogent evidence, and so the seller was not liable.

In *Parker v. Palmer*<sup>1</sup>, the buyer after he had seen fresh samples from the bulk of rice bought by him, which were inferior in quality to the original sample, offered the rice for sale at a limited price at auction, but the limit was not reached, and the rice not sold. He then rejected it as inferior to sample; but it was *held* that by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score.

Where the buyers claimed an allowance for inferiority and delivered the goods to their purchaser who refused to take delivery, it was *held* that the buyers could not reject the goods.<sup>2</sup> So also, delivery to sub-purchasers after notice of defect amounted to an acceptance.<sup>3</sup>

Resale by the buyer *ipso facto* does not amount to an act of ownership, but it may have the effect if the buyer resells after he had reasonable opportunity of examining them. See *Wallis v. Pratt*, (cited at page 262 *ante*) where the buyer evidently had no opportunity of examining the goods and resold them under the belief that they were in terms of the contract. It was *held* that the buyers could treat the breach of condition as a breach of warranty.<sup>4</sup> In *Chapman v. Morton*<sup>5</sup>, the buyer rejected the goods and gave notice to the seller that they were at the risk of the seller. The seller not taking any action the buyer sold the goods in his own name to a third person. *Held*, that under the circumstances the buyer had accepted the goods. It is not necessary to amount to acceptance that the buyer should actually examine the goods; it would be enough if he had an opportunity to examine. If he takes no steps to examine, he is deemed to have accepted.<sup>6</sup> In *Cunningham Ltd. v. Robert*<sup>7</sup>, the mere fact of the buyer nominating a vessel and a sub-sale by him was *held* not to amount to acceptance.

As a general rule, when the buyer exercises acts of ownership with regard to part of the goods he is deemed to accept the whole.<sup>8</sup> In *Harnor*

1. 4 B. and Ald. 387; 23 R.R. 312. See also *Parker v. Wallis*, (1855) 5 E. and B. 21.

2. *Denaim and Co. v. Bebono*, 1924 A.C. 514.

3. *Perkins v. Bell*, (1893) 1 Q.B. 219.

4. See also *Molling v. Dean*, (1901) 18 T.L.R. 217. (Goods shipped from Germany to England for export to America; goods rejected in America and returned to England; buyers in England could accept those up to the

standard and reject others).

5. (1843) 11 M. and W. 584 (acceptance of goods on the strength of subsequent conduct of the buyer; rejection must be clear and unequivocal).

6. See *Haridas v. Kalamull*, *supra*.

7. (1920) 28 Com. Cas. 42, 48.

8. See *Hardy v. Hillerns*, *supra*; *Mechan v. Bow*, (1910) 47 Sc. L.R. 650 (Fitting of tanks into tugs without required test).



*v. Groves*,<sup>1</sup> out of 25 sacks of flour which were found not according to contract, the buyer used two sacks and sold half a sack. *Held*, he accepted the whole. In *Aitken v. Boullen*<sup>2</sup> (Scotch case) part of the twill supplied was according to sample and part was not. *Held*, the buyer could keep the whole claiming damage for the part not according to sample, but he could not keep a part and reject the rest.

But when deliveries are severable or to be made by instalments, the buyer accepting the part or instalment delivered does not waive his right to reject the rest when tendered if not in terms of the contract.<sup>3</sup> Waiver of breach with regard to one or more instalments does not imply similar waiver in future ; but if the buyer wants to insist on strict performance in future, the seller must have a reasonable notice of the same.<sup>4</sup>

When the acceptance of the part is conditional e.g., made on the ground that in future there will be no further breach, the buyer can return the part delivered if the seller commits breach with regard to subsequent deliveries. In *Lucy v. Mouflet*<sup>5</sup>, the defendant, who had bought by sample a hogshead of cider on May 28, wrote to the plaintiff, the seller, that the cider was unsaleable, and that "should this continue he would be obliged to return it." The seller did not reply till July 24 when he wrote demanding payment. At that time twenty gallons had been consumed. *Held*, that the seller had by his silence consented to a further trial, and that the defendant had not accepted the cider. "Where an effective examination of the goods is possible only by consuming or destroying a sample of them a buyer is not debarred from rejecting the remainder merely because he has consumed or destroyed such a sample, or because he has sold such a sample for consumption."<sup>6</sup>

There was a sale of quantity of coal briquettes of a specified size. They were loaded partly on deck and partly under deck, those on the deck being of the contract size. The master of the ship finding that the cargo was heating bought the deck cargo from the buyers. It was afterwards discovered that the briquettes loaded under deck were of a size larger than the specified size. The buyers thereupon gave notice rejecting the whole cargo and not (as they might have done) the underdeck part only. As they had accepted part of the cargo, this notice was ineffectual.<sup>7</sup>

It is thus clear that in order that an act may amount to acceptance it must fulfil the following conditions : Firstly, it should have been done after delivery of the goods to the buyer and secondly that it should be inconsistent with the ownership of the seller. An act done before delivery of the goods does not amount to acceptance even if it is inconsistent with the ownership of the seller. The buyer must have an opportunity to reject or accept before he can be bound down to his acceptance by his conduct. He must be given a chance of election which arises only when the goods

1. (1855) 5 C.B. 667.

2. (1908) 10 F. 490.

3. See *Jackson v. Rotax Motor*, (1910) 2 K.B. 937 ; *Mitchell v. Buldeo Das*, (1888) 15 Cal. 1.

4. *Panoutsos v. Raymond, etc.*, (1917) 1 K.B. 767 ; *Cunningham Ltd. v. Robert*, (1922) 28 Com. Cas. 42.

5. (1860) 5 H. & N. 229. See also *Elliott*

*v. Thomas*, (1838) 3 M. & W. 170 ; *Winnipeg Fish Co. v. Whitman Fish Co.*, (1909) 41 Can. S.C.R. 453 (frozen fish).

6. *Chalmers, Sale of Goods Act*, 16th Edn., p. 167.

7. *Barker (William) (Junior) & Co. Ltd. v. Ed. T. Agius, Ltd.*, (1927) 43 T.L.R. 751 ; 33 Com. Cas. 120.



are delivered to him and he has an opportunity to examine them and not before. A resale is an acceptance only when it takes place after an opportunity of rejecting so as to amount to an election to accept the goods. Where the buyer resells before such an opportunity, there is no acceptance, unless it is impossible to return the goods. But where the buyer has had such opportunity but does not avail it and resells the goods, both the conditions are satisfied and he has no right to reject the goods when they are rejected by the sub-buyer inasmuch as the act of resale being inconsistent with the ownership of the seller, the buyer shall be deemed to have accepted the goods.

**(4) Acceptance implied from retaining the goods after the lapse of a reasonable time without intimating to the seller their rejection.**

“When after delivery and after the lapse of a reasonable time the buyer retains the goods delivered without intimating the seller that he has rejected them, law will imply acceptance on his behalf.<sup>1</sup> As Scrutton L.J. has said,

“When one party to a contract becomes aware of a breach of a condition precedent by the other, he is entitled to a reasonable time to consider what he will do, and failure to reject at once does not prejudice his right to reject if he exercises it within a reasonable time.”<sup>2</sup>

What is a reasonable time is a question of fact in each case.<sup>3</sup> The parties may by the contract limit the time within which the buyer must determine whether to accept or reject the goods and if after the expiration of such a limit, or if no time be fixed, a reasonable time, he does not reject, he is deemed to have accepted them.<sup>4</sup> The notice of rejection, however, must be a valid notice to make it effectual.<sup>5</sup>

After what is *prima facie* an unreasonable delay in rejection the burden is on the buyer to show that it is reasonable as, for instance, where he could not discover a breach of a condition before.<sup>6</sup> The time for rejection after the discovery of breach of a contract is not extended because the goods were warranted for a certain period.<sup>7</sup>

To imply acceptance from the laches of the buyer in intimating their rejection, the following three conditions must be satisfied :

- (1) lapse of a reasonable time after delivery ;
- (2) retention of goods by the buyer ; and
- (3) no intimation to the seller that he has rejected them.<sup>8</sup>

1. Morrison v. Clarkson, 25 R. 427.

2. Fisher, Reeves & Co. v. Armour & Co., (1920) 3 K.B. 614, at p. 624, C.A. Cf. Chao v. British Traders, (1954) 1 All E.R. 779.

3. Sec. 63, *infra*.

4. Sanders v. Jameson, (1851) Car. & Kir. 557; Phaggu Mal v. Babu Mal, (1913) 35 All. 325; Fisher, Reeves & Co. v. Armour & Co., 3 K.B. 614, at p. 624; Kissendoyal v. Askaran, (1916) 28 Cal. L.J. 415 at p. 422; 34 I.C.

290; Ishar Das v. Khannumul, A I.R. 1927 Lah. 427; Empire Engineering Co. v. Municipal Board, Bareilly, A.I.R. 1929 All. 801.

5. Barker (Junior) & Co. v. Agius LtJ., (1928) 48 T.L.R. 751.

6. Hyslop v. Shirlaw, 7 F. 875.

7. Upton Mfg. Co. v. Huiske, 69 Iowa 557.

8. See Bushel v. Wheeler, 15 Q.B. 442; Norman v. Phillips, 14 M. & W. 227.



The time may be expressly provided for by the contract,<sup>1</sup> or it may be implied be trade usage.<sup>2</sup> In determining what is a reasonable time, regard must be had to the seller's conduct, as where he has induced the buyer to prolong the trial of the goods, or has acquiesced in a further trial.<sup>3</sup> Where one party to a contract becomes aware of the breach of a condition precedent, he is entitled to a reasonable time to consider what he shall do.<sup>4</sup>

Acceptance may be conditional and on the condition being complied with, the acceptance may become absolute.<sup>5</sup>

Where by arrangement between the parties to the contract, goods are to be accepted conditionally, they can be rejected when the condition is broken,<sup>6</sup> and the buyer is entitled to a reasonable time after the breach of the condition.<sup>7</sup>

In the case of a divisible contract, acceptance of one instalment does not prevent rejection of others.<sup>8</sup>

If the contract is not severable, the buyer cannot, except in cases provided for by section 37, reject part of the goods; if therefore he accepts part, he accepts all.<sup>9</sup> Where the goods have once been accepted in such a case, the buyer can only treat the breach of a condition as a breach of warranty and claim damages.<sup>10</sup>

Where the buyer who was responsible for not discovering an alleged breach of warranty earlier, sued to recover damages after having effected a resale; *held*, that the claim was not unsustainable.<sup>11</sup>

Where the goods reached the plaintiffs-buyers on the 21st October and were resold on 22nd and the buyer for resale sent the intimation of damaged condition of goods on 30th October but the plaintiffs delayed for another fortnight ;

*Held*, that the plaintiffs were not entitled to recover damages in view of their prolonged failure to give notice.<sup>12</sup>

Chalmers<sup>13</sup> observes: "By S. 56 *post* (corresponding to section 63 of the Indian Act), what is a reasonable time is a question of fact. In determining what is a reasonable time, the conduct of the seller may be taken into consideration, so that the time for rejection will be extended if the seller has induced the buyer to prolong the trial of the goods by a

1. Sharp v. Great Western Railway Co., (1841) 9 M. & W. 7; 60 R.R. 647.
2. Sanders v. Jameson, *supra*: custom allowing only one day to accept or reject was held to be reasonable.
3. Heilbutt v. Hickson, *supra*.
4. Fisher v. Armour & Co., (1920) 3 K B. 614, at p. 624.
5. Doraiswamy v. Subbanna, A.I.R. 1927 Mad. 880; 105 I.C. 613.
6. Lucy v. Mouslet, *supra*.
7. Fisher, Reeves & Co. v. Armour & Co., *supra*.
8. In re Andrew Yule & Co., A.I.R. 1932 Cal. 879; 143 I.C. 877; Pranal v. Maneckji, A.I.R. 1933 Bom. 46; 140

- I.C. 610.
9. Hardy & Co. v. Hillerns and Fowler, (1923) 1 K.B. at p. 666. per Greer J.; In re Andrew Yule & Co., A.I.R. 1932 Cal. 879; 59 Cal. 928; 140 I.C. 877; Pranal Bhai Chand v. Maneckji Petit Manufacturing Co., A.I.R. 1933 Bom. 46; 140 I.C. 610.
10. See section 13 ante.
11. Mithan Lal Inder Narain v. Suraj Parshad Madan Gopal, A.I.R. 1932 Lah. 52; 135 I.C. 498.
12. Mithan Lal Inder Narain v. Suraj Parshad Madan Gopal, *supra*.
13. Sale of Goods Act, 16th Edn., pp. 166, 167.



misrepresentation,<sup>1</sup> or by a promise which he cannot fulfil<sup>2</sup>, or by acquiescing by silence to an extended trial,<sup>3</sup> or by encouraging the buyer to give the goods a fair trial.<sup>4</sup>

"Where there are negotiations between the buyer and the seller with a view to settling the buyer's claim, these negotiations will also be taken into account."<sup>5</sup>

*Baker v. Inland Truck Sales*, (1970), 11 D.L.R. (3d) 469 is also quoted. In this case the buyer retained possession of a truck for six months, giving seller every opportunity to correct defects in it and attempting to use it for the purpose for which he bought it. It was held that the right to reject for breach of a fundamental term was not lost. It was, however, observed: "But this case is difficult to reconcile with *Long v. Lloyd*, (1958) 2 All E. R. 402" (cited at p. 266 *ante*).

### (5) Grounds of rejection.

It has been held that the buyer by rejecting the goods on an insufficient ground is not precluded from supporting the rejection on other and valid grounds. It is a long established rule of law that a contracting party who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact exists, whether he was aware of it or not.<sup>6</sup> Where in a c.i.f. contract there was refusal to accept documents on the ground that the goods were lost before tender of them, it was held that the buyer was not precluded from supporting the rejection on the ground that the documents were not in order.<sup>7</sup>

But when the contract is repudiated by a party before performance this amounts to a waiver of performance of the conditions precedent. So when the buyer wrongfully repudiates the contract before performance is due he cannot support the repudiation on the ground that the seller was not otherwise ready or willing to perform his part.<sup>8</sup> But a repudiation made after the due date does not operate as a waiver of the performance of the conditions precedent on the part of the other party.<sup>9</sup> A repudiation or rejection after breach on a wrong ground does not deprive the party repudiating or rejecting his right to support his conduct on grounds actually existing at the time of breach unless there has been a waiver of such breach. But a buyer cannot justify his refusal of an offer to deliver

1. *Heilbutt v. Hickson*, (1872) L.R. 7 C.P. 438; *Munro & Co. v. Bennet & Son*, 1911 S.C. 337; *Freeman v. Consolidated Motors Ltd.*, (1968) 69 D.L.R. (2d) 581 (right to reject not lost by accepting "forced alternative" imposed by seller); *Rafuse Motors v. Mardo Constructions* (1963) 41 D.L.R. (2d) 340 (settlement of claim to reject induced by misrepresentation of seller does not bind buyer).  
2. *Scholfield v. Emerson Brantingham Implements*, (1918) 43 D.L.R. 509 (Sup. Ct. of Canada) (representation that the vehicle would be all right in time, or if not, then the seller would make it all right).  
3. *Lucy v. Moullet*, (1860) 5 H. & N.

229.

4. *Rafuse Motors v. Mardo Construction*, *supra*.  
5. *Polar Refrigeration Service, Ltd. v. Moldenhauer*, (1967), 61 D.L.R. (2d) 462.  
6. See *Taylor v. Oakes, etc.*, (1922) 38 T.L.R. 349; affirmed 127 L.T. 267; 38 T.L.R. 517 C.A.  
7. *Manbre, etc. Co. v. Corn Products Co.* (1919) 1 K.B. at p. 204; see also *Alexander v. Webber*, (1922) 1 K.B. 642; repudiation supported by the subsequent discovery of fraud in the seller.  
8. See *British and Beningtons Ltd. v. N.W. Cachar Tea Co.*, (1923) A.C. 48  
9. *Steel Bros. v. Dayal Khatao*, (1923). 47 Bom. 924, 935.



goods under the contract by proving that if he had not refused the goods when delivered would not have been in accordance with the contract. In *Braithwaite v. Foreign Hardwood & Co.*<sup>1</sup>, the buyer wrongfully repudiated the contract on the ground that the seller committed a breach by supplying goods to third parties. The seller tendered some goods but the buyer refused to accept on the ground of previous repudiation. The seller thereupon resold the goods and sued for the recovery of the difference between the contract price and market price. There was in fact some inferiority in a portion of the goods. *Held*, the buyer could not set up the inferiority of the goods as a defence; he was held to have waived the performance of the condition precedent on the part of the seller by his repudiation.

*Braithwaite's* case was followed in *Nannier v. Rayalu Iyer*.<sup>2</sup> In that case the buyer accepted part of the goods and then repudiated the contract on the ground that the goods were not tendered by the seller within the time alleged to have been agreed. The seller tendered some goods under the contract and then accepted the repudiation and sued for damages for breach of contract. The buyer pleaded non-liability not only on the ground that the goods tendered were not of the agreed quality but also on the ground that the seller would not have been able to deliver the goods according to the contract. It was *held* that the buyer could not plead non-liability on the latter ground.

*Braithwaite's* case was also followed in *Continental Contractors v. Medway*<sup>3</sup> but was criticised in *British and Beningtons, Ltd. v. N.W. Cachar Tea Co.* (1923) A.C. 48, 70: 'The *Braithwaite* case is not to be taken as impugning the general rule that a buyer, who gives a wrong reason for refusing to perform his contract and afterwards discovers a sound reason, may then rely on the sound reason.'<sup>4</sup>

### Conditional acceptance.

Goods may, by arrangement, be accepted conditionally and the acceptance may in such case be withdrawn on failure of the condition.<sup>5</sup> In *Chao v. British Traders*,<sup>6</sup> Devlin J said that the transfer of the shipping documents (in a c. i. f. contract) was effective only to pass a *conditional* property to the buyer. Thus if the buyer subsequently deals with the shipping documents, he is dealing only with his own conditional property in the goods and will not be taken thereby to have accepted them; but if he deals physically with the goods themselves after they have been landed, e. g. if he delivers them to a sub-buyer, he will be doing an act inconsistent with the seller's reversionary interest in the goods, and may thus be taken to have accepted them. Neither a pledge of the goods nor a sale of the documents, however, is inconsistent with the seller's reversionary interest.<sup>7</sup>

1. (1905) 2 K.B. 543. See also notes under S. 38 at p. 578 *ante*.

2. (1926) 49 Mad. 781 : A.I.R. 1926 Mad. 778. See also *Rustomji v. Haji Hussain*, (1920) 22 Bom. L.R. 1165.

3. (1925) 23 Ll. L. Rep. 55, 124, C.A.

4. See Chalmers, *Sale of Goods Act*, 16th Edn., p. 155. f. n. (b). See also *Universal Cargo Carriers Corporation v. Citati*, (1957) 2 All E.R. 70.

5. Chalmers, *Sale of Goods Act*, 16th Edn., p. 167 citing *Lucy v. Moullet*, (1860) 5 H. & N. 229 and *Heilbutt*

*v. Hickson* (1872) L.R. 7 C.P. 438.

6. (1954) 1 All E.R. 779; *J. Rosenthal & Sons Ltd. v. Esmail*, (1965) 2 All E.R. 860, at p. 869.

7. A *fortiori* where the buyer rejects the shipping documents but unloads and stacks the cargo as agent for the ship-owner he is not deemed to have accepted the goods: *Libau Wood Co. v. H. Smith & Sons, Ltd.* (1930) 37 Ll. L. Rep. 296. See Chalmers, *Sale of Goods Act*, 16th Edn., pp. 165, 166.



### (6) When right of rejection may be excluded.

The right of rejection may be excluded by the terms of the contract or by usage of trade.<sup>1</sup> An usage not to reject goods not excessively deficient in quality or deficiency of quality of which may be fairly compensated by an allowance, has been held to be reasonable and valid.<sup>2</sup> But an agreement or trade usage which excludes a right of rejection even if the goods do not altogether conform to their description in the contract of sale is not valid, inasmuch as to allow a stipulation against rejection to apply to a case of non-conformity to description would render the contract altogether nugatory<sup>4</sup> and, therefore, a trade usage also to that effect cannot be incorporated in a written contract.<sup>5</sup> A usage that goods howsoever deficient in quality, shall, if they answer their general description be accepted, is also probably invalid.<sup>6</sup> The fact of the case may, however, sometimes show that, although a name is given to the goods, yet that they are not really sold under that description as where goods are sold for what they are, and in such case right of rejection may be excluded.<sup>7</sup>

### (7) Allowance for inferiority.

In the absence of a contract to the contrary, the buyer cannot be compelled to accept inferior goods with an allowance for such inferiority. But even if there is such an agreement, the buyer can reject if the goods are different in kind.<sup>8</sup> In *Vigers Bros. v. Sanderson Bros.*,<sup>9</sup> there was a contract for the sale of goods to be "about the specification stated below." The contract provided that the property in the goods was to be deemed to have passed to the buyer when the goods were put on board and if any dispute arose the buyers were not to reject the goods but the dispute was to be referred to arbitration. The goods were not according to specification. *Held*, the buyers were justified in rejecting the goods and were not bound to accept the goods subject to an allowance to be fixed by arbitration. The clause does not operate so as to force the buyer to take goods which are neither within nor about the specification, nor commercially within its meaning.

A custom as to acceptance of goods with an allowance for inferiority was held reasonable.<sup>10</sup> But in *Ruttonsi v. Bombay United Spinning etc. Co.*<sup>11</sup>, a similar custom was held to be inconsistent with the express stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price.

When there is a breach of warranty only the buyer cannot return the goods, but he can set off the damage against the price.<sup>12</sup> In *Robert etc.*

1. *Heyworth v. Hutchinson*, L.R. 2 Q.B. 447; *Leary & Co. v. Briggs & Co.*, 6 F. 857.

2. *Re Walkers etc.*, (1904) 2 K.B. 152.

3. *Shepherd v. Kain*, 5 B. & Ald. 240.

4. *Per Bigham J. in Vigers v. Sanderson*, (1901) 1 K.B. 608 (611).

5. *Re North Western Rubber Co., etc.*, (1908) 2 K.B. 907 C.A.

6. *Per Hawkins J. in Sinidino, Ralli & Co. v. Kitchen & Co.*, (1883) Cab. & El. B. 217 (220).

7. *Per Chennell L.J., in Carter v. Crick*, 4 H. & N. 412.

8. *Azemar v. Casella*, (1867) L.R. 9 C.P. 431, 447, where the allowance clause was held to have reference to inferiority of quality and not to difference in kind.

9. (1901) 1 K.B. 608.

10. *Re Walkers*, (1904) 2 K.B. 152, 168. See also *Produce Brokers Co. v. Olympia Oil Co.*, (1916) A.C. 414.

11. (1916) 41 Bom. 518, 539.

12. *In Fl Bourgeois Co.*, (1920) 25 Com. Cas. 260. *Heyworth v. Hutchinson*, (1867) L.R. 2 Q.B. 447.



*Co. v. Meyer*<sup>1</sup>, there were "goods to be taken with all faults and defects at a valuation." It was *held* that clause applied to goods which answered the trade description and did not override the warranty under sec. 13 of the English Act.

#### (8) Right to reject after payment.

The buyer does not necessarily lose his right to reject by payment. This is especially the case where payment is made before the arrival or delivery of the goods, as in such cases the buyer does not get an opportunity of examining the goods before payment. In *Polenghi v. Dried Milk Co.*<sup>2</sup>, there was a sale of goods by sample, "payment to be made in cash on the arrival of the goods against shipping or railway document." The buyer cannot be deemed to have accepted the goods until he had a reasonable opportunity of examination which he could not do until the arrival of the goods.<sup>3</sup>

In some cases bills of exchange are accepted against delivery of document. In such cases if the goods are not in terms of the contract the buyer can reject them and defend an action on the bill on the ground of total failure of consideration and he may not defend an action on the bill by setting off the damage (if the damage cannot be ascertained without collateral enquiry), but he can always sue for the damage sustained by him.<sup>4</sup>

In *Bhagwati Saran v. Baijnath Prasad*<sup>5</sup>, there was order for supply of goods according to description. Goods were despatched by railway. Plaintiff made payment demanded under protest as it was in excess of contract price. On taking delivery bulk of goods were found not according to description. A suit for refund of price was instituted four days after taking delivery. It was *held* that there was no completed contract and plaintiff was entitled to refund as property in goods did not pass to him.

#### (9) Passing of property and acceptance.

If the property in the goods has passed to the buyer, he being the owner of the goods cannot reject them. So if the property in the goods has passed to the buyer before the receipt and acceptance of the goods, the buyer cannot reject them but only left with the remedy of claiming damages only. Thus in the case of sale of specific goods, the property generally passes at the time of contract of sale and delivery may be made afterwards and the buyer cannot reject it. See *Varley v. Whipp*<sup>6</sup> where there was a sale of specific goods by description and property did not pass until acceptance. In the case of unascertained goods property passes by appropriation by one party and an assent to the appropriation by the other party, though the order may vary. If both have taken place before delivery and acceptance property has already passed to the buyer and he cannot reject.

1. (1930) 2 K.B. 312.

2. (1905) 10 Com. Cas. 42.

3. See *Bragg v. Villanova*, (1923) 40 T.L.R. 154; f.o.b. contract. See also *Sha Thilok Chand Poosaji v. Crystal Co.*, (1955) 1 Mad. L.J. 494 cited at p. 283 ante—Sale of goods by description—goods delivered not answering

to those contracted for—Remedies of buyer.

4. See Ss. 43 & 44, Negotiable Instruments Act. See *Bubby Hurry & Co. v. Hertz & Co.*, A.I.R. 1923 Lah. 541; (1923) 4 Lah. 215.

5. I.L.R. (1950) All. 112.

6. (1900) 1 Q.B. 573.



Where goods in *terms of the contract* are delivered to a carrier the property passes and the buyer is bound to accept them. If the buyer on receipt of the goods finds that the goods are not in terms of the contract, he is not bound to accept; but in such cases the property has not passed to the buyer, as they were not delivered in *terms of the contract*. If the buyer in such cases accepted the goods, he waives the breach and the property is deemed to have passed not at the time of acceptance but at the time when they were delivered to the carrier. This is consistent with the view that the carrier is an agent to assent to the appropriation but not to accept the goods on behalf of the buyer. When the passing of property is conditional on the acceptance of the goods by the buyer (e.g. when the assent to the appropriation is to be deduced from acceptance) no difficulty arises. In such cases the property does not pass if the buyer refuses to accept, and it is immaterial whether the refusal is made rightly or wrongly.

#### (10) Effect of acceptance—breach of warranty.

The buyer loses his right to reject the goods after acceptance but he retains the right to sue for damage for breach of warranty though he has notice of the breach unless there is a waiver on his part as to this. It seems there is no difference in this respect whether the warranty is express or implied. This follows from the principle that every breach of contract gives rise to an action for damages.<sup>1</sup>

There is no provision in the present Act as to giving notice to the seller about any claim for compensation for breach of warranty. But failure to give notice may afford evidence that the goods were not defective or that there was waiver on the part of the buyer. At common law, failure to give notice was not considered as a bar to an action for damage. In *Poulton v. Lattimore*<sup>2</sup>, there was sale of seed with a warranty. The buyer after notice of defect proceeded to sow part of it and to sell the residue without giving any notice to the seller that it was defective in quality. In an action by the seller for the price the buyer could prove breach of warranty in diminution of claim or in extinction of it if the goods are of no value. "The not giving notice indeed, raises a strong presumption that the article at the time of the sale corresponded with the warranty and calls for strict proof of breach of the warranty. But if that be clearly established, the seller will be liable in an action brought for breach of his contract notwithstanding any length of time which may have elapsed since the sale."<sup>3</sup> In *Beck & Co. v. Szymanowski*<sup>4</sup>, breach of warranty was discovered eighteen months after delivery.

#### (11) Time limit after complaint.

When the contract provides that the complaints regarding the goods delivered should be made within a specified time after delivery, the seller would not be bound for any defect unless the complaint regarding it is

1. See S. 118 of the Contract Act (now repealed) Appendix B; *Empire Engineering Co. v. Bareilly Municipal Board*, (1929) 27 All. L.J. 574.  
2. (1829) 9 B. & C. 259.

3. *Ibid*, Per Littledale J. at p. 265. See *Shoshi v. Nobo*, (1879) 4 Cal. 801, 806; effect of fraud or misrepresentation in avoiding contract.  
4. (1924) A.C. 43.



made within the time specified. Such provisions are not void as coming under S. 28 of the Contract Act.<sup>1</sup>

In *Beck & Co v. Szymanowski*<sup>2</sup>, the clause provided that "goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for same accordingly unless the seller shall within 14 days after the arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract." Eighteen months after delivery the buyers discovered for the first time that the reels of sewing cotton sold were 6 per cent shorter in lengths and brought action against the seller for damage for breach of warranty. *Held*, that the condition applied to quality only and not to quantity and that the buyers were entitled to damages. It was *also held* that the condition, if applied to quantity, included the right to reject and not the right to claim damages. In *Taylor & Co. v. Ofverderg & Co.*,<sup>3</sup> there was a claim for defects within ten days of delivery of document of title; *held*, the ultimate purchaser could complain within the period. In a c. i. f. contract notice of claim was given within 14 days after delivery of document. *Held*, notice was within the contract time.<sup>4</sup> See *Chapman v. Withers*<sup>5</sup>, where under circumstances the non-return of the horse within the period stipulated was held to be no bar to an action for breach of warranty.

In *Province of Madras v. Galia Kotwala Co Ltd.*,<sup>6</sup> on the 22nd April, 1942, an order for the supply of 10,000 ft. of cotton fire hose, similar in quality to a previous supply was placed by the plaintiff firm who accepting the same intimated that the goods would be supplied "part by part." The defendant firm supplied the whole lot in seven instalments spread over the period between the 28th April, 1942, and the 3rd June, 1942. Each instalment was accompanied by a letter from the defendant firm stating that if the goods were not approved, it must be informed of the fact within three days, otherwise it would not take back the goods. By the 15th May, 1942, 7986 feet of hose had been supplied and paid for. The balance was supplied but not paid for. On the 7th July, 1942, the plaintiff wrote to the defendant firm complaining of the defective quality of the goods supplied and demanded that the goods delivered should be replaced by those of the same quality as supplied on the prior occasion. The defendants maintained that the goods were of the contract quality and that they had been unequivocally accepted. In a suit to recover from the defendant money which the plaintiff had paid for the goods supplied in which the defendant counter-claimed for the balance of the price for goods delivered and not paid for, it was *held* that the plaintiff's claim failed because (1) it accepted without reservation the goods, and (2) even if there was no acceptance, the rejection of the goods took place

1. See *Baroda Spinning etc. Co., v. Satya Narayan Marine etc. Co.*, (1913) 38 Bom. 344, 356; claim under an Insurance Co.

2. (1923) 1 K.B. 457 C.A.; (1924) A.C. 43.

3. (1923) 39 T.L.R. 637; see also *Pinnock Bros. v. Lewis Peat Ltd.*, (1923) 1 K.B. 690; *Scott v. Avery*, 4 H.L. Cas. 811;

*Board of Trade v. Cayzer etc. Co.*, 1927 A.C. 610; *Berry & Sons v. Star Brush Co.*, (1915) 31 T.L.R. 603, time limit for exercising option to purchase.

4. *Scriven Bros. v. Schmoll Fils & Co.*, (1924) 40 T.L.R. 677.

5. (1888) 20 Q.B.D. 824.

6. A.I.R. 1946 Mad. 69; I.L.R. (1946) Mad. 548.



after a reasonable time had elapsed for the reinspection and examination and that the defendant's counter claim should be decreed.

**Note :** The following comments at page 164 of Chalmers' Sale of Goods Act, 16th edition, may be observed: "Most of the numerous decisions relating to acceptance have arisen on the construction of the provisions of the Statute of Frauds relating to the sale of goods, or of S. 4 of this Act (the Sale of Goods Act, 1893), all of which have been repealed now. For that reason they must be looked at critically. Before the repeal there could be an acceptance within the meaning of S. 4, which yet was not an acceptance in performance of the contract. For the purpose of determining whether there is an acceptance in this latter sense those cases may still be of use. At one time acceptance within the meaning of the Statute of Frauds was interpreted in the same sense as acceptance in performance of the contract, but in the course of time two different interpretations of the word were developed and there was much learning on the distinction between the two. All this is now happily obsolete."

### (12) Innocent misrepresentation.

It is an important doctrine of English law that a contract which has been induced by a material innocent misrepresentation can be set aside at the instance of the party misled. The question whether this doctrine of rescission is applicable to *all* cases where *restitutio in integrum* is possible, is not limited to *executory* contracts.

In *Seddon v. North Eastern Salt Co. Ltd*<sup>1</sup>, it was *held* that the court would not grant rescission of an *executed* contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation, and that the plaintiff in order to succeed in such a case must prove fraud. This judgment was criticised in an article in *Law Quarterly Review* of January, 1939 (p.90), as laying down incorrect limitation on the doctrine of rescission for innocent representation, namely, that it should cease to apply when the formal instrument of transfer has been executed, or the formal delivery of a chattel has taken place and the contract executed.

In *Leaf v. International Galleries (A Firm)*<sup>2</sup>, the plaintiff bought a picture from the defendants in 1944 on the innocent misrepresentation by them that it was the work of Constable. The plaintiff took delivery of the picture and it was not until 1949, when being minded to sell it, he was informed that it was not the work of Constable. Thereupon, he purported to rescind his contract with the defendants and brought an action against them to recover the price which he had paid them for the picture. The county court judge found that the defendants had made an innocent misrepresentation and that the picture had not been painted by Constable, but he gave judgment for the defendants on the ground that the remedy of rescission was not available where a contract has been executed. It was *held*: Assuming that it was a condition of the contract that the picture was painted by Constable, he could on breach of that condition, have rejected the picture and at any time before he accepted it.

1. (1905) 1 Ch. 326. See also *Bell v. Lever Bros. Ltd.*, (1932) A.C. 161.

2. (1950) 2 K.B. 86; (1950) 1 All E.R. 693.



By S. 35 of the Sale of Goods Act, 1893<sup>1</sup>, he would be deemed to have accepted the picture if he did not intimate the seller within a reasonable time that he rejected it. The five years which the plaintiff allowed to elapse was not a reasonable time. He was not, therefore, entitled to reject it. Assuming the equitable remedy of rescission for an innocent misrepresentation to be open to a buyer of the goods, it was not open to the buyer in this case as it had not been exercised within a reasonable time.

Denning L. J. observed : "In my opinion, this is to be decided according to the well-known principles applicable to the sale of goods. This was a contract for the sale of goods. There was a *mistake as to the quality of subject matter*,<sup>2</sup> because both parties believed the picture to be a Constable, and that mistake in one sense was essential or fundamental. Such a mistake, however, does not avoid the contract. There was no mistake about the subject-matter of the sale. It was a specific picture of "Salisbury Cathedral". The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract.<sup>3</sup> There was a term in the contract as to the quality of the subject-matter, namely, as to the person by whom the picture was painted—that it was by Constable. The term of contract was either a condition or a warranty. If it was a condition, the buyer could reject the picture for breach of the condition at any time before he accepted it or was deemed to have accepted it, whereas, if it was only a warranty, he could not reject it but was confined to a claim for damages.

"I think it right to assume in buyer's favour that this term was a condition, and that if he had come in proper time, he could have rejected the picture, *but the right to reject for breach of condition has always been limited by the rule that once the buyer has accepted the goods in the performance of the contract, he cannot thereafter reject, but it is relegated to his claim for damages*.<sup>4</sup> The circumstances in which the buyer is deemed to have accepted goods in performance of the contract are set out in S. 35 of the Act which provides that the buyer is deemed to have accepted the goods, among other things, '.....when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.' In this case the buyer took the picture into his house, and five years passed before he intimated any rejection. That, I need hardly say, is much more than a reasonable time.....

"Is it to be said that the buyer is in any better position by relying on the representation, not as a condition, but as an innocent misrepresentation?"

"I agree that *on a contract for the sale of goods an innocent material misrepresentation may in a proper case be a ground for rescission even after the contract has been executed*. The observations of Joyce J. in *Seddon v. North Eastern Salt Co.*<sup>5</sup> are in my opinion, too widely stated. Many Judges have treated it as plain *that an executed contract of sale may, in a proper case, be rescinded for innocent misrepresentation* : see, for instance,

1. Corresponding to S. 42 of the Indian Sale of Goods Act, 1930.

2. Italics author's throughout.

3. *Solle v. Butcher*, (1942) 2 All E.R. 1107 referred to.

4. See S. 11 (1) (c) of the English Sale of Goods Act, 1823 and *Wallis, Son and Wells v. Pratt and Haynes*, (1911) A.C. 394.

5. (1905) 1 Ch. 326.



Warrington L.J. and Scrutton L.J. in *Harrison v. Knowles*<sup>1</sup>, Lord Atkin in *Bell v. Lever Bros. Ltd.*<sup>2</sup>, Scrutton L.J. and Maugham L.J. in *L. Estrange v. F. Graucob Ltd.*<sup>3</sup> Apart from that, there is now the decision of the majority of this court in *Solle v. Butcher*<sup>4</sup> which over-rules the first ground of decision in *Angel v. Jay*.<sup>5</sup> It is unnecessary, however, to pronounce finally on these matters because, although rescission may in some cases be a proper remedy, nevertheless it is to be remembered that an innocent *misrepresentation is much less potent than a breach of condition*. A condition is a term of the contract of a most material character, and if a claim to reject for breach of condition is barred, it seems to me a *fortiori* that a claim to rescission on the ground of innocent misrepresentation is also barred. *So assuming that a contract for the sale of goods may be rescinded in a proper case for innocent misrepresentation, nevertheless, once the buyer has accepted, or is deemed to have accepted the goods, the claim is barred*. In this case the buyer must clearly be deemed to have accepted the picture. He had ample opportunity to examine it in the first few days after he bought it. Then was the time to see if the condition or representation was fulfilled, yet he had kept it all this time, and five years have elapsed without any notice of rejection. In my judgment he cannot now claim to rescind."

In *Routledge v. McKay and others*,<sup>6</sup> a motor cycle combination was first registered on Oct. 17, 1930. In the course of time a registration book was issued in which the date of original registration was shown as Sep. 9, 1941. The seller bought the machine after that date. He was not himself responsible for the wrong entry. He was informed by the makers that it was a 1936 or 1938 model. On Oct. 23, 1949, the seller, in answer to a question by the buyer as to the date of the model, said that it was a late 1941 or a 1942 model. On Oct. 30, 1949, the buyer and seller entered into a contract of sale, and signed a memorandum of agreement which did not refer to the date of the model. The buyer claimed damages for breach of warranty. It was *held* that the statement by the seller on Oct. 23, 1949, as to the date of the model and the wrong entry in the registration amounted only to a false representation and not to a warranty, and, accordingly, in the absence of any allegation of fraud, the action failed. Denning L. J. laid down the proposition in the following words :

"When a motor car or a motor cycle is bought and sold second-hand by a succession of persons, it often happens that each seller in the chain tells each buyer what year it is, basing his information on the statement in the registration book. Suppose that unknown, to either party, the statement in the registration book is false because some previous and remote seller falsified either the number plate or the book, what is the legal position ? Has each seller in the chain warranted the correctness of the entry in the registration book so that each seller is responsible to his buyer in damages ? Or has he merely made an innocent representation for which he is not liable in damages ?

"The answer must depend, of course, on a proper application of the law relating to innocent misrepresentation and warranty as laid down by

1. (1918) 1 K.B. 609, 610.

2. (1932) A.C. 224.

3. (1934) 2 K.B. 400, 405.

4. (1949) 2 All E.R. 1107.

5. (1911) 1 K.B. 666.

6. (1954) 1 All E.R. 855.



the House of Lords in *Heilbutt, Symons & Co. v. Buckleton*<sup>1</sup> but in considering this question it is important to remember that the seller, unless he is the first owner, is not the originator of the statement about the year. He has to accept it from the registration book and cannot be expected to warrant its accuracy unless he in express terms makes himself responsible for it. In the ordinary way, therefore, the statement is only a representation and not a warranty. If the entry in the registration book should turn out to be false, the eventual buyer can sue the original wrong-doer in fraud without any limitation... ..; but he cannot sue innocent people in between who merely passed on a statement which was in the registration book.....As between the fourth and fifth parties.....this was a representation and not a collateral contract."

**43.** Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Buyer not bound to return rejected goods.

### Synopsis

- (1) *Buyer not bound to return rejected goods.* (2) "*Unless otherwise agreed.*"

#### (1) Buyer not bound to return rejected goods.

This section reproduces section 36 of the English Sale of Goods Act, 1893. The Indian Contract Act did not contain any provision corresponding to the present section, although the rule it embodies was applied in India before the passing of the present Act.<sup>2</sup>

The English Common Law rule before the passing of the English Sale of Goods Act, 1893, was that the buyer could reject the goods, either by giving notice of rejection or by doing any unequivocal act showing that he has rejected them, and that he was not bound either to return the goods or to place them in the custody of a third party.<sup>3</sup> The rule enacted by section 36 of the English Act and by the present section is in substance the same; it does not profess to lay down an exhaustive rule.<sup>4</sup> As observed by Brett J. in *Grimoldby v. Wells*, at p. 395, "the buyer may, in fact, return (the goods) or offer to return them, but it is sufficient I think, and the more usual course is to signify his rejection of them by stating that the goods are not according to contract, and that they are at the vendor's risk. No particular form is essential. It is sufficient if he does any unequivocal act showing that he rejects them."

1. (1913) A.C. 30 : 32 L.J. K.B. 245.  
2. *Sumer Chand v. Ardesbir*, (1907) All. W.N. 67; *Phaggu Mal v. Babulal*, (1913) 35 All. 325; *Buch v. Gordhandas*, A.I.R. 1923 Bom. 92 : 70 I.C.

877 : 24 Bom. L.R. 991.  
3. *Grimoldby v. Wells*, (1875) L.R. 10 C.P. 391.  
4. See *Halsbury*, Vol. 34, (3rd Edn.), 112, (f.n.e.).



In a case of rightful rejection, the buyer is not bound to put himself to the expense and trouble of returning the goods, and it is the seller's business to take away the goods, if he is so minded,<sup>1</sup> and if the buyer offers to return them and the seller refuses to take them, the buyer, it seems, may charge for their keep.<sup>2</sup> The cost of returning them must be borne by the seller.<sup>3</sup>

The goods must be placed at the disposal of the seller without obstruction. For instance, the buyer should not claim to keep them as security for purchase money paid in advance. The buyer in such a case is not in a position analogous to that of an unpaid seller within the meaning of section 45 (2)<sup>4</sup> and is not entitled to retain possession until the money paid has been returned. The buyer is, however, in the position of an involuntary bailee with respect to them.<sup>5</sup>

The buyer must also after rejection of the goods act in relation thereto in a reasonable manner. He must take reasonable care of them as he would of his own goods, as his position in respect of them is still that of bailee like that of a carrier after the refusal to the goods by the consignee although he occupies such position involuntarily.<sup>6</sup> So when it is said that the goods are at the risk of the seller, what is no doubt meant is that the buyer is not responsible for accidents not caused by his default.<sup>7</sup>

The rule in this section applies, although the place of delivery and the place where the goods are inspected and rejected are not the same.<sup>8</sup> The reason is that there is no reason for throwing on the buyer the burden of a situation caused by no fault of his.<sup>9</sup>

Where the contract was to deliver goods in England in closed packages to be sent to a sub-buyer in America, the buyer being entitled to reject them at their rejection by the sub-buyer it was *held* that the cost of returning goods from America was recoverable from the seller.<sup>10</sup> Where goods are resold before rejection and are rejected by the sub-buyer, the buyer, being entitled under the contract to reject them on such rejection by the sub-buyer, can claim from the seller also the expenses of carting and sending them to and from the sub-buyer, of warehousing and returning them to the seller.<sup>11</sup>

It may, of course, be expressly agreed that the buyer must return the goods to the seller in case he rejects them.<sup>12</sup>

This section pre-supposes the relation of the seller and buyer. It does not appear to touch the case of goods delivered to a man on the chance that he may buy them. In such cases he will be liable as a bailee

1. *Phaggu Mal v. Babu Lal*, supra; *Buch v. Gordhandas*, supra. See also *Sha Thilockchand Poosaji v. Crystal & Co.*, (1955) 1 Mad. L.J. 494.
2. *Caswell v. Coare*, (1909) 1 Taunt. 566; 10 R.R. 606; *Chesterman v. Lamb*, (1834) 2 A. & E. 129, 41 R.R. 397.
3. *Heilbutt v. Hickson*, supra; *Molling v. Dean*, (1902) 18 T.L.R. 217.
4. *J.L. Lyons & Co. v. May & Baker Ltd.*, (1923) 1 K.B. 685.
5. *Okell v. Smith*, (1815) 171 E.R. 816;

- 18 R.R. 752.
6. *Heugh v. London & North Western Rail Co.*, L.R. 5 Exch. 51. See also proviso to section 29, supra.
7. *Ibid*; *Okell v. Smith*, 1 Stark. 107.
8. See *Heilbutt v. Hickson*, supra.
9. *Molling v. Dean*, supra.
10. *Molling v. Dean*, supra.
11. *Heilbutt v. Hickson*, supra.
12. Vide the opening words of the section "unless otherwise agreed".



for particular purpose.<sup>1</sup> Buyer may intimate the rejection of the goods either orally or in writing. No particular form is necessary, it being sufficient if he does any unequivocal act showing that he rejects them.<sup>2</sup>

In *Mekhri, H. R. v. Mohzai Trading Corporation*,<sup>3</sup> under a contract with the defendant, the plaintiff supplied certain quantity of steel turnings and borings. The defendant rejected finding that 53 tons of the supply consisted only of dust and rubbish, kept it aside and required the plaintiff to come and inspect. The plaintiff ignored the communication and sued the defendant for the entire money. The Port Trust authorities destroyed the 53 tons which the plaintiff failed to remove. It was held : The refusal to accept delivery of the 53 tons of goods was proper, and the plaintiff could not succeed in respect of the price of that quantity of goods. Under S. 43 of the Act, in the absence of a contract to the contrary, buyer who rightly refused to accept the goods delivered to him, is not bound to return the same to the seller provided he intimates to the seller that he has refused to accept them. The destruction of the goods by the Port Trust Authorities did not fasten the liability on the defendant in respect of that matter.

In *Munnalal Pansari and Sons v. Ganga Prasad Sudarshan Chamarsia*,<sup>4</sup> the plaintiff delivered 32 logs of wood on approval to the defendant. After inspection the defendant rejected the goods and sued the plaintiff for the return of Rs. 300 which had been advanced on the transaction. This suit was decreed. The plaintiff thereupon served a notice on the defendant asking him to return the goods. On his failure to do so he brought a suit for the return of the goods or the recovery of the price. The defendant stated that he had no knowledge as to whether the plaintiff had taken away his goods or had sold them elsewhere when the defendant declined to take delivery of them. The finding of the courts below was that all the 32 logs of wood were actually delivered to the defendant by the plaintiff. It was held : A gratuitous bailee is bound to take the same care of the property entrusted to him as a reasonable, prudent and careful man may fairly be expected to take of his property of the like description. If the logs of wood had belonged to the defendant, he would not have been oblivious of the fact whether they had been taken away by any one and, if so, by whom. Further, he would have taken care to prevent any unauthorised person from taking them away. Then defendant having failed to take the amount of care which the law enjoined upon him to take was liable to pay damages to the plaintiff for the loss sustained by him. The measure of damages was obviously the price of the logs as there was complete loss of the property.

## (2) "Unless otherwise agreed."

These covering words are used to save special contract. Where there is a contract between the parties that goods rejected shall be returned by the buyer to the seller, it is binding on the buyer in spite of

1. Chalmers, 16th Edn., p. 168.

2. Grimoldby v. Wells, supra.

3. (1968) 2 Mys. L.J. 106 ; Grimoldby v. Wells, (1875) L.R. 10 C.P. 391 and

I.L.R. 35 All. 325 followed. See Yearly Digest, 1969, Column. 2768.

4. A.I.R. 1955 V.P. 30.



the provisions of this section which do not apply to such case and if the buyer fails to return them after rejection, he is liable for their price to the seller or for damages, as the case may be.<sup>1</sup>

### **Relationship of the buyer and seller or of agent.**

In *Sreelal Agarwalla v. State of Orissa* [I.L.R. (1961) Cut. 331], by an agreement between S and O.C., S. was engaged as a middleman by O.C. to purchase second-hand gunny bags from the H.D.P. and to deliver them at factory premises of O. C. The question that arose for determination was: Whether the relationship between S and O.C. was that of an agent and principal or that of a buyer and seller, so that S is a dealer and the transaction between them is sale within the meaning of the Orissa Sales Tax Act. It was *held* as construction of the agreement that the relationship was of buyer and seller. It was observed: There is one important distinction between the relationship of agent and principal on the one hand and that of buyer and seller on the other which is decisive in this case. The seller remains the owner of the goods until the property in the goods passes to the buyer. Till then the risk remains with the seller because risk usually follows property. As between an agent and a principal, the property in the goods vests in the principal and consequently the risk also remains with him though the agent must take proper care of the same as a bailee.

**44.** When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:

Liability of buyer for neglecting or refusing delivery of goods.

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

### **Buyer's liability when delivery not taken.**

This section is based on section 37 of the English Act (Appendix A). The opening words of the section indicate that the seller must be ready and willing to deliver the contracted goods.<sup>2</sup> If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract.<sup>3</sup> Where A contracts to build a steam launch for B by a fixed date, delivery to be made on a vessel found by B and A does not complete the launch by the contract time, but

1. *Ornstein v. Alexandra Furnishing Co.*, 12 T.L.R. 128; *Mellor v. Street*, 15 L.T. 238. See also S. 62, *infra*.  
2. *M/s. Endupani Narasimham v. M/s.*

*Mahadevram Udimiram*, (1973) (2) C.W.R. 1442; 39 C.L.T. 1256.  
3. *Greaves v. Ashlin*, (1813) 3 Camp. 426; 14 R.R. 471.



B does not notify A of a ship to receive the launch till A is ready to deliver, neither party has any remedy against the other.<sup>1</sup>

The reference to the charge for the care and custody of the goods indicates that the section applies only to cases where the property has passed and the buyer neglects to take possession *i.e.* where the goods are kept against the seller's will. The seller cannot charge for keeping the goods if he detains them against the buyer's will in the exercise of his right of lien.<sup>2</sup>

The proviso to the section saves all the rights of the seller in the case where the buyer's neglect or refusal amounts to a repudiation of the contract.<sup>3</sup> Mere delay by the buyer in taking delivery does not entitle the seller to rescind the contract, unless indeed the date at which he is to do is of the essence of the contract. In the case of undue delay, however, the seller may give notice fixing a reasonable time, after the expiration of which he will treat the contract as at an end.<sup>4</sup>

In order that the seller may be entitled, under this section, to claim any loss due to the buyer's default or neglect and a reasonable charge for care and custody, he must show firstly that he was ready and willing to deliver the goods, secondly that he had made the request to the buyer to take delivery, thirdly that the buyer did not within a reasonable time after such request take delivery of the goods, and lastly where loss is claimed owing to buyer's neglect or default in taking delivery that he suffered any loss or had to incur any expenses. Where he fails to show any of these four things, his claim must fail.<sup>5</sup>

It is not an effective application for delivery on the part of the buyer to merely send notices or letters if goods are to be delivered at the place of the seller. Some person must be sent to whom the goods can be delivered. Where the buyer does not make any effective application for delivery up to a certain date the seller is entitled to reasonable charges for care and custody up to that date.<sup>6</sup>

The liability of a buyer for reasonable charges for care and custody of the goods arises under S. 44 of the Act. As the liability arises under the statute, apart from any contract between the parties, the Article of Limitation Act (1908) applicable is the residuary Article 120, and not Art. 110 or Art. 115.<sup>6</sup>

The Act does not give to seller any lien over the goods in respect of charges for care and custody recoverable under S. 44. The seller is entitled to recover them by an action against the buyer. If the seller, however,

1. *Forrest v. Aramayo*, (1900) 9 Asp. Mar. Cas. 134 C.A.

2. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 114, (f.n.m.); *Somes v. British Empire Shipping Co.*, (1860) 8 H.L. Cas. 338 at p. 344; 122 R.R. 186, 190.

3. See *Mersey Steel Co. v. Naylor*, (1884) App. Cas. 434 at p. 443; *Braithwaite v. Foreign Hardwood Co.* (1905) 2 K.B. 543, C.A. criticised in *British etc. Ltd. v. N.W. Cachar Tea Co.*,

(1923) A.C. 48, at p. 70.

4. Compare section 55 of the Indian Contract Act.

5. *Greaves v. Ashlin*, (1813) *supra*; *Somes v. British Empire Shipping Co.*; *supra*; *Hartley v. Hitchcock*, 1 Stark. 408.

6. *Kamruddin v. Anjangaon Municipality*, A.I.R. 1951 Nag. 148. See now Article 113 of the Schedule to the Limitation Act, 1963.



keeps the goods so that he may be the better able to enforce the payment in respect of the claim for the charges on account of care and custody, he cannot add to his claim any charges in respect of the further retention of the goods.

**Charges for care and custody of goods.**

Where there is a contract to supply paddy to Government, and plaintiffs purchase paddy from various places and keep them in their charge until directions for their disposal are received from Government, the plaintiffs can claim godown charges incurred.<sup>1</sup>

1. State of Bihar v. Motilal Chamarla,

A.I.R. 1964 Pat. 127.



## CHAPTER V

### RIGHTS OF UNPAID SELLER AGAINST THE GOODS

#### **Rights of the unpaid seller against the goods.**

The “unpaid seller” has three rights notwithstanding that the property in the goods may have already passed to the buyer. These are :

(1) A *lien* on the goods when they are still in his possession [Sec. 46 (1) (a)]. He is entitled to retain possession of the goods until payment or tender of the price in the following cases, namely (a) where the goods have been sold without any stipulation as to credit ; (b) where the goods have been sold on credit, but the term of credit has expired ; (c) where the buyer becomes insolvent [Sec. 47 (1)]. This right of lien may be exercised by the seller notwithstanding that he is in possession of the goods as agent or bailee for the buyer [Sec. 47 (2)].

The lien terminates upon delivery by the seller to a carrier or other bailee for transmission to the buyer without a right of disposal having been reserved, or upon the buyer lawfully obtaining possession or upon a waiver of the lien by the seller. The lien is not lost by reason only that the unpaid seller has obtained a decree for the price of the goods [Sec. 49].

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien [Section 48].

(2) *Stoppage in transit*—When the buyer of the goods becomes insolvent the unpaid seller who has parted with possession of the goods may stop them in transit, resume possession and retain them until payment or tender of the price [Sec. 50]. The right is exercisable only while the goods are in the course of transit in the hands of a person *in medio* holding neither at the will of the seller or the buyer and they are deemed to be in transit, from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer until the buyer or his agent takes delivery of them from such carrier [Sec. 51 (1), (2)]. Section 51 contains a list of five specific instances where the duration of the transit does or does not end.

Stoppage in transit is effected by the unpaid seller either taking actual possession of the goods or giving notice of his claim to the carrier or other bailee [Sec. 52].

Section 53 deals with the effect of a sub-sale or pledge by the buyer.

(3) *Resale*—Although the contract of sale is not rescinded by the mere exercise of his lien or rights of stoppage in transit [Sec. 54 (1)], the unpaid seller who has exercised either of those rights may on resale of the goods give a good title to his buyer as against the original purchaser [Sec. 54(3)] and the unpaid seller may resell the goods (and recover



damages from the original buyer for any loss thereby occasioned) whenever the goods are of a perishable nature, or the unpaid seller gives notice to the buyer of his intention to resale and the latter does not pay or tender the price within reasonable time [Sec. 54 (2)].

Of course, a right of resale on default of the buyer may be reserved by agreement and in such a case a resale on the buyer's default rescinds the contract of sale, without prejudice to any claim the seller may have for damage [Sec. 54(4)].

**45.** (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—  
 "Unpaid seller" defined.

(a) when the whole of the price has not been paid or tendered ;

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

### Synopsis

- |   |   |
|---|---|
| (1) <i>Rights of unpaid seller against the goods.</i>     | "seller".   |
| (2) <i>Definition of "unpaid seller"—sub-section (1).</i> | (4) <i>Payment when ordinarily due.</i>             |
| (3) <i>Sub-section (2)—meaning of</i>                     | (5) <i>Agent purchasing on behalf of principal.</i> |

#### (1) Rights of unpaid seller against the goods.

This chapter deals with the rights of the unpaid seller against the goods. Where the property in goods has passed by a sale, the *right of possession* also passes but is defeasible in certain cases, as, for instance, in the case of non-performance of conditions precedent or concurrent imposed on the buyer by the contract, or on the insolvency of the buyer. When the property in the goods has passed to the buyer, the unpaid seller has three different rights, *viz.*, (1) the right to retain possession of the goods ; (2) the right to stop the goods in transit ; and (3) the right to resell the goods. The circumstances under which these rights are available to the seller, are different in each case.

In a suit to recover amount advanced, the plea of defendants claiming equitable set-off is maintainable.<sup>1</sup>

1. 1964 All. L.J. 987,



**(2) Definition of "unpaid seller"—sub-section (1).**

This section is based on section 38 of the English Act. The Indian Contract Act did not define the expression.

According to sub-section (1), the seller of goods is deemed to be an "unpaid seller" for the purposes of this Act (a) when the *whole* of the price has not been paid or tendered ; (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

It is an essential condition of the definition that the seller should, besides being unpaid, have an immediate right of action for the price.<sup>1</sup> The price must be due inasmuch as there can be no lien without an immediate right of action for debt. The seller is deemed unpaid even if the buyer has a right of set-off.<sup>2</sup> The existence of a set-off without an agreement to set-off is not a payment of the debt,<sup>3</sup> and an offer by the creditor to set-off a debt due from the person having a lien does not amount to a tender so as to discharge the lien.<sup>4</sup>

In the case of an entire contract, the expression 'whole price' means the whole amount stipulated. Therefore, even where a portion of the price is unpaid, the seller will be an "unpaid seller" for the purpose of this Act.<sup>5</sup> But, where the contract is severable, the term will mean only the apportioned price of such part of the goods as is retained.<sup>6</sup>

Thus the unpaid seller's rights extend over every part of the goods for the price of all of them, except, where, by the terms of the contract or otherwise, the price has been apportioned, as in the case of instalment contracts, where the instalments are to be separately paid for. In such cases the seller's rights are apportioned.<sup>7</sup> If the buyer becomes insolvent, then, notwithstanding the apportionment of the price, the unpaid seller's rights are exercisable over every portion of the goods not paid for in respect of any part of the price of the goods due under the contract.<sup>8</sup> If any portion of the goods is paid for, the seller's rights over that portion are gone.<sup>9</sup>

A seller, however, is not unpaid if the buyer has tendered the price and the seller has refused to accept it ; in such a case the seller loses all his rights against the goods.

If there is a period of credit then the seller is not unpaid until the price becomes due. Again, if there is a condition attached to payment it must be fulfilled.

1. Raitt v. Mitchell. (1818) 171 E.R. 47 ; 16 R.R. 795 ; Kuttayan Chetty v. Palaniappa, (1905) 27 Mad. 540.  
2. Pinnock v. Harrison, (1838) 150 E.R. 1256 ; see also Chase v. Westmore, (1816) 105 E.R. 1016, 17 R.R. 301.  
3. Pinnock v. Harrison, *supra*.  
4. Clarke v. Fell (1833) 4 B. & Ad. 404 ; see also Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 120, (f.n.g.).  
5. Hodgson v. Loy, (1797) 7 T.R. 440, 4 R.R. 483.

6. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 120 (f.n.g.) ; Ex-parte Chalmers, (1873) 8 Ch. Ap. 289 : (cf.) Wentworth, v. Outhwaite, (1842) 10 M. & W. 436, 452 ; 62 R.R. 664.  
7. Re Edwards, Ex-parte Chalmers, *supra* ; Morgan v. Bain, (1874) L.R. 10 C.P. 15.  
8. Re Edwards, Ex-parte Chalmers, *supra*.  
9. Merchant Banking Co. v. Phoenix Bessemer Co., (1877) 5 Ch. D. 205.



Payment of price is often made by a bill of exchange which is usually drawn on the buyer ; the buyer accepts it on presentation and pays on the due date. The buyer thus gets a credit during the period from the date on which it is drawn and the due date of payment.

Although tender of performance is not the same as performance and a seller to whom the price of goods has been tendered is strictly unpaid, and can, therefore bring an action subsequently for the price which he has refused, yet tender destroys the seller's lien.<sup>1</sup> Accordingly, so far as concerns his rights against the goods, he is not an unpaid seller after tender of the price. A claim by the seller of an excessive amount if made in good faith does not of itself discharge the lien. In such a case the buyer must make actual tender in order to discharge the lien ; but if the excessive claim is made fraudulently, the lien is discharged, without actual tender.<sup>2</sup>

The second clause of the sub-section gives effect to the general presumption of conditional payment in the case of negotiable instruments. The seller is unpaid not only when the price has not in any way been paid or tendered in full, but also if he has taken bills of exchange or other negotiable instruments as conditional payment and the buyer has failed to meet them at maturity or has become insolvent during their currency.<sup>3</sup> The rule is the same though the seller may have negotiated the bills, and they are still outstanding and not yet at maturity.<sup>4</sup> In a case where the seller had discounted the buyer's acceptance, but the latter failed before the bills matured, it was *held* that the seller was unpaid.<sup>5</sup> Mellish L.J. observed :

“No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill and, during the time that the bill is current, there is a vendor's lien, and the vendor is bound to deliver. But if the bill is dishonoured before delivery has been made, then the vendor's lien revives ; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser.”

When payments are made by negotiable instruments there is presumption that they are usually taken as conditional, so that if the instruments cannot be sued upon (*e.g.* owing to defective stamp) the seller can sue on the original consideration.<sup>6</sup> In *Goldshede v. Cottrell*<sup>7</sup>, the question whether the payment was absolute or conditional was held to be a question of fact.

As already noted, the condition is broken when the instrument is dishonoured.

1. *Martindale v. Smith*, 1 Q.B. 389 ; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164.

2. *Williston on Sales*, Revised Edition, S. 502, Vol. III, pp. 96, 97.

3. *Edwards v. Brewer*, (1837) 2 M. & W. 375, 46 R.R. 626.

4. *Feise v. Wray*, (1802) 3 East 93, 6 R.R. 551.

5. *Gunn v. Bolckow Vaughan*, (1875) L.R. 10 Ch. App. 491 ; *Ex-parte*

*Lambton*, (1875) L.R. 10 Ch. at p. 415.

6. See *Payana v. Panna Lal*, (1914) 41 I.A. 142.

7. (1836) 2 M. & W. 20. See also *Re. Refries & Sons*, (1902) 2 Ch. 425 ; mere giving or endorsement of a cheque is not conditional payment of a secured debt so as to release the security.



Where the bill is running there is no debt, and so the seller is paid. So also where the bill, although it may be overdue, is outstanding in the hands of an indorsee or holder. If the buyer becomes insolvent, the fact that the seller has negotiated the buyer's acceptance taken as conditional payment, and that the instrument is outstanding, does not prevent the seller being an unpaid seller.<sup>1</sup>

But it is quite possible that a negotiable instrument may in particular cases be taken in absolute discharge. In such a case, there is no right available against the goods to the seller, as an unpaid seller. Whether the instalment operates as a conditional payment or absolute discharge is, of course, a question of fact,<sup>2</sup> though the rebuttable presumption is against its being an absolute discharge.

Where goods are properly rejected by a buyer there is no obligation upon him to return the goods in the sense that he is not bound to take steps to see that they are delivered at the place of business of the seller. In case where a buyer who has already paid for the goods rejects them as not conforming to the contract, he has however no lien upon the goods to enable him to hold on to their possession and effect a resale in exercise of such lien.<sup>3</sup> In other words, a buyer who has rejected the goods after paying for them, is not an unpaid seller within the meaning of Ss. 45 and 46 of the Act, so as to have a lien on them.<sup>4</sup>

If on the maturity of notes given for the price new notes are taken, it is a question of fact whether the lien which revived on the maturity of the notes is again waived by the extension of a further period of credit or whether the understanding of the parties was that the goods should remain pledged for the price until the renewal notes were paid.<sup>5</sup>

### (3) Sub-section (2)—meaning of "seller".

An extended meaning has been given to the word "seller" for the limited purpose of exercising the rights of lien, stoppage in transit and resale dealt with in Chapter V of the Act, and has no application to other remedies of the seller.

Sub-section (2) gives effect to the accepted view that the rights of an unpaid vendor against the goods should be available to any one whose position can be shown to be substantially analogous to that of an ordinary seller, e.g., seller's agent to whom a bill of lading is endorsed<sup>6</sup> or a surety for the price of goods who has paid the price to the seller,<sup>7</sup> or a broker contracting as a principal,<sup>8</sup> or a commission agent who is personally liable for the price.<sup>9</sup>

1. Halsbury, Laws of England, 3rd Edn., Vol. 34, pp. 120, 121.

2. *Cowasjee v. Thompson*, (1855) 13 E.R. 454 : also 18 E.R. 560 ; 70 R.R. 27.

3. *Goldshede v. Cottrell*, 1836) 2 M. & W. 20.

4. *Sha Thilockchand Poosaji v. Crystal & Company*, (1955) 1 Mad. L.J. 494

5. *Williston on Sales*, Revised Edition, Vol. III, S. 582, pp. 98, 99.

6. *Morison v. Gray*, (1824) 130 E.R. 805, 27 R.R. 624 ; *Cassaboglou v. Gibbs*, (1883) 11 Q.B.D. 797. See also *Venkatachalam v. Ponnuswami*

*Ayyangar*, A.I.R. 1925 Mad. 46 : 82 I.C. 536.

7. *Imperial Bank v. L. & St. K. Dock*, (1877) 5 Ch. D. 195. See also section 140 of the Indian Contract Act, 1872. But a surety has not this right unless he has paid the price, *Siffken v. Wray*, 6 East 371.

8. *Ramendra v. Brajendra*, (1919) 46 Cal. 831 : 53 I.C. 886. See also *Bombay Steam Navigation Co. v. Ram Dass*, (1912) 14 Bom. L.R. 532 : 16 I.C. 61.

9. *Harilal v. Pehladarai*, A.I.R. 1929 Bom. 260 : 120 I.C. 337.



In *Jenkyns v. Usborne*<sup>1</sup>, A consigned cargo to Z in London exceeding the quantity which Z had contracted to take and drew two bills on Z, one for the price of the quantity contracted for, the other for the price of the residue. Z accepted the first bill and refused to accept the second. It was then agreed that B, who was A's London agent, should himself take the smaller portion. This agreement, as the court held, gave the right to Z to take possession of and receive his portion of the goods on the ship's arrival and B the right to receive the residue. B sold his interest in the cargo to P, taking P's bill. There was only one bill of lading which was held by Z, and P had only a delivery order addressed to the master of the ship. P pledged his interest in the cargo to Q and handed Q this delivery order. Before the ship arrived P failed and the bill which he had given to B was dishonoured. B notified the master not to deliver his share of the cargo to any one without further instructions. *Held*, that B was in the position of an unpaid seller, was entitled to stop his portion of the cargo in transit and had effectually done so as against Q.

The tendency of the decisions in England even before the enactment of the English Sale of Goods Act, 1893, was to give rights of an unpaid seller against the goods to any one whose position could be shown to be substantially analogous to that of an ordinary seller.<sup>2</sup>

As to the right of the consignor or other agents to exercise the rights of the unpaid seller see *Feise v. Wray*<sup>3</sup> where the rule of common law has been laid down. In that case the consignor, a factor, who had bought goods on his own credit on account and order of his principal, was held entitled to exercise his right of stoppage in transit. An agent of a bankrupt who has made himself responsible for the price of goods may stop them in transit.<sup>4</sup>

As to the rights of the commission agents against their principals see *Ireland v. Livingston*.<sup>5</sup> Schmitthoff<sup>6</sup> illustrates the principle thus: Where, e.g., a wine importer in London instructs a commission agent in Oporto to buy and ship some hogsheads of port to him and the commission agent buys the wine from a local seller, the latter will look to the commission agent for payment of the price; the commission agent though in law an agent of the wine importer is, as against the goods, in the position of *quasi-seller* and can exercise the unpaid seller's rights if the wine importer fails to pay. In *Imperial Bank v. London and St. Katherine etc.*,<sup>7</sup> a surety who paid the price was held entitled under the circumstances to the possession of the goods as against the buyer's pledgee.

But a buyer who has rejected, on examination, goods after paying for them is not an "unpaid seller", and has no lien on the goods for the price repayable to him.<sup>8</sup>

1. (1844) 7 Man. & C. 678, 66 R.R. 767.

2. See Chalmers, *Sale of Goods Act*, 1893, 16th Edn., p. 170.

3. (1802) 3 East 93.

4. *Hawkes v. Dunn*, (1831) 1 C. and J. 519.

5. (1872) L.R. 5 H.L. 395.

6. Schmitthoff "The Sale of Goods", p. 127.

7. (1877) 5 Ch. D. 195.

8. *Lyons and Co. v. May & Baker*, (1923) 1 K.B. 685. Williston, however,

states the American law thus: "A buyer who has paid for goods and who has by his contract a right to reject them and recover the contract price on exercising this election becomes an unpaid seller. Even though the buyer's right of rescission is given by law, not by the terms of the contract, he has a lien for the price which he has paid." Williston on Sales, Revised Edition, Vol. III, S. 503, pp. 99, 100.



Where the contract is indivisible 'seller is an unpaid seller if any part of the price when due is not paid to him and.....can exercise the rights given to him by S. 39 (of the English Act)<sup>1</sup> over any part of the goods...provided the price of those particular goods has not actually been paid.'<sup>2</sup>

(4) **Payment when ordinarily due.** See notes under section 55 *infra*.

(5) **Agent purchasing on behalf of principal.**

(i) **Sections 45, 46—Agent purchasing on behalf of principal—His rights in respect of unpaid purchase-money—Agent can re-sell goods.**

Under clause (2) of section 45, an agent, who has himself paid, or is directly responsible for the price is included in the term "seller" within the meaning of the Act and he will, therefore, have all the rights of and the remedies available to an "unpaid seller" under the Act.<sup>3</sup>

Under S. 46, clause (1)(a) he had a lien on the goods for the price, while he is in possession of them and under clause (1)(c), he has a right of re sale as limited by the Act. S. 54, clause (2), provides that the unpaid seller who gives notice to the buyer of his intention to sell may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re sale.<sup>2</sup>

(ii) **Sections 45(2), 46, 54—Commission agent—Purchase of goods on behalf of his principal with his own money—Rights of, are analogous to that of unpaid seller—Rights of lien and re-sale are available to commission agent—Limits of.**

Under S. 45(2) of the Act, the position of a commission agent who is proved to have personally paid the price of the goods purchased by him for his principal has been placed on par with that of unpaid seller for the purposes of Chapter V of the Act.

A commission agent where he has purchased goods with his own money on behalf of his principal and the latter fails to pay for the goods at the proper time then, apart from certain other rights, such as of lien which he has, he has a further right to sell goods in the market and recover the balance of the money due to him as damages for such loss as may have been occasioned to him by the breach of the contract provided that except in cases where the goods may be of a perishable nature in which case no notice is necessary, he gives a reasonable notice to his principal of his intention to re-sell and the latter fails to pay the price within a reasonable time. Two types of cases may arise in this connection : (1) where the property in the goods has passed to the purchaser and (2) where it has not. In the first branch of cases the commission agent will have a right of re-sale as provided by and under the Sale of Goods Act (Sec. 54), while in the other branch of cases, he would have

1. Corresponding to S. 46 of the Indian Act.  
2. Per Atkin L.J. in Longbottom & Co. Ltd. v. Bass, Walker and Co. (1922)

W.N. 245, C.A.  
3. Girdhari Lal v. Jethmal, A.I.R. 1963 A.P. 185.



it a *fortiori* because the commission agent retains his right of property in the goods and, therefore, the view taken in A I. R. 1926 Lah. 94 and A.I.R. 1929 Lah. 666 prior to the enactment of S. 45(2) that the commission agent has no right of sale whatsoever and that he has only his lien on the goods until his dues are paid in full to him must be held to be *otiose* and unsound.<sup>1</sup>

**46.** (1) Subject to the provisions of this Act and of any <sup>Unpaid seller's</sup> law for the time being in force, notwithstanding <sup>rights.</sup> that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a) a lien on the goods, for the price while he is in possession of them ;

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them ;

(c) a right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

### Synopsis

- |  |  |
|--|--|
| (1) <i>Rights of the unpaid seller—<br/>analogous law.</i>                       | <i>has passed to the buyer.</i>  |
| (2) <i>Sub-section (1)—unpaid seller's<br/>rights when property in the goods</i> | (3) <i>Sub-section (2)—rights when pro-<br/>perty remains in the seller.</i> |

#### (1) Rights of the unpaid seller—*analogous law.*

This section corresponds to section 39 of the English Sale of Goods Act, 1893 (Appendix). It groups together in a convenient form all the rights of an unpaid seller which were scattered over a number of sections (95, 99, 107) in Chapter VII of the Indian Contract Act, 1872 (Appendix B).

The section declares generally the rights of an unpaid seller. When the property in the goods has passed to the buyer, he has the following rights :

- (1) lien,
- (2) stoppage in transit,
- (3) right of resale.



The next group of sections deal with the rights of the unpaid seller as defined by this section against the goods after they have become the property of the buyer.

Sub-section (2) refers to the right of unpaid seller where the property has not passed to the buyer.

**(2) Sub-section (1)—unpaid seller's rights when property in the goods has passed to the buyer.**

The seller's right of lien is distinct from his right of stoppage in transit although the two rights are, in a sense, analogous. Both rights arise when the property in the goods has passed to the buyer and in both these cases the buyer must have committed default in paying the price. But the first right may be exercised whether the buyer be solvent or insolvent, and the second only when he is insolvent. The first pre-supposes possession by the seller, the second that he has parted with it. Or in other words, the right of stoppage in transit does not arise until the seller's lien is gone, for it pre-supposes that the seller has parted with the possession as well as with the property in the goods.

The right of resale pre-supposes that the unpaid seller is entitled to the exercise of his right of lien or stoppage in transit. Such a seller can resell the goods at the buyer's risk after giving reasonable notice to the buyer to pay the price.<sup>1</sup>

These rights of the seller are not dependent in any way on any implied agreement between the parties but are incidents attached by law to the contract of sale, and can only be exercised by a seller or person in the position of a seller.<sup>2</sup> Bayley J. in *Bloxam v. Sanders*<sup>3</sup> stated the principles as follows :

"Where goods are sold and nothing is said as to the time of delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price. But the buyer has no right to have possession of the goods till he pays the price. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession,<sup>4</sup> but grows out of his original ownership and dominion and payment or a tender of the price is a condition on the buyer's part and until he makes such payment or tender, he has no right to the possession.<sup>5</sup> If goods are sold upon credit, and nothing is agreed upon as to the time of delivery of the goods, the vendee is immediately entitled to the possession, and the risk of possession and the right of property vest at once in him, but his

1. See section 54, post.

2. *Sweet v. Pym*, (1800) 1 East 4 ; *Siffken v. Wray*, (1805) 6 East 371.

3. 4 B. & C. 941 ; 28 R.R. 519. See also *Sha Thilokchand Poosaji v. Crystal & Co.*, (1955) 1 Mad. L.J. 494 cited at p. 283 ante—goods properly rejected by buyer after paying for same—buyer has no lien upon goods.

See also *Kamruddin Kadibhai & Co. v. The Municipal Committee, Anjan-gaon*, A.I.R. 1951 Nag. 148—charges for care and custody.

4. *i.e.*, to some carrier or other agent for transmission to the buyer. As to a case where the buyer himself obtains possession, see section 49.

5. Cf. section 32.



right of possession is not absolute ; it is liable to be defeated if he becomes insolvent before he obtains possession.....If the seller has despatched the goods to the buyer and insolvency occurs, he has a right in virtue of his original ownership, to stop them in *transitu* Why ? Because the property is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the possession, and his insolvency, without payment of his price, defeats the right. And if this be the case after he has despatched the goods, and whilst they are in *transitu a fortiori*, it is when he has never parted with the goods and when no *transitus* has begun."

The implications of law may, however, be negatived under section 62. Or there may be circumstances creating a personal estoppel against the seller.

In *Kishenchand Chellaram v. Vishandas Amarnath*<sup>1</sup>, it was held : Where the purchaser having taken delivery of the goods subsequently leaves the goods at the door of the seller against his will, the seller has neither the right nor the duty to resell the goods. In such a case, if instead of allowing the goods to perish, the seller gets them sold by public auction after notice to the purchaser, the seller's liability being in the nature of liability arising on conversion, he is liable to account to the purchaser for such price as fairly represents the value of the goods at the date of the sale and no more. The sale in such a case is not a resale as contemplated by Ss. 46 and 54. The resale as it took place is binding on the purchaser in the sense that the price realised at the resale is fair price. The suit by the seller to recover the price on resale of the goods is maintainable and interest can be awarded under S. 61 of the Act.

The seller's lien depends on actual possession and not on title and it can be exercised only when the property in the goods has passed to the buyer. And in such a case the property in the goods having passed to the buyer the seller by taking the receipt in his own favour merely exercises his right of lien on the goods.<sup>2</sup>

**Sections 46, 2(8), 19 to 24, 25(2)—Right of stoppage in transit—Exercise of conditions to be fulfilled—Insolvency of buyer—Passing of property—Tests—Admiralty—Jurisdiction when attracted.**

In order to bring the case under S. 46(1) of the Act, the plaintiff must allege and prove (a) that he was unpaid seller (b) that the buyer was insolvent (c) that the goods were in transit and (d) that the property in the goods had passed to the buyer.

The failure to pay for just and admitted debt would be sufficient evidence of insolvency of the buyer. The just and admitted debt must be a debt different from the one by reason whereof the vendor claims to be an unpaid vendor.

The cardinal principle with regard to the passing of property in goods under a contract is that property passes when it is intended to pass.

1. A.I.R. 1949 Bom. 334 ; 51 Bom. L.R. 480.

2. *Paharia Mal Ram Sahai v. Birdhi*

*Chand Jain & Sons*, A.I.R. 1956 Punj. 217.



In the case of unascertained goods the property in them passes when they are unconditionally appropriated to the contract by any of the parties with the assent of the other. Such assent need not be express and may even be given before or after the appropriation. Where the goods are delivered to a carrier for the purpose of transmission to the buyer without the reservation of the right of their disposal, the seller must be taken to have appropriated the goods to the contract unconditionally. Such right may be created expressly by the terms of the contract or may arise by the conduct of the seller in appropriating the goods to the contract subject to certain conditions. In the last-mentioned case the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. Under S. 25(2) of the Act, the seller's right of disposal is preserved when goods are shipped and by the bill of lading they are deliverable to the order of the seller or his agent.

On the facts of the present case the properties in the goods passed to the buyer on shipment and the issue of the bill of lading in favour of the buyer.<sup>1</sup>

**(3) Sub-section (2)—rights when property remains in the seller.**

Where property in the goods has not passed,<sup>2</sup> the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. Where property in the goods has not passed, *e.g.* where the seller has reserved his right of disposal, there is no need to involve these rights at all, for the seller is still the owner and can exercise the right of ownership which includes the above rights and has the additional rights of withholding delivery, called "*quasi-lien*."<sup>3</sup> Where property has not passed, the unpaid seller can withhold delivery where the buyer becomes insolvent<sup>4</sup> in addition to the other remedies provided by law, *e.g.*, right to sue for the price or a suit for non-acceptance of goods. And for this purpose, the fact that the sale was on credit is immaterial. It is likewise immaterial whether the goods are specific or unascertained.<sup>5</sup> Even if the seller is guilty of a breach before the insolvency of the buyer, he will usually only be liable to pay nominal damages.<sup>6</sup> In such cases the buyer has no rights against the goods and on refusal of the seller to deliver has only personal remedies against him.<sup>7</sup> But as we shall see under section 58, the buyer in a proper case can sue for the specific performance of the contract of sale and prevent the seller from dealing with or reselling the goods; at the same time the unpaid seller has a right of withholding delivery similar to and co-extensive with the above rights.

1. *Rungto Sons (Private) Ltd. v. Owner Master and Interested Parties in S.S. Edison*, 66 C.W.N. 1083.

2. See *Ram Saran Das Raja Ram v. Lala Ramchander*, A.I.R. 1968 Delhi 233 under S. 54 *post*.

3. (Cf.) *Mordaunt v. British Oil & Cake Mills*; (1910) 2 K.B. 502; *Raju Naidu v. Kanakku Pillai*, (1928) 54 M.L.J. 116; see also *Ex-parte Chalmers*, (1873) 8 Ch. App. 289.

4. *Haji Karim v. Doma*, A.I.R. 1924

Nag. 416 : 80 I.C. 639.

5. *Griffiths v. Perry*, (1859) 120 E.R. 1065, 117 R.R. 397 (seller guilty of breach of contract to deliver before the buyer's insolvency, yet held liable only for normal damages); *Raju Naidu v. Kanakku Pillai*, *supra* : A.I.R. 1928 Mad. 279; 54 Mad. L.J. 116.

6. *Valpy v. Oakeley* (1851) 16 Q.B. 941, 83 R.R. 786; *Griffiths v. Perry*, *supra*.

7. See *Moakes v. Nicholson*, (1895) 19 C.B.N.S. 290.



In *Ex-parte Chalmers*,<sup>1</sup> there was a sale of goods to be delivered by instalments to be paid for in cash fourteen days after delivery. During the currency of the contract the buyer became insolvent and the price of one instalment was unpaid. *Held*, the seller need not make further deliveries unless the price of that instalment is paid and cash is paid against the delivery of subsequent instalments.

No doubt, the giving of the key of the premises in which the goods are locked up may ordinarily amount to symbolical delivery of possession. But where the payment of price before the delivery of the goods is an important condition in the document of sale, and the key of the premises in which the goods are locked is handed over to the buyer on the very day on which the document is written, not for the purposes of delivering possession but for the purpose of taking care of the goods, there is no delivery of possession of the goods and the right of resale is not lost.<sup>7</sup>

### Unpaid seller's lien

**47.** (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :

Seller's lien.

(a) where the goods have been sold without any stipulation as to credit ;

(b) where the goods have been sold on credit, but the term of credit has expired ;

(c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

### Synopsis

(1) *When lien exists.*

(2) *Lien defined.*

(3) *Lien extends only to price—sale credit—insolvency of buyer—clauses (b) and (c).*

(4) *Clause (a)—no stipulation as to credit.*

(5) *Sub-section (2)—seller in possession as bailee of the buyer.*

#### (1) When lien exists.

This section is the same as section 41 of the English Act with the words "or custodier" after the bailee in sub-section (2) omitted (see

1. (1873) L.R. 8 Ch. App. 289.

2. *Vora Abbasbhai Mullan Valji v.*

*Thakor Saheb of Katola Sangari*,  
(1949) 2 Sau. L.R. 98.



Appendix A). See also old sections 95 to 97 of the Indian Contract Act (Appendix B). Sub-section (1) describes the circumstances in which the unpaid seller may exercise his right of lien. Subject to the provisions of the Act<sup>1</sup>, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :

- (a) where the goods have been sold without any stipulation to credit ;
- (b) where the goods have been sold on credit but the term of credit has expired :
- (c) where the buyer becomes insolvent.

The effect of sub-section (1) may therefore be summed up in the proposition that a lien is exerciseable when the price is due and unpaid.<sup>2</sup>

Clauses (a) and (c) of this sub-section declare the law as it was laid down in *Bloxam v. Sanders*.<sup>3</sup> It was not decided in that case whether on the sale of goods on credit the seller could claim a lien upon them if they were still in his possession after the period of credit had expired, although the buyer had not become insolvent. This point was decided in *New v. Swain*<sup>4</sup>, wherein it was held that when goods have been sold on credit, and remain in the seller's possession till the term of credit has expired, the seller's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent. "Where the owner of goods sells on credit, the buyer has a right to immediate possession ; but if he suffers the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them. There is no difference in principle whether the seller charges the buyer with the rent or not : they are still in his possession."<sup>5</sup>

It will be observed that the difference between the two cases of sale on credit is that the buyer's insolvency puts an end to his right to claim delivery, even where the term of credit has not yet expired ; but where he remains solvent, he does not lose that right until the term has expired.

## (2) Lien defined.

A lien in general may be defined to be a right of retaining property until a debt due to the person retaining it has been satisfied ;<sup>6</sup> and as the rule of law is, that in a sale of goods where nothing is specified as to delivery or payment, the seller has the right to retain the goods until payment of the price,<sup>7</sup> he has in all cases a lien, unless he has waived it.<sup>8</sup>

The lien then is based on the unpaid seller's possession of the goods and not on title, and unless there is possession there is no lien.<sup>9</sup> It is not affected by his having parted with the document capable of transferring the title.

1. In this connection, see sections 48, 49, 53 and 62 of the Act.

2. See Benjamin on Sale, 8th Edn., p. 938.

3. (1825) 4 B. & C. 941 cited at p. 637 ante.

4. (1828) 1 Dans. & L. 193 : 34 R.R. 767.

5. See also Bunnay v. Poyntz, (1833) 4 B. & Ad. 568 ; 2 L.J.K.B. 55 ; 38 R.R. 309.

6. Per Grose J. in *Hammondas v. Barclay*, (1802) 2 East 245, approved by Eve J. in *Dyson v. Peat*, (1917) 1 Ch. 99, 103. See Aggarwala's Law of

Agency, p. 463.

7. Per Bayley B. in *Miles v. Gorton*, (1834) 2 C. & M. 511 : 3 L.J. Ex. 155 ; 39 R.R. 820.

8. See Benjamin on Sale, 8th Edn., p. 839.

9. *Maneckjee v. Wadilal*, A.I.R. 1926 P.C. 38 : 50 Bom. 360 : 94 I.C. 824. See also *Lord's Trustee v. Great Eastern Railway*, (1908) 2 K.B. 54, 60, per Cozens Hardy M.R. "possession is.....the vital and essential element in lien."



He may have given a bill of lading which passes the legal property in the goods or he may have given a delivery order which, though it does not pass the title or property in the goods, enables the person receiving it to acquire possession of the goods and to acquire title in the way. But whatever he has done in that respect does not as between himself and the buyer destroy his right of lien as long as he keeps possession of the goods as vendor and in no other character.<sup>1</sup> Thus it has been held that the fact that a delivery order has been given does not of itself give the buyer such a possession of the goods as to defeat the seller's lien for the price,<sup>2</sup> but where the seller is estopped by his own conduct from denying that he had received payment for the goods to which the delivery order relates, he cannot exercise the lien under this section.<sup>3</sup>

A seller will be in possession notwithstanding that some degree of contract is given to the buyer, so long as the seller has not done anything to allow the goods to pass into the uncontrolled possession of the buyer. Thus the seller preserves his lien over goods stored in a place to which the buyer has access, but from which he cannot remove the goods without the seller's consent as, for example, where the buyer has the inner, but the seller has the outer key.<sup>4</sup>

The lien pre-supposes that the property in the goods has passed. A person cannot have a lien on his own goods.<sup>5</sup>

The possession of servant or bailee of the seller is sufficient for the purpose of the section.<sup>6</sup>

Possession is the fact of control coupled with a legal claim and right to exercise it in one's own name against the world at large.<sup>7</sup>

Whether seller has retained a sufficient hold over the goods is a question of intention and fact. Where, *e.g.*, a garage-owner sells a second-hand car, which at the time of the sale is in a lock-up garage in his yard, and hands buyer the key of the garage in order to enable him to carry out repairs on the car, seller retains possession until he allows buyer to remove the car indefinitely from his yard; he must not do anything that amounts to an abandonment of the power, to exercise his right of retention.<sup>8</sup> In *Great Eastern Railway Co. v. Lord's Trustee*,<sup>9</sup> the company opened a monthly credit account for railway charge in favour of Lord, a coal merchant; the agreement provided for a continual lien for the company's charge upon Lord's coal on the lines of the company and on ground rented from the company. By a separate agreement the company let Lord some ground within the railway yard

1. *Imperial Bank v. London & St. Katherine Dock Co. Ltd.*, (1877) 5 Ch. Div. 195, 200, Per Jessel M.R.  
 2. *Le Geyt v. Harvey*, (1884) 8 Bom. 501.  
 3. *Anglo-Indian Jute Mills Co. v. Omademull*, (1910) 38 Cal. 127; 10 I.C. 879.  
 4. *Milgate v. Kebble*, (1841) 3 M. & G. 100; 60 R.R. 475; *Ex-parte Willoughby*, (1881), 16 Ch. D. 604, S.C. (1908) 2 K.B. 54; cf. *Wrightson v. McArthur*, (1921) 2 K.B. 807 (delivery of key of locked room); *Lord's Trustee v. Great Eastern*

*Railway Company*, (1903) 2 K.B. 54; *Albemarle Supply Co., v. Hind & Co.*, (1928) 1 K.B. 307.  
 5. *Nippon Yusen Kaisha v. Ramjibhan*, A.I.R. (1938) P.C. 152; I.L.R. (1938) 2 Cal. 381; 174 I.C. 564.  
 6. *Owenson v. Morse*, (1796) 101 E.R. 856.  
 7. *Pollock & Wright*, 'Possession in the Common Law', p. 16.  
 8. Per Fletcher Moulton L.J., in *Lord's Trustee v. Great Eastern Railway*, (1908) 2 K.B. 54, 64.  
 9. (1909) A.C. 109; (1908) 2 K.B. 54.



for the purpose of stacking and dealing with the coal. The company had the keys of the yard gates which they could lock at any time. Lord became bankrupt and the company claimed a lien on coal in the yard for arrears of railway charges. It was *held* that the company had retained possession of the coal and consequently was entitled to the lien.

*Where seller deposits the goods with a third person, who agrees to hold them as his agent or bailee, seller continues to be in possession of them and can exercise his lien until the third person has delivered the goods to buyer or attorned to him.*<sup>1</sup> Where, e.g., a fur dealer sells skins which are deposited in a warehouse, he is entitled to the unpaid seller's lien whilst the goods are in the custody of the warehouse-man. But where the terms of the contract of bailment are such that the bailee might advise the goods with other goods so that they lose their identity e.g., grain in a silo or gold bars in a bank deposit, the seller has lost possession of them and can no longer claim his lien.<sup>2</sup>

Ss. 45 (1) (a) and 47 (1) provide that seller can claim the lien 'for the price.' In this connection the distinction should be noted between seller's personal remedies against buyer and his rights against the goods of which the lien is one. When the seller has retained the property in the goods, his action against buyer personally is for damages for non-acceptance but normally not for the price (Ss. 55, 56); but by virtue of S. 45 (2) he can still exercise his right of retention against the goods 'for the price' though he might have to sell the goods in reasonable mitigation of damages.

It appears that the seller's lien extends only to the price but not to any claim for storage or other charges incidental to the retention of the goods; where these charges accumulate, seller's remedy is to use his right of resale.<sup>3</sup>

Buyer who wishes to obtain the release of the goods from seller's lien has to tender the correct amount due to the latter but may claim the goods without such tender, if seller, 'claiming the lien for a wrong cause or amount, makes it clear that he will not release the goods unless his full claim is satisfied, and that claim is wrongful';<sup>4</sup> but seller, who originally claimed the lien for an excessive or wrongful claim, is not thereby debarred from later claiming it for the right claim.

The contention that the seller's exercise of the right of lien begins when a demand for delivery is made from him, by the buyer and is followed by a refusal by him, is not well founded. It puts a very narrow interpretation on the language of S. 47. The result of accepting this interpretation will be that by simply keeping quiet the buyer could deprive the seller of his exercise of the right of lien. This could never have been the intention of law.

1. See *Ancona v. Rogers*, (1876) 1 Ex. D. 285, 292; *Imperial Bank v. London and St. Katherine Docks Co.*, (1877) 5 Ch. D. 195.

2. *Dollfus Miegiet Cie v. Bank of England*, (1950) 2 All E.R. 605; (1950) Ch. 333.

3. See *Booth Steamship Co. Ltd., v. Cargo Fleet Iron Co. Ltd.*, (1916) 2

K.B. 570, 602; *Somes v. British Empire Shipping Co.*, (1860) 8 H.L. Cas. 338, 345 (Shipwright's lien for ship repairs).

4. Per Scrutton L.J. in *Albemarle Supply Co. Ltd. v. Hind & Co.*, (1928) 1 K.B. 307, 318. See Schmitthoff, 'The Sale of Goods', p. 132.



Thus where the goods are ascertained by the buyer and are in a deliverable state, the property in the goods passes to the buyer under S. 20 as soon as the contract was made. If the seller is allowed to retain possession of goods till the payment of price and no period of credit is given to the seller (buyer ?) in respect of them, the case falls under sub-sec. 1(a) of S. 47 and the seller's lien commenced from the time of the making of the contract.<sup>1</sup>

**(3) Lien extends only to price—sale on credit—insolvency of buyer—clauses (b) and (c).**

The lien extends only to the *price*. If by reason of the buyer's default the goods are kept in warehouse, or other charges are incurred detaining them, the lien does not extend to such a claim, and the seller's remedy is personal against the buyer.<sup>2</sup> The fact that there is an unadjusted account current between the seller and the buyer will not divest his right, but the case may be different if there is any ascertained balance against the seller.<sup>3</sup>

As the seller's lien is a right solely for the purposes of securing payment of the price, it follows that a tender of the price puts an end to the lien if the seller declines to receive the money.<sup>4</sup>

During the currency of the bill given in payment the seller is paid, but on its dishonour, or the buyer's insolvency, the seller becomes unpaid and his lien revives.<sup>5</sup>

A sale is on credit when the seller agrees to accept payment at a future date, and there is nothing to show that the buyer is not entitled to immediate delivery. A sale on credit excludes the lien during the currency of the credit,<sup>6</sup> unless there be a trade usage to the contrary.<sup>7</sup> "It is..... undoubted law that, by sale of specific goods for an agreed price, the property passes to the buyer and remains at his risk.....and it is equally clear law that, where by the contract the payment is to be made at a future day, the lien for the price, which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods without payment upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment."<sup>8</sup>

If the buyer becomes insolvent, the fact that the seller has negotiated the buyer's acceptance taken as conditional payment, and that the instrument is outstanding, does not prevent the seller being an unpaid seller.<sup>9</sup>

1. Kalka Prasad Ram Charan v. Harish Chandra, A.I.R. 1957 All. 25.

2. British Empire Shipping Co. v. Somes (1858), E.B. & E. 353, Ex. Ch, at p. 367; affirmed Somes v. British Empire Shipping Co., (1860) 8 H.L.C. 338, 125 R.R. 186.

3. Wood v. Jones, (1825) 7 D. & R. 126; Vertue v. Jewell, (1814) 7 Camp. 31; Anglo-India Jute Mills v. Omademull, (1910) 38 Cal. 127; seller estopped from denying payment.

4. Martindale v. Smith, (1841) 1 Q.B. 389; 55 R.R. 285.

5. Valpy v. Oakeley, (1851) 16 Q.B. 941; 83 R.R. 786; Griffiths v. Perry, 28 L.J.

Q.B. 204; 1 E. & E. 680; 117 R.R. 357.

6. Spartali v. Benecke, (1850) 10 C.B. 212, at p. 223.

7. Field v. Lelean, (1861) 6 H. & N. 617, Ex. Ch.

8. Spartali v. Benecke, *supra*, per Wilde, C.J.

9. Halsbury, 3rd Edn., Vol. 34, pp. 120, 121 citing Miles v. Gorton, (1834), 2 Cr. & M. 504 at p. 512; Gunn v. Bolckow, Vaughan & Co., (1875), 10 Ch. App. 491, overruling on this point Bunney v. Poyntz (1833), 4 B. & Ad. 568.



Where specific goods were sold to be paid for by cash in one month, less 5 per cent discount, this was held to be a sale on month's credit, and not a sale for ready money with a month's grace.<sup>1</sup>

"Even where the parties agree upon a sale on credit, the seller's lien may revive. By the nature of such a sale, the buyer is entitled to possession of the goods without paying the price; but if he fails to exercise his right until the term of the credit has expired and the price becomes due, he loses the right which he theretofore had.

"It may be urged that the original agreement shows that the seller did not rely upon his lien in such a case; but the existence of a lien does not depend upon the interpretation of the contract, but upon a rule of law which is imposed by reasons of its inherent justice. After the term of credit has expired, the buyer is by the terms of the contract bound immediately to pay the price and the seller to deliver the goods, and it is a general principle of contracts that wherever the parties to a bilateral agreement are each under an immediate agreement to perform, the performances are concurrently conditional."<sup>2</sup>

It is to be noted that it is immaterial that the seller holds the goods as bailee from the buyer. Indeed, this is always the situation where the seller's lien is in question; for the property having passed, the seller is necessarily holding the buyer's goods and, therefore, acting as bailee for him. And though the seller has charged the buyer storage for the goods, the lien still may be asserted.<sup>3</sup>

Where the buyer becomes insolvent, the unpaid seller becomes entitled to his right of lien, whether credit has been given or not, and whether or not the insolvency occurs during the period of credit.<sup>4</sup> Provision in clause (c) being perfectly general, the seller's lien will revive even when the period of credit has not expired at the time when the buyer becomes insolvent. Insolvency before the due date of the bill of exchange revives the lien.<sup>5</sup>

It will be open to the assignee in insolvency of the buyer to elect to affirm the contract within a reasonable time and obtain the goods on payment.<sup>6</sup> A sub-purchaser would probably have the same right.<sup>7</sup> The effect of the buyer's insolvency is that all stipulations as to credit are put an end to and the seller has a right to say, "I will not deliver the goods until I see that I shall get my price."<sup>8</sup> But a repudiation of the contract

1. *Sparatoli v. Benecke*, (1850) 10 C.B. 212, per Wilde C.J.

2. *Williston on Sales*, Revised Edn., Vol. III, S. 507 at p. 104.

3. *Ibid*, pp. 106, 107.

4. *Bloxam v. Sanders*, (1825) 4 B. & C. 941; 28 R.R. 519; *Grice v. Richardson*, (1877) 3 App. Cas. 319, P.C. See *Re Nathan Ex-Parte Stapleton*, (1879) 10 Ch. D. 586, C.A.; *Re Edwards Ex-parte Chalmers*; (1873) 8 Ch. App. 239.

5. *Re Phoenix Co., etc.*, (1876) 4 Ch. D. 108.

6. *Grey v. Lamond*, (1913) 40 Cal. 523; 18 I.C. 753; *Ex-parte Stapleton*, (1879) 10 Ch. D. 586, C.A.; *Mess v. Duffus*, (1901) 6 Com. Cas. 165 (action for damages for non-acceptance).

7. *Exp. Stapleton* (supra); *Kemp v. Falk*, (1882) 7 App. Cas. 573 at p. 578; *Pritchett v. Currie*, (1916) 2 Ch. 515; lien of sub-contractor who supplied goods to the seller who became insolvent before payment by the buyer.

8. *Griffiths v. Perry*, (1859) 1 E. & E. 680 at p. 688.



on the insolvency of the buyer will be presumed if his assignee does not within a reasonable time intimate to the seller that he intends to complete contract or tender the price.<sup>1</sup>

Even if the seller has broken his contract to deliver while the buyer is solvent, his lien revives on the buyer becoming insolvent, and the buyer's trustee is only entitled at most to nominal damages for the breach, unless the value of the goods at the time of breach was above the contract price.<sup>2</sup>

As regards instalment contracts, Mellish L.J. says: "The seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered.....It would be strange if the right of a vendor who had agreed to deliver goods by instalments were less than that of a vendor who had sold specific goods."<sup>3</sup>

For the purposes of the present section a person is to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of insolvency or not [*vide S.2 (8) ante*]. It is not necessary that he should be adjudged an insolvent.

The vendee purchased a second-hand refrigerator for Rs. 120 and it was agreed between him and the vendor that the refrigerator should be put in order at a cost of Rs. 320. The purchaser took delivery and admitted that its condition was satisfactory. Later, he said that it was not in working order and the vendor took away two parts of it for further repairs, the thermostat and the engine. The full bill for repairs had not, however, been paid and the vendor claimed a lien on the parts taken for the balance of the original cost of repairs and refused to return the same until he was paid the balance due for the original repairs. *Held*, that when the contract was fully performed and when the goods were handed back (although cost of the repairs had not been fully paid) the lien was ended and it could not be revived because the vendor undertook further repairs.<sup>4</sup>

#### (4) Clause (a)—no stipulation as to credit.

The law applicable where there is no provision as to credit was thus stated by Bayley B. in *Miles v. Gorton*<sup>5</sup> :

"The general rule of law is, where there is a sale of goods, and nothing is specified as to delivery or payment, although everything

1. *Ex-parte Chalmers*, (1878) L.R. 8 Ch. at p. 294; *Morgan v. Bain*, (1874) 4 L.R. 10 C.P. 15; *Grey v. Lamond*, (1913) 40 Cal. 523, 531; *Kemp v. Falk*, (1882) 7 A.C. 573, 575.  
2. *Valpy v. Oakeley*, and *Griffiths v. Perry*, *supra*.

3. *Ex-parte Chalmers*, (1873) L.R. 8 Ch. App. 289. at p. 293; cf. *Exp. Stapleton*, *supra*.  
4. *Eduljee v. John Bros.*, A.I.R. 1943 Nag. 249; 209 I.C. 356.  
5. (1834) 2 C. & M. 504, at p. 511; 39 R.R. 820.



may have been done so as to divest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until payment of the price."

**(5) Sub-section (2)—seller in possession as bailee of the buyer.**

Sub-section (2) deals with the question whether a seller is entitled to exercise his right of lien when he is in possession of the goods as an agent or bailee of the buyer. The old common law rule was that though the goods may remain in the possession of the seller, yet, if it is agreed between the seller and the buyer that the former's possession shall thenceforth be that of a bailee for the buyer, and not that of a seller, the right of lien is gone if the buyer was merely in default, being solvent.<sup>1</sup> The lien is only revived if the buyer becomes insolvent.<sup>2</sup>

The common law rule was abrogated in England by section 41(2) of the English Act and section 47(2) of the Indian Act is based on the statutory rule adopted in that sub-section. It definitely states that the seller may exercise his right of lien notwithstanding that he is in possession of the goods, as agent or bailee for the buyer.

If the buyer be solvent, and entitled to credit, he can of course during the currency of the credit call upon his agent, the seller, to deliver the goods, for at that time there is no "right of lien" for the seller to exercise.<sup>3</sup>

If the goods are in the possession of a third party who is holding goods as the agent of the seller, the lien attaches ; but it is not available after such third party attorns to the buyer<sup>4</sup>.

It may be observed that in India no question arises as to whether such an arrangement between the seller and buyer will now constitute a "receipt" sufficient to satisfy the Statute of Frauds. It, however, appears that the provisions of this sub-section will not be entirely irrelevant if in any case the question should arise whether the seller is in possession within the meaning of section 30(1).

Williston observes :<sup>5</sup> "If the buyer refuses to receive the goods after they have been delivered to a carrier or other bailee on his behalf, though the seller has parted with both the property and possession, he may reclaim the goods and revest himself with his lien."

"Likewise if the buyer returns the goods to the seller in wrongful repudiation of the sale the lien is revived ; but the seller should make clear that he is not assenting to a rescission to prevent an inference from taking the goods back and resuming dominion over them, that he is assenting to a discharge of the original sale. If, however, the goods are returned to the seller for a special purpose, the lien that has been lost by the original delivery is not revived."

1. *Cusack v. Robinson*, (1861) 30 L.J. Q.B. 261 at p. 264 ; (1861) B. & S. 299, at p. 308.
2. *Townley v. Crump*, (1835) 4 A. & E. 58 ; *Grice v. Richardson*, (1877) 3 App. Cas. 319, P.C.
3. Per Bayley J. in *Bloxam v. Sanders*, *supra* ; see *Benjamin on Sale*, 8th

- Edn., p. 845.
4. See *McEwan v. Smith*, (1849) 2 H.L. Cas. 309 ; *Poulton v. Anglo-American Oil Co*, (1911) 27 T.L.R. 216 ; *Hammond v. Anderson*, (1809) 2 Camp. 243.
5. *Williston on Sales*, Revised Edition, Vol. III, S. 507b, pp. 107, 108.



**48.** Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Part delivery.

### Synopsis

- |  |   |
|--|---|
| (1) <i>Part delivery.</i>                            | <i>as bailee of seller.</i>                       |
| (2) <i>Part delivery under instalment contracts.</i> | (4) <i>When goods in the custody of a bailee.</i> |
| (3) <i>Buyer may be let into possession</i>          |   |

#### (1) Part delivery.

This section follows section 42 of the English Act (See Appendix A) and the principle is to be found in the *illustration* to old section 106 of the Indian Contract Act (See Appendix B). It states that the unpaid seller's lien is not lost by reason of the seller making a part delivery, unless such part delivery is tantamount to a waiver of the lien.<sup>1</sup>

A part delivery may or may not be a delivery of the whole according to the intention of the parties. In *Kemp v. Falk*,<sup>2</sup> Lord Blackburn said :

"In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intended it as delivery of the whole, then it is a delivery of the whole : but if either of the parties does not intend it as a delivery of the whole if either of them dissents, then it is not a delivery of the whole.....and the onus is on those who say it was so intended."

In other words a delivery of part is *prima facie* only a delivery of that part. This adopts the common law rule.

Although a delivery of part of goods in progress of the delivery of the whole, has the same effect for the purpose of passing the property in such goods, as a delivery of the whole ; and a delivery of part of the goods with an intention of severing it from the whole, does not operate as a delivery of the remainder for such purpose,<sup>3</sup> yet in either case, whether it is made in progress of the delivery of the whole or with an intention of severing it from the whole, it does not operate to extinguish the lien of the unpaid seller in the part undelivered.<sup>4</sup> But this rule is only specially meant for the protection of the seller's right of lien. So where there is none, there is no occasion for application of section 48.

Where the circumstances under which delivery of part of the goods is made are such as to raise an inference that the seller agrees to waive

1. *Dixon v. Yates*, (1833) 5 B. & Ad. 313, at p. 341, 39 R.R. 489, 499 : *Miles v. Gorton*, (1834) 2 Cr. & M. 504, 39 R.R. 820.

2. (8882) 7 A.C. 573, at p. 586. See also *Ex. p. Cooper* (1879) 11 Ch. D. 68, C.A. at p. 73, per Brett L.J.—Onus on the party who asserts that delivery

of a part was as a delivery of the whole.

3. See section 34, *supra*.

4. *Bunney v. Poyntz*, (1833) 4 B. & Ad. 568 ; *Tanner v. Scovell*, (1845) 14 M. W. 28 ; *Dixon v. Yates* (1833) 5 B. & Ad. 313,



his right of lien, such part delivery may destroy the lien in the rest of the goods as well as which remain undelivered.<sup>1</sup> Such agreement may be inferred where the delivery is of an essential part of the goods sold, as for example, an essential part of a machine,<sup>2</sup> or where the character of the person taking delivery, or the object for which it is taken, is such as to show a common intention to treat the part delivery as a delivery of all the goods,<sup>3</sup> or where part delivery takes place in circumstances showing that the seller's agent in possession of the goods has acknowledged to the buyer that he holds the goods on his behalf.<sup>4</sup>

But the fact that the goods are in the seller's own possession is important to show that a part delivery is not intended as a complete delivery.<sup>5</sup> In this case the sellers sold a parcel of hops consisting of two kinds; twelve packets of Kent and ten packets of Sussex hops. They rendered one invoice for the whole, which expressed that the goods remained at rent for account of buyer. A bill of exchange was given in payment. The buyer sold the ten packets, and they were delivered to his sub-buyer. He afterwards became bankrupt, his acceptance was not paid, and his assignees brought trover against the sellers for the twelve packets remaining on hand. It was *held* that the delivery of part did not constitute delivery of the whole, not being so intended by both parties.

This section is very similar to section 34 and the principles enunciated in the cases cited under that section equally apply to this and may be referred to.<sup>6</sup>

In *Tanner v. Scovell*,<sup>7</sup> M bought of B certain goods, "delivered alongside the wharf" The sellers gave the following order, addressed to the defendants: "Please weigh and deliver to Mr. M forty-eight bales glue pieces." The defendants weighed and sent a return of the weight to B who thereupon sent invoice to M. About a month later the defendants delivered five of these bales to a sub-buyer of M on the latter's order. Other vessels arrived with further goods, which were treated in the same way by handing delivery orders to M, and by having the goods weighed, and invoices sent to him. But no transfer of any of the goods was made on the defendant's books to M, nor was any rent charged to him. Another partial delivery was made to a sub-buyer of M, and the sellers then notified to defendants to make no further deliveries, M being then in debt to them about £ 700. M became bankrupt and his assignees brought action in trover against the defendants. *Held*, first, that the evidence failed to show that the defendants had agreed to become bailees for the buyer; and, secondly, that the delivery of the part removed from the

1. *Bunney v. Poyntz*, (1833) 4 B. & Ad. 568; *Tanner v. Scovell*, (1845) 14 M. & W. 28; *Dixon v. Yates*, (1833) 6 B. & Ad. 313.

2. *Re McLaren Ex-p. Cooper*, (1879) 11 Ch. D. 68 at p. 75.

3. *Jones v. Jones*, (1841) 1 M. & W. 531.

4. *Hammond v. Anderson*, 1 B. & P.N.R. 69.

5. *Miles v. Gorton*, *supra*.

6. See *Slubey v. Heyward*, 2 Bl. H. 505, 3 R.R. 486; *Hammond v. Anderson*, 1 B. & P.N.R. 69, 8 R.R. 763. (In these two cases there was a delivery of the

whole, not because a part was carried away, but because the seller's agent and bailee in each case had attorned to the buyer. There was in each case an agreement between the seller, the buyer and the bailee, that the last named should thenceforth hold for account of the buyer. In *Bunney v. Poyntz*, (1833) 4 B. & Ad. 568, 38 R.R. 359; the intention of both parties was to separate the part delivered from the residue, and vendee took possession of part only.

7. (1845) 14 M. & W. 28.



wharf was not intended to be, and therefore did not operate as a delivery of the whole, but was a separation for the purposes of that part only.

No case has been met with where the delivery of part has been held to constitute a delivery of remainder when kept in the *seller's own custody*.<sup>1</sup>

Williston<sup>2</sup> states the principle thus: "When part of the goods are delivered the seller has a lien upon the remainder, not simply for the proportion of the price which is due on account of the goods so retained, but for whatever portion of the price is unpaid. It is said in the cases that if delivery of the part is intended as a symbolical delivery of the whole, and a waiver as to any right of return, as to the remainder, the lien is lost'. Doubtless it is possible for a seller to agree to give up his lien, but it is probable that the intent to make such an agreement would need to be quite explicit in order to deprive the seller of his right.

"The cases must be distinguished where the part delivery is made to a sub-purchaser. As will be seen,<sup>3</sup> the seller's lien is destroyed if he agrees to hold as bailee for a sub-purchaser, and delivery of a part to a sub-purchaser would be strong evidence of an assent to hold as bailee for him. On the other hand, as has been said, an agreement by the seller to hold as bailee for the buyer does not deprive the seller of his lien. Whether or not the agreement to hold as such bailee be called a constructive delivery, it is not such a delivery as destroys the seller's lien."

## (2) Part delivery under instalment contracts.

Section 48 obviously pre-supposes that there is an existing "right of lien" at the time when the delivery of the remainder of the goods is claimed after a part delivery. Accordingly, for example, if the goods are deliverable by instalments which are not to be separately paid for, as payment is due only on full delivery, the seller has no lien *ab initio*, and the buyer can claim delivery of all the goods. But the lien will come into existence in circumstances like the buyer's insolvency.<sup>4</sup> Where the contract is an entire contract *i.e.* for a single price, although delivery is agreed to be made by instalments the seller is entitled to retain goods in his possession for the entire sum which remains unpaid if entire price is not to be paid for on complete delivery.<sup>5</sup>

As regard severable contracts, if, for instance, delivery is to be made by three instalments, and the first instalment has been delivered and paid for and the second has been delivered but not paid for, the seller cannot withhold delivery of the third instalment till he has been paid for both the second and third instalments, unless (1) the non-payment involves a repudiation of the contract under section 38 *ante*, or (2) the buyer is insolvent.<sup>6</sup>

1. See Benjamin on Sale, 8th Ed., p. 856.

2. Williston on Sales, Revised Edition, Vol. III, S. 509, p. 108.

3. See under S. 53 post.

4. Per Jessel M.R., in *Ex-p. Carnforth Haematite Iron Co.*, (1876) 4 Ch. D. 108, at 113. See Halsbury; 3rd Edn., Vol. 34, p. 123, f.n. (r).

5. See Halsbury, *ibid* pp. 123, 124 and

f.n. (u).

6. *Ex-p. Chalmers* (1873) L.R. 8 Ch. App. 289; cf. *Sooltan Chand v. Schiller*, (1878) 4 Cal. 252; *Chalmers, Sale of Goods Act*, 16th Edn., pp. 175, 176; *Steinberger v. Atkinson & Co.*, (1914) 31 T.L.R. 110, no lien on goods delivery of which was wrongfully refused.



But any instalment which has been paid for must be delivered, even though the buyer be insolvent.<sup>1</sup>

As already observed under section 47, the trustee in bankruptcy of a bankrupt purchaser, and it seems also a sub-purchaser, may elect to fulfil the contract by tendering the price in full within a reasonable time, although the seller is not bound to tender the goods.

**(3) Buyer may be let into possession as bailee of seller.**

In order that the seller's lien may be divested, the possession taken by the buyer must be taken in his capacity of buyer. For the buyer may be let into possession of the goods for a special purpose, or in a different character from that of buyer.

Thus A might refuse to deliver a horse sold to B *qua* purchaser but lend it to him for a day or a week.<sup>2</sup> Where a watch was lent by the pawnee to the pawnor, it was *held* that the pawnor possessed as agent of the pawnee, and that they could recover the watch in trover against third person, to whom the pawnor had pledged it a second time.<sup>3</sup> In *North Western Bank v. Poynter*,<sup>4</sup> pledgees of a bill of lading who had handed it to the pledgers to enable the latter to sell the cargo on account of the pledgees were held not to have lost their security, the pledger's possession being only that of the pledgees' agents for a special purpose.

**(4) When goods in the custody of a bailee.**

When the goods are in the custody of some bailee of the seller's it may appear that the bailee had, with the consent of the seller, attorned to the buyer in respect of the whole, and where this is not the case it must still be shown that the part delivery took place in such circumstances as to make it a delivery of the whole.<sup>5</sup>

It may be observed that a decision under the Statute of Frauds in England, that an acceptance of part of goods ordered, where the contract included several classes of goods, made the contract enforceable as to all the goods contracted for, and not only as regards the parts to which the parcel accepted belonged,<sup>6</sup> has nothing to do with the effect of part delivery as regards the seller's lien or right to stop in transit either at common law or under the present Act.<sup>7</sup>

**Termination of lien. 49. (1) The unpaid seller of goods loses his lien thereon—**

1. *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, (1877) 5 Ch. D. 295. See also *Longbottom & Co. Ltd. v. Bass, Walker & Co.*, (1922) W.N. 245, 246, per Atkin L.J.—where the contract is severable, *i.e.*, where it provides for several payments for several portions of goods, S. 48 applies only to the individual instalment and seller has no lien as regards those portions of the goods which have been actually paid for.  
2. *Tempest v. Fitzgerald*, (1820) 3 B. & Ald. 680 ; 22 R.R. 526.

3. *Reeves v. Capper*, (1838) 5 Bing. N.C. 136, 50 R.R. 634.  
4. (1895) A.C. 56.  
5. Compare *Tanner v. Scovell*, *supra*, with *Hammond v. Anderson*, *supra*. in this connection. In the latter case the buyer had, in addition, weighed and, therefore, had actual Physical possession of the whole.  
6. *Elliott v. Thomas*, (1838) 3 M. & W. 170, 49 R.R. 550.  
7. See *Sale of Goods Act*, by Pollock and Mulla, p. 244.



(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

(b) when the buyer or his agent lawfully obtains possession of the goods ;

(c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

### Synopsis

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|--|---|
| (1) <i>Termination of lien.</i>  | (5) <i>Waiver by seller's wrongful repudiation of contract or claim of possession on other grounds.</i> |
| (2) <i>Clause (a)—loss of lien on delivery to a carrier or other bailee.</i> | (6) <i>Sub-section (2)—decree for the price—lien not destroyed by judgment for the price.</i>           |
| (3) <i>Clause (b)—on buyer obtaining possession.</i>                         |   |
| (4) <i>Clause (c)—waiver of lien.</i>  |   |

#### (1) Termination of lien.

This section follows section 43 of the English Act. There was no corresponding provision in the Indian Contract Act. This section declares that the unpaid seller of goods loses his lien thereon—

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

(b) when the buyer or his agent lawfully obtains possession of the goods ;

(c) by waiver thereof.

Blackburn observes:<sup>1</sup>

“When the vendor has given the buyer possession under the contract of sale, all his rights in the goods are completely gone ; he must recover the price exactly as he would recover any other debts and has no longer any claim on the goods sold superior to those of any other creditor. The delivery and acceptance of possession complete the sale, and give the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price be unpaid and the buyer insolvent unless, indeed, the whole transaction is vitiated by actual fraud.”

#### (2) Clause (a)—loss of lien on delivery to a carrier or other bailee.

The unpaid seller's lien is a possessory lien and the right is available so long as the seller remains in possession of the goods either himself or through his agents.<sup>2</sup> When goods are delivered to a carrier or other

1. Blackburn on Sale, 3rd Ed., p. 341.

2. Cf. *Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co.*, A.I.R. 1926

P.C. 38 : (1926) 50 Bom. 360 : 94 I.C. 824 (sale of shares).



bailee, such as a forwarding agent of the buyer, for being transmitted to the buyer, without reserving the right of disposal under section 25 (1) *ante*, the lien is lost. This is so because such delivery is *prima facie* deemed to be a delivery to the buyer.<sup>1</sup> The reservation of the right of disposal, indeed, prevents the delivery to the carrier being a delivery to the buyer but as in such cases the property remains in the seller,<sup>2</sup> no question of the parting with his lien really arises, for the right of lien only comes into existence when the property has passed.<sup>3</sup> But when the property has passed, and the seller, though entitled to retain possession, deliberately parts with the possession by delivering the goods under the contract, he abandons his rights over the goods. A right of stoppage *in transitu*, however, arises should the buyer become insolvent and if this is exercised the right of lien revives.<sup>4</sup>

The phrase 'without reserving the right of disposal' here means 'without constituting the carrier the seller's own agent,' instead, as is generally the case, the agent of the buyer as under section 39, sub-section (1).<sup>5</sup> Thus shipment when the bill of lading is taken to the order of the seller or his agent is a delivery to the master as the agent of the seller.<sup>6</sup> In all cases in which the seller constitutes himself or his agent as the consignee of the goods or agrees to deliver the goods at their destination, possession of the goods being still with the seller, his lien continues over them. But when the delivery to the carrier is such or under such circumstances as to constitute the carrier an agent of the buyer, the carrier being a bailee of the buyer the possession passes to the buyer, and there being left no control of the goods in the seller the lien is extinguished.

A delivery order is however a mere token of authority to deliver. Therefore, the giving of a delivery order by the vendor the vendee does not of itself give the vendee such a right to the goods as to enable him to defeat the vendor's lien.<sup>7</sup> A delivery order properly so-called is a mere promise to deliver<sup>8</sup>, and delivery is not complete until the bailee attorns to the buyer and thus becomes the buyer's agent as custodian of the buyer.<sup>9</sup> The seller's lien is not affected until the buyer has obtained possession of the goods or the acceptance of the delivery order by the bailee signifying the bailee's assent to hold on his behalf.<sup>10</sup> These cases however should be carefully distinguished from the cases where, although the bailee has

1. See *Owenson v. Morse*, (1796) 7 T.R. 64.

2. See section 39(1), *ante*.

3. See section 25(1).

4. The buyer may redeliver the goods to the seller or, in certain cases, agree to the seller re-taking possession of the goods [*Bhimji N. Dalal v. Bombay Trust Corporation*, A.I.R. 1930 Bom. 306 : 54 Bom. 381], with the right to hold them on the same terms as if he had the seller's lien : but here the right is created by express contract, and does not, as does the seller's lien properly so-called, arise by implication of law ; and such transactions may amount to a fraudulent preference, *Re O' Sullivan*, (1892) 61 L.J.Q.B. 228 : cf. *In re Nripendra Kumar Bose*, A.I.R. 1930 Cal. 171 : 56

Cal. 1074. Apart from such an express contract, the seller regains no rights over the goods by obtaining possession of them from the buyer, *Valpy v. Gibson*, *infra*.

5. *Craven v. Ryder*, 6 Taunt. 433 ; *Ruck v. Hatfield*, (1822) 4 B. & Ald. 632.

6. *Wait v. Baker*, (1848) 2 Exch. 1 ; *Gabarron v. Kreeft*, *Kreeft v. Thompson*, (1875) L.R. 10 Exch. 274.

7. *Le Geyt v. Harvey*, 8 Bom. 501.

8. *Ibid* ; *Gillman v. Carbutt*, 61 L.T. 281 ; *J.C. Shaw v. Bill*, 8 Mad. 38 ; *G.I.P. Railway Co. v. Hanumandas*, 14 Bom. 501.

9. *Bentall v. Burn*, 3 B. & C. 423 ; *Farina v. Home*, 16 M. & W. 110.

10. *McEwan v. Smith*, (1849) 2 H.L. Cas. 309 ; *Griffiths v. Perry*, 1 E. & E. 680.



accepted a delivery or other order constituting himself as the agent of the buyer, the buyer's title to the goods is not complete because something yet remains to be done to the goods by the seller or the bailee as the seller's agent.<sup>1</sup> In such cases, in spite of the delivery or other order having been accepted by the bailee, if the buyer becomes insolvent, the seller can countermand the order.<sup>2</sup> In such cases the right continues until that something which remained to be done by the seller and for want of which the buyer's title was incomplete is done and his title is completed.<sup>3</sup> The rules laid down above also apply *mutatis mutandis* to other documents of title.<sup>4</sup> But the endorsement of a delivery order or a bill of lading or other documents of title to the goods which entitles the buyer to demand the delivery of the goods from the carrier or custodian thereof without any further act being needed from the seller transfers to the buyer not only the property in such goods but also possession thereof and is a complete delivery<sup>5</sup> divesting the seller of the right of his lien on such goods.<sup>6</sup>

In *Valpy v. Gibson*<sup>7</sup>, the goods were ordered of the Manchester sellers and sent to forwarding house in Liverpool by order of the buyer, to be forwarded to Valparaiso : but the Liverpool house had no authority to forward *till receiving orders* from the buyer. The buyer ordered the goods to be relanded after they had been put on board, and sent them back to the sellers, with orders to repack them into eight packages, instead of four and the sellers accepted the instructions in writing. "We are now repacking them in conformity with your wishes." While they were still in the possession of the sellers for the purpose, the buyer became insolvent. Thereupon the sellers refused to deliver them to the buyer's trustee in bankruptcy except upon payment of the price. *Held*, that the right of stoppage was lost and the seller had lost their lien by delivering the goods to the shipping agent, that the *transitus* was at an end when the goods reached the forwarding agents, and that the redelivery to the sellers for a new purpose could give them no lien.

The seller may, however, undertake to deliver the goods to the buyer at the destination, and the carrier is then the seller's agent.<sup>8</sup>

The seller may also reserve the right of disposal, which he *prima facie* does when, on shipment, he takes a bill of lading making goods deliverable to the order of himself, or his agent.<sup>9</sup> This reserves not only the right of property, but also the possession, for such a delivery is not a delivery to the buyer, but to the captain of the vessel on behalf of the person indicated by the bill of lading,<sup>10</sup> and it is by the endorsement and delivery only of the bill of lading that a symbolical delivery of the cargo is effected.<sup>11</sup>

1. See sections 21 and 22 *supra*.

2. *Busk v. Davis*, 2 M. & S. 397 ; *Wallace v. Breeds*, 13 East 522.

3. *Hammond v. Anderson*, (1803) 1 Bos. & P.N.R. 69.

4. *Farina v. Home*, 16 M. & W. 119 ; *Bartlett v. Holmes*, 22 L.J.C.P. 182.

5. *Sanders v. Maclean*, 11 Q.B.D. 327 (341).

6. See Bill of Lading Act, IX of 1856, sections 1 and 2.

7. (1847) 4 C.B. 827, 840.

8. *Dunlop v. Lambert*, (1838) 6 Cl. & F. 600, 49 R.R. 143 ; *Badische v. Basle Chemical Works*, (1898) A.C. 200, 67 L.J. Ch. 141.

9. Section 25(2) *ante*.

10. Per Parke B. in *Walt v. Baker*, (1848) 2 Ex. 1 ; 76 R.R. 469.

11. Per Bowen L.J. in *Sanders v. Maclean*, (1883) 11 Q.B.D. 327, at 341 (C.A.) ; see *Benjamin on Sale*, 8th Edn., p. 848.



**(3) Clause (b)—on buyer obtaining possession.**

Section 33 *ante* explains the various methods by which possession can be given to the buyer, and clause (b) states that the unpaid seller of goods loses his lien thereon when the buyer or his agent lawfully obtains possession of the goods. This follows from the fact that the right of lien pre-supposes that the seller is in possession of the goods, and that it would naturally cease to exist as soon as the buyer or his agent lawfully obtains possession of the goods.<sup>1</sup>

In order to defeat the lien it is not necessary that the buyer should obtain possession of the goods ; it is enough if the seller parts with their possession. The right of lien for unpaid purchase money subsists only so long as the seller has the possession of the goods.<sup>2</sup> Once the seller delivers possession of the goods to the buyer the lien disappears under S. 49 of the Act. When the buyer obtains possession, both the rights of lien and stoppage in transit are lost and the seller's remedy is only for the price. In *Schotsmans v. L. & Y. Ry.*<sup>3</sup>, which was a case relating to stoppage in transit, delivery on board the buyer's ship was held *under the circumstances* to be delivery to the buyer.<sup>4</sup> Lord Chelmsford, L.C., however, observed (p. 335) : "Although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable."

The addition of the word "lawfully" shows that the possession must not be obtained tortiously as against the seller.<sup>5</sup> If possession of the goods is obtained by the buyer by some tortious act, the seller may take them back if he can do so, or sue the buyer in trover if he refuses to redeliver them, the reason being that the mere right to have possession of goods is a sufficient right upon which to found that action.<sup>6</sup>

When the goods are in the possession of a third person at the time of sale, the seller's lien continues until such third person attorns to the buyer.<sup>8</sup> Thus, where the seller's agent in possession of the goods attorns to the buyer with the seller's consent, the lien will cease.<sup>7</sup> Where the seller delivers the goods to the buyers on condition that the buyer is to hold them as the seller's bailee, the right of the seller to the goods is in the nature of a special property rather than a lien properly so-called.<sup>8</sup> If at the time of the contract the goods are in the possession of the buyer himself as the seller's bailee the completion of the contract of sale turns the buyer's previous possession as a bailee, into possession as owner and terminates the seller's lien. But attornment by the seller himself will not divest the lien.<sup>9</sup>

1. *Re McLaren, Ex-parte Cooper*, (1879) 11 Ch. D. 68, C.A.

2. *Central Finance and Housing Co. Ltd. v. British Transport Co.*, A.I.R. 1954 All. 195.

3. (1867) L.R. 2 Ch. App. 332, 335.

4. See *Wallace v. Woodgate* (1824) Ry. & M. 193 ; (1824) 1 C. & P. 575—The seller may revest his lien by peaceably retaking goods fraudulently removed by the buyer.

5. Cf. *Litt v. Cowley*, (1816) 7 Taunt.

169, 17 R.R. 482.

6. *Grigg v. National Guardian Assurance Co.*, (1891) 3 Ch. 206 ; *McEwan v. Smith*, (1849) 9 E.R. 1109, 81 R.R. 166 ; *Castle v. Swarder*, (1861) 6 H. & N. 828, 123 R.R. 860 . see section 36 (3) *ante*.

7. *Dodsley v. Varley*, (1810) 12 A. & E. 632, at p. 634, 54 R.R. 652, 654.

8. *Cain v. Moon*, (1896) 2 Q.B. 283 ; *Kilpin v. Ratley*, (1892) 1 Q.B. 582.

9. See section 42 (2) *ante*.



Where the seller allows the buyer to take the chattel temporarily, for the purpose of trying, and the buyer then refuses to return it to the seller, the result will be the same as in the case of obtaining possession by some tortious act. The delivery would not then be under the contract of sale but under a special contract of bailment.<sup>1</sup>

If the seller is induced by fraud voluntarily to consent to the surrender of possession of goods to the buyer who already is the owner of the property, the legal lien is on principle lost, for the seller has consented to surrender it. If, therefore, the buyer should dispose of the goods after having thus obtained them to a *bona fide* purchaser for value without notice, the latter should hold the property free of lien. As against the buyer himself, however, the seller would be able to receive the delivery of possession and become entitled to the possession of the goods again. When the seller regained possession his legal lien would be restored.<sup>2</sup>

If goods on which the seller has a lien are put into the possession of the buyer merely for the purpose of allowing the latter to examine them, this would not amount to an assent to a surrender of the lien. But if the seller permitted a buyer who thus obtained possession of the goods to retain them without taking steps to resume possession, this acquiescence would amount to an assent to surrender the lien.<sup>3</sup>

#### (4) Clause (c)—waiver of lien.

The seller's lien may, of course, be waived expressly. It may also be waived by implication at the time of *formation* of the contract when the terms show that it was not contemplated that the seller should retain the possession till payment; and may be abandoned during the *performance* of the contract by the seller's actually parting with the goods before payment.<sup>4</sup>

Where the seller takes security for the price on terms inconsistent with the existence of the lien, an implication of waiver may arise.<sup>5</sup> Thus, as already noticed, by selling the goods on credit the seller waives his lien during the currency of the credit, unless in the meantime the buyer becomes insolvent. The same will be the result if after the contract of the sale he accepts conditional payment by taking a negotiable instrument for the price, though the lien would revive on its dishonour,<sup>6</sup> or takes some other security which postpones the date of payment and is therefore inconsistent with the right of lien.<sup>7</sup> The seller thus may waive his lien by assenting to a sub sale; and if he parts with the documents of title and they come into the hands of a third party, he may thereby lose his lien.<sup>8</sup> It is essential that the security taken should be inconsistent with the lien.<sup>9</sup>

1. See *Allen v. Smith*, (1862) 11 W.R. 440 Ex. Ch. and cf. *Tempest v. Fitzgerald*, (1820) 3 B. & Ald. 680, 22 R.R. 526.  
2. Williston on Sales, Revised Edition, Vol. III, S. 511, p. 112.  
3. Williston on Sales, Vol. III, p. 112.  
4. See Benjamin on Sale, 8th Edn., p. 852 and section 62 post.  
5. *Chambers v. Davidson*, (1866) L.R. 1 P.C. 296; (Cf.) *Re Morris*, (1908) 1 K.B. 573 (case of solicitor's lien); *Bank of Africa v. Salisbury Mining Co.* (1892) A.C. 231; *Re Leith's Estate*, (1866) 1 P.C. 296 (lien created by con-

tract excludes statutory lien).  
6. *Valpy v. Oakeley*, (1851) 16 Q.B. 941, at p. 951; *Griffiths v. Perry*, (1859) 1 E. & E. 680, at p. 686. See also *Miles v. Gorton*, (1834) 2 C. & M. 504; 39 R.R. 820.  
7. *Knights v. Wiffen*, (1870) L.R. 5 Q.B. 660—seller consenting to sub-sale by the buyer.  
8. See section 53.  
9. See *Augus v. McLachlan*, (1883) 23 Ch. Div. 330; *Bank of Africa v. Salisbury Mining Co.*, (1892) A.C. 281.



**(5) Waiver by seller's wrongful repudiation of contract or claim of possession on other grounds.**

The lien is also waived by implication where the seller repudiates the contract by wrongfully refusing<sup>1</sup> or rendering himself unable<sup>2</sup> to deliver the goods, or by using or dealing with them in a manner inconsistent with a mere right of possession, for example, by wrongfully reselling or consuming them.<sup>3</sup> So also where he does not rely upon a right of lien, but claims to keep the goods upon some other ground.<sup>4</sup> In all these cases the seller dispenses with payment or tender of the price.<sup>5</sup>

As a practical result of it, in such cases the person whose lien is waived cannot, when sued by the owner, defeat his action by setting up the lien or objecting that the amount due in respect of which the lien is exercisable had not been tendered before action brought.<sup>6</sup>

A case of wrongful resale of the goods is provided for by section 54, and in a case where the seller wrongfully consumes the goods, presumably the damages would be the value of the goods, less the purchase price or that part of it which remained unpaid, that is to say, the value of the buyer's actual interest in the goods.<sup>7</sup>

It was held in *Morton v. Woodfall*<sup>8</sup> that the mere taking of a personal security is not tantamount to abandonment of the lien.

If the goods are redelivered to the seller by the buyer with the intention of revesting the right of lien, the right of lien revives. But the mere obtaining possession of the goods subsequently does not revive the lien.<sup>9</sup>

“Sometimes when goods are sold they are at a place where either the seller or buyer can readily obtain access to them, and the possession of either party is rather based on a theory of law than on actual physical control. While the seller retains title in such a case, it is clear that the goods must legally be regarded as in his possession, since no one is asserting physical control over them in opposition to the seller's legal title. But when the goods have been sold and title passed, the legal possession would, for the same reason, be in the buyer.”<sup>10</sup>

Where there are several debts and only one of them is secured by a seller's lien, the question may arise of the effect of a part payment. In speaking of the analogous case of an artisan's lien on skins given for furnishing into garments, L. Hand J. said :<sup>11</sup>

1. *Jones v. Tarleton*, (1842) 1 M. & W. 575 : 60 R.R. 853 ; *Kerford v. Mendel*, (1859) 28 L.J. Ex. 303 ; *Davies v. Vernon*, (1844) 6 Q.B. 443, 66 R.R. 457.
2. *Jones v. Cliff*, (1833) 1 C & M. 540 ; 38 R.R. 685 (case of a person having redeemed goods from pawn at the request of the owner) ; *Gurr v. Cuthbert*, (1843) 12 L.J. Ex. 309 : 61 R.R. 787 ; *Mulliner v. Florence* (1878) 3 Q.B.D. 484, C.A. (inn-keeper).
3. *Gurr v. Cuthbert and Mulliner v. Florence*, supra.
4. *Boardman v. Sill*, (1808) 1 Camp. 410 (n) : refusal to deliver without insisting on lien amounts to a waiver of

- lien ; *Yungmann v. Briesemann*, (1893) 67 E.T. 642 (C.A.).
5. *Jones v. Cliff & Jones v. Tarleton*, supra. See Benjamin on Sale, 8th Edn., p. 853
6. See *Jones v. Tarleton* ; *Jones v. Cliff* ; *Mulliner v. Florence*, supra.
7. *Chinery v. Viall*, (1860) 5 H. & N. 288, 120 R.R. 588.
8. A.I.R. 1927 Lah. 103 ; 8 Lah. 257 : 99 I.C. 770.
9. Halsbury, Laws of England, 3rd Edn., Vol. 34, pp. 126, 127.
10. Williston on Sales, Revised Edition, Vol. III, S. 513, p. 113.
11. In re Lindau, 183 F. 608, 609 ; Williston, *ibid* pp. 114, 115.



"The artisan is entitled to hold the residue of any given lot for the whole sum due for work on all that lot. In short the release of a part of a lot throws the lien upon the balance. On the other hand there was no general lien under well-established law. The usual attribution of payments in an account like this would be against the first indebtedness. That would make the unpaid balance arise wholly from work done on the last lot. For that sum all of the skins which remain in the artisan's hands of the last lot he might hold on his lien. This would, however, release to the estate the skins withheld from earlier lots. However, the rule of attributing payments to earlier debts is merely one of presumption, and, in the absence of agreement to the contrary, the creditor has the right to apply payments as he pleases. What must be the presumption then arising from the retention of parts of the preceding lots? Obviously, that the artisan was withholding some of those skins for a balance due for work upon the lot of which they formed a part. Subsequent payments he must have meant to apply to other lots, else why keep back any part of the lots paid in full?"<sup>1</sup>

Again, a quantity of goods sold under one contract may have been paid for in part. If the seller's claim for the price is indivisible or if the goods that have been paid for are so mingled with the rest as to be indistinguishable, the seller has a lien on the whole quantity of goods in his possession.<sup>1</sup>

Regarding surrender or loss of lien by agreement or estoppel, Williston observes :<sup>2</sup>

"The seller may lose his lien either by express agreement to surrender it or by such conduct as estops him from asserting it. No comprehensive statement can be made covering every case, but it has been held that where the buyer was allowed to alter the character of the goods and make them much more valuable, the seller could not assert a lien. So, if a seller should take part in bankruptcy proceedings of the buyer as an unsecured creditor, proving for the full amount of the price, it would, it seems, be an election to abandon his lien.

**Surrender or loss of lien by agreement or estoppel.**

It is sometimes laid down broadly that one having a lien waives it by asserting mistakenly that his retention of the goods was based on a wrong ground. The assertion of a claim for an amount larger than was due has been discussed previously. As to other cases, the true doctrine is doubtless that stated by the Supreme Court of Minnesota : "An examination of the authorities on the subject, from the early case of *Boardman v. Sill*,<sup>3</sup> down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omissions to assert it on the ground of refusal, or by a general refusal to surrender the goods, without specify-

1. Williston, *ibid*, S. 515a, p. 115.  
2. Williston on Sales, Revised Edition,

Vol. III, S. 516, pp. 115 to 117.  
3. 1 Camp. 410, note.



ing the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so.

A conversion of the goods by the lienholder extinguishes his right; and an attachment by the lienholder of the goods as the property of the general owner is a waiver of the lien, but where the goods are seized as the property of the general owner at the instance of a third party, the lienholder does not lose his right, and if to protect himself he buys the goods at execution sale, there is still no waiver. Giving credit to either at the time of the original bargain or at any time subsequently is in effect an agreement to give up a right to a lien as is also assent to a resale by the buyer. Taking security for the price is not inconsistent with the continuance of a lien unless the circumstances are such as to indicate an agreement to rely solely upon security taken, nor is bringing suit or obtaining a judgment for the price."

**(6) Sub-section (2)—decree for the price—lien not destroyed by judgment for the price.**

Sub-section (2) declares that the unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods. It is declaratory of the common law rule.<sup>1</sup> The result is that though the debt is merged in a decree, the lien on the goods is not destroyed unless the seller attaches them in execution of the decree, for he gives up his right to the possession of the goods by letting the sheriff take possession.<sup>2</sup>

**Stoppage in transit**

**\*50.** Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who had parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in transit, and may retain them until payment or tender of the price.

**Synopsis**

- |   |   |
|---|---|
| (1) <i>Right of stoppage in transit.</i>    | (4) <i>Extent of the right.</i>                                     |
| (2) <i>When can the right be exercised.</i> | (5) <i>Against whom the right to stoppage in transit available.</i> |
| (3) <i>Nature of the right.</i>             |   |

**(1) Right of stoppage in transit.**

Another remedy which an unpaid seller has against the goods is stoppage in transit. This right arises solely upon the *insolvency* of the

1. *Houlditch v. Desauges*, (1818) 2 Stark 337, 20 R.R. 692.  
2. *Jacobs v. Latour*, (1828) 5 Bing. 130,

\*Analogous law.  
Section 44 of the English Sale of Goods Act, 1893, and old section 99 of the Indian Contract Act—see Appendix A and Appendix B.



buyer and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts.<sup>1</sup> If, therefore, after the seller has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, as we have already noticed, is such a constructive delivery as divests the seller's lien), he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and may retain them until payment or tender of the price.<sup>2</sup>

It may be noted that the right of stoppage in transit arises only after the seller has parted with the possession of the goods and if the buyer becomes insolvent. This right is only available when the goods are neither in the possession of the seller or buyer nor any agent of them, but are in the possession of a middleman or intermediary, for the purpose of transmission to the buyer.<sup>3</sup> It is a much narrower right than the right of lien because it only arises in case of the buyer's insolvency, whereas the right of lien is available to the unpaid seller in every case in which he is in possession of the goods the price of which has become payable. As already pointed out, the right of stoppage in transit can only arise after the right of lien has come to an end.<sup>4</sup> The term "stoppage in transit" only applies in strictness to cases where the property in the goods has passed to the buyer.<sup>5</sup>

The history of the law of stoppage in transit is given very fully by Lord Abinger in *Gibson v. Carruthers*,<sup>6</sup> and this is extracted and supplemented by some very useful remarks in Lord Blackburn's book.<sup>7</sup>

## (2) When can the right be exercised.

Right of stoppage in transit can be exercised only when the following conditions are satisfied : The seller is unpaid ;<sup>8</sup> the buyer must be insolvent ; the property must have passed ;<sup>9</sup> the seller must have parted with the possession of the goods and the buyer must not have acquired it. Strictly speaking, stoppage in transit takes place only where the goods have become the property of the buyer. Where they remain the property of the seller, the latter may withhold them by virtue of his ownership, but this is not stoppage in transit by the law merchant.<sup>10</sup>

Further, the right can only be exercised by a seller or a person in a position analogous to that of a seller.<sup>11</sup>

1. Per Lord Northington L.C. in *D'Aquila v. Lambert*, (1761) 2 Eden. at 77 ; Amb. 339. See also per Lord Reading C.J. in *Booth Steamship & Co. v. Cargo Fleet Iron Co.*, (1916) 2 K.B. 579, 580 : "It is a right founded upon the plain reason that one man's goods shall not be applied to the payment of another man's debt..... It is the right not only to countermand delivery to the purchaser but to order delivery to the vendor."
2. See Benjamin on Sale, 8th Edn., p. 879.
3. See *Schotsmans v. L. & Y. Ry.*, (1867) L.R. 2 Ch. at p. 338.
4. See notes under section 46 ante.

5. *Gibson v. Carruthers* (1841), 8 M. & W. 321.
6. (1841) 8 M. & W. 321, 11 L.J. Ex. 138 ; 58 R.R. 713. See also *Rash Behari Karuri v. Narain Das*, (1923) 50 Cal. at p. 406.
7. Blackburn on Sale, Part 3, Chapter I.
8. As to this, see section 45, ante and notes thereunder.
9. See section 46 (2) ante, as to the right of the seller to withhold or countermand delivery in the case of executory contracts.
10. See *Lickbarrow v. Mason*, (1793) 6 East, 22, n., H.L., 1 R.R. 425 ; Blackburn on Sale, 3rd Edition, p. 420.
11. Section 45 (2), ante.



**(3) Nature of the right.**

The right of stoppage in transit is a right against the goods themselves. "If they arrive injured and damaged in bulk or quality the right to stop *in transitu* is so far impaired ; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive, and to claim some moneys which have been paid by the non-arrival of their property",<sup>1</sup> and, accordingly the vendor was not entitled to the policy moneys ; and had no right to claim from the creditor anything beyond the balance of the money realised by the damaged timber.

As between the right of stoppage in transit and the carrier's lien for a general balance of account, the former has precedence<sup>2</sup> though not of his lien for the special charges on the goods carried.<sup>3</sup> Similarly, the right of stoppage will prevail over a third party's attachment of the goods.<sup>4</sup>

The resumption of possession by the seller does not necessarily amount to a rescission of the contract, but is done in the exercise by an unpaid seller of his right to insist on his lien for the price.<sup>5</sup> The stoppage does not revest the property in the goods in the unpaid seller. "It is a retaking by the unpaid vendor, either on the cancellation of the contract as some people say, or as I should rather say, on resuming possession for the purpose of insisting on his lien for the price at any time while the goods are in the hands of the carrier and have not reached the hands of the purchaser or consignee, and when they are not in his possession."<sup>6</sup> So the seller is bound to deliver the goods as soon as the price is paid or tendered. If the price is tendered by the buyer's assignee in insolvency, the seller is bound to deliver the goods, as the insolvency of the buyer does not put an end to the contract ; but the tender must be made within a reasonable time after insolvency.<sup>7</sup>

In *Rash Behari v. Narain Das*,<sup>8</sup> the nature of the right is dealt with in detail.

**(4) Extent of the right.**

The right is available only so long as the goods are in transit. It stops just short of delivery of the goods to the buyer. It is enough for the valid exercise of the right of stoppage in transit that the buyer becomes insolvent before the end of the actual transit. It is not necessary that at the very moment of the stoppage the buyer must be insolvent, and the right may be exercised in anticipation of the insolvency of the buyer<sup>9</sup> though in such a case the seller stops the goods at his own risk, and if it

1. *Berndston v. Strang*, (1868) L.R. 3 Ch. App. 588, at p. 591, per Lord Cairns ; see also *Schotsmans v. Lancashire & Yorkshire Ry. Co.*, (1867) 2 Ch. App. 332 ; *Bethell v. Clark*, (1887) 19 Q.B.D. 353, 20 Q.B.D. 615, C.A.  
 2. *Oppenheim v. Russell*, (1802) 3 Bos. & P. 42 ; 127 E.R. 24, 6 R.R. 604.  
 3. *Morley v. Hay*, (1828) 3 M. & Ry. (K.B.) 396.  
 4. *Smith v. Goss*, (1808) 170 E.R. 958, 10 R.R. 684,

5. See S. 48 (1) *supra* ; *Page v. Cowasjee*, (1866) L.R. 1 P.C. at p. 145.  
 6. Per Cotton L.J. in *Phelps & Co. v. Comber*, (1885) 28 Ch. D. at p. 821.  
 7. See *Ex-parte Chalmers*, (1873) L.R. 8 Ch. 289 ; *Jaffer v. Budge Budge Jute Mills*, (1907) 34 Cal. 289.  
 8. A.I.R. 1923 Cal. 182 ; (1923) 50 Cal. 399 ; 80 I.C. 485.  
 9. *The Tigress*, (1863) 167 E.R. 286. *The Constantia*, (1807) 165 E.R. 947,



turns out that the buyer is insolvent, the seller is answerable in damages in addition to his liability to deliver the goods.<sup>1</sup>

Delivery taken by the buyer's trustees in bankruptcy on the delivery of the goods into the buyer's warehouse after his bankruptcy puts an end to the transit, as bankruptcy does not rescind the contract.<sup>2</sup>

An insolvent buyer may rescind the contract in case where it is only an agreement to sell, with the consent of the seller : and then the subsequent delivery of the goods in the buyer's possession cannot affect the seller's rights, since the property in the goods will not be in the buyer. Where the property has passed, the buyer may decline to take possession thus leaving the seller free to exercise the right of stoppage. But in some circumstances such an act of the buyer may amount to fraud.

The rule as to stoppage in transit applies both to cases of carriage of goods by land and sea.<sup>3</sup>

The effect of stoppage in transit is not to rescind the contract between the carrier and the purchaser or to vest the property in the goods in the unpaid seller.<sup>4</sup>

Where the property has not passed to the buyer, the right of the seller to withhold delivery while the goods are in transit is not, properly speaking, a right of stoppage in transit but an analogous right which is recognised by law.<sup>5</sup>

#### (5) Against whom the right of stoppage in transit available.

The right of the unpaid seller to stop the goods while they are in transit until he is paid off is available against the buyer who has become insolvent and against the representative in interest *i.e.*, trustee or official assignee or receiver in insolvency,<sup>6</sup> or attaching creditor,<sup>7</sup> or sub-buyer or any other person who derives his interest in the goods from the buyer.<sup>8</sup> There exists a conflict of opinion as to the question whether the right is available against the attaching creditor of the buyer,<sup>9</sup> but weight of the authorities is for the affirmative <sup>10</sup> As to whom and how far the right is available against a sub-buyer or other person who derives his interest from the buyer, notes under section 54 *infra* may be referred to.

**51. (1) Goods are deemed to be in course of transit**  
**Duration of transit.** from the time when they are delivered to  
 a carrier or other bailee for the purpose

1. G.I.P. Ry. v. Hanmandas, (1890) 14 Bom. 57; Lilladhar v. George Wrexford, (1893) 17 Bom. 62. See also Halsbury, Laws of England, 3rd Edition, Vol. 34, pp. 127, 128.

2. Ellis v. Hunt, (1789) 3 T.R. 464, 1 R.R. 743; Scott v. Pettit, (1803) 127 E.R. 255, 7 R.R. 804.

3. Blackburn on Sale, 3rd Edition, p. 413; see Kendall v. Marshall, (1883) 11 Q.B.D. 356, at p. 364.

4. Booth S.S. Co. Ltd. v. Cargo Fleet Iron Co. Ltd., (1916) 2 K.B. 570 C.A.,

5. See section 46 (2) ante; see Turner v. Liverpool Docks (Trustees), (1851) 6 Exch. 543; Ex. Ch., 86 R.R. 377.

6. Grice v. Richardson, 3 App. Cas. 319.

7. Smith v. Goss, 1 Camp. 282.

8. See section 53, *infra*.

9. See Blackburn, p. 411; Remfry, p. 337.

10. Smith v. Goss, 1 Camp. 282; Bhola Nath v. Baijnath, 1 Agra H.C. 11; Mercantile & Exchange Bank v. Gladstone, (1868) L.R. 3 Exch. 223; Keith v. Burrows, (1877) 2 App. Cas. 651.



of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

### Synopsis

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|--|--|
| (1) <i>Analogous law.</i>  | (6) <i>Sub-section (4)—goods rejected by the buyer.</i>            |
| (2) <i>Meaning of "transit".</i>   | (7) <i>Sub-section (5)—ship chartered by the buyer.</i>            |
| (3) <i>Sub-section (1)—duration of transit.</i>  | (8) <i>Sub-section (6)—wrongful refusal by carrier to deliver.</i> |
| (4) <i>Sub-section (2)—buyer obtaining delivery before goods reaching destination.</i> | (9) <i>Sub-section (7)—effect of part delivery.</i>                |
| (5) <i>Sub-section (3)—attornment of carrier to buyer on reaching destination.</i>     | (10) <i>Public wharves.</i>  |

### (1) Analogous law.

This section is based on section 45 of the English Sale of Goods Act, 1893 (See Appendix A) and in fact reproduces it with some slight verbal



differences. It replaces old section 100 of the Indian Contract Act (See Appendix B). In the English Act the expression used is *in transitu*, while in the present Act, the English phrase "in transit" is used though there is absolutely no difference between the meaning of the two expressions.

### (2) Meaning of "transit".

The term "transit" does not necessarily imply that the goods are in motion, for the goods may be in transit even when they are lying deposited with a forwarding agent as such.<sup>1</sup> The essence of stoppage *in transitu* is that the goods should be in the possession of middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them.<sup>2</sup>

### (3) Sub-section (1)—duration of transit.

The transit is held to continue from the time the seller parts with the possession until the purchaser acquires it ; that is to say, from the time when the seller has so far made delivery that his right of lien is gone to the time when the goods have reached the *actual* possession of the buyer.<sup>3</sup> Sub-section (1) clearly lays down that goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in the behalf takes delivery of them from such carrier or other bailee.

This sub-section assumes that the delivery to the carrier is as agent of the buyer for carriage. If the carrier is the agent of the seller, no question of stoppage can arise.<sup>4</sup> Where a seller having instructed his own agent to deliver countermands the order, or himself refuses delivery, or, having despatched goods to his own factor, countermands the delivery by the carrier to the factor, so as to prevent the factor acquiring a lien,<sup>5</sup> these are not cases of stoppage in transit within the meaning of sub-section (1). In such cases *a lien*, and not a right of stoppage, comes in question.

Section 46 of the Act must be read with section 51 of the Act and where as a matter of fact the transit is at an end and the goods are at home then the right of stoppage of the unpaid seller is gone. Where goods are unloaded from the Railway and delivered over to the buyer in his godowns, the transit is at an end. The fact that later on the Railway Company passes an order to the effect that the goods should not pass to the buyer until freight had been paid is of no avail to the seller so as to enable him to retain or exercise his lien.<sup>6</sup>

Mere non-payment of freight although it sometimes raises a presumption that the *transit* is not at an end is not sufficient. Where the first consignment of the goods purchased by the insolvent vendee had actually been unloaded in the godown of the vendee without payment of freight

1. See Blackburn on Sale, 3rd Edn., pp. 362, 378.

2. Schotsmans v. Lancashire Railway, (1867) L.R. 2 Ch. App. 322, at p. 338 ; Cf. the duration of transit for the purpose of insurance policies covering goods in transit : Sadler Brothers Co. v. Meredith, (1963) 2 Lloyd's Rep. 293 ; Crows Transport Ltd. v. Phoenix Assurance Co. Ltd.,

(1965) 1 All E.R. 595. See Chalmers, 16th Edn., p. 181 f.n. (1).

3. Benjamin on Sale, 8th Edn., p. 888.

4. McEwan v. Smith, (1849) 2 H.L.C. 309, 81 R.R. 166.

5. Kinloch v. Craig, (1790) 3 T.R. 783, 1 R.R. 664 (H.L.).

6. Narain Das Tikkam Das v. Official Assignee, A.I.R. 1936 Sind 200,



before the countermanding order was given by the vendor, the right to the freight is waived and the consignment ceases to be in transit and the vendor has no right over it.

The right of stoppage in transit is an equitable right which arises wholly from the insolvency of the buyer and is based upon the plain reason of justice and equity that one man's goods shall not be applied in payment of another's debts. The right continues so long as the goods are in the possession of a carrier or other bailee for transmission in his capacity as such to the buyer and are made deliverable to him ; and it is immaterial whether the document obtained from the carrier or other bailee for transmission of goods is made out in the name of the buyer both as a consignor and as consignee of the goods or not, provided the goods are delivered for transmission by the vendor and not the buyer.<sup>1</sup>

The seller's right in the goods is very frequently not ended on their arrival at their ultimate destination because of his having retained the *property* in them, through the reservation of the right of disposal *i.e.*, of the *title* to the goods. The stoppage in transit is called into existence for the seller's benefit after the buyer has acquired *title and right of possession*, and even *constructive* though not *actual*, possession.<sup>2</sup>

The constructive possession above referred to is the possession of the buyer through his agent, the *carrier*. The term is also used to mean a possession which (unlike constructive possession in the sense above mentioned) *divests* the seller's right of stoppage, *viz.*, the possession of the buyer's agent not to carry, but to *hold* the goods at the disposal of the buyer.<sup>3</sup>

In *James v. Griffin*,<sup>4</sup> goods were consigned by ship to the purchaser deliverable in the river Thames. On their arrival the purchaser, being pressed by the captain of the ship to have them landed, sent his son with directions to hand them at a wharf, where he was accustomed to have goods landed for him and to take them thence in his own carts. The purchaser was then insolvent, and told his son that he did not intend to meddle with the goods and that the seller ought to have them. The goods were by the son's directions landed at the wharf and there they were stopped by the seller.<sup>5</sup> It was *held* that, as the purchaser had not taken possession of the goods as owner, the transit was not at an end. Parke B. in the course of his judgment observed :

"The delivery by the vendor of goods sold to a carrier of any description either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee ; but the vendor has a right, if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the

1. *Narain Das v. Official Assignee*, A.I.R. 1939 Sind 106 : 163 I.C. 875.

2. See Benjamin on Sale, 8th Edn., p. 889.

3. *Ibid*, p. 889 ; see remarks of Brett L.J. in *Kendall v. Marshall*, (1883) 11

Q.B.D. 356, at pp. 364-365.

4. 3 M. & W. 623, 42 R.R. 243.

5. *Scott v. Pettit*, (1803) 3 Bos. & P 469, 7 R.R. 804 ; *Rowe v. Pickford*, (1817) 8 Taunt. 83 ; 19 R.R. 466,



vendee, or some one whom he means to be *his agent to take possession of and keep the goods for him*, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession.....The actual delivery to the vendor or his agent, which puts an end to the transitus, or state of passage, may be at the vendee's warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods, or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself,<sup>1</sup> or it be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination."

Goods are deemed to be in transit, as long as they remain in the possession of the carrier *qua* carrier<sup>2</sup>—a qualification to be kept in view, for he may become bailee for the buyer as a warehouse-man or wharfinger after his duties as carrier have been discharged—and it makes no difference that the carrier has been named or appointed by the buyer.<sup>3</sup>

The transit does not cease merely by reaching the destination, but continues till the goods come into the possession of the buyer.<sup>4</sup> The test is not whether the goods have arrived at their destination but whether, having arrived, there has been delivery to the buyer. Thus, where the endorsee of a railway receipt from the purchaser, after paying the freight loaded the goods in his carts, but became insolvent before the carts left the goods compound of the railway station, it was *held* that the transit had terminated and that the company had no right to stop the goods on behalf of the unpaid seller.<sup>5</sup> Similarly, the goods are deemed to be in transit, though in fact lying deposited with a forwarding agent.<sup>6</sup> "The essence of stoppage," says Lord Cairns, "is that the goods should be in the possession of a middleman"<sup>7</sup> between the vendor who parted with the goods and the buyer who has not yet acquired possession.

It is not necessary that the goods should actually be in transit, *i.e.*, moving but it is sufficient if they are in the hands of a carrier for being carried to their destination.<sup>8</sup> As transit includes the possession of forwarding agents,<sup>9</sup> where goods are lying in a place of deposit for the purpose of transmission the goods are deemed to be in transit. The transit continues so long as the goods are not delivered to the buyer. Lord Esher observed :<sup>10</sup>

"Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land and

1. *Dixon v. Baldwin*, (1804) 5 East 175, 7 R.R. 681.
2. *Mills v. Ball*, (1801) 2 B. & P. 457 ; 5 R.R. 653.
3. *Bethell v. Clark*, (1888) 20 Q.B.D. 615, C.A. ; *Hodgson v. Loy*, (1797) 7 T.R. 440 ; 4 R.R. 483 ; *Berndston v. Strang*, (1867) 4 Eq. 481 ; *Ex-parte Rosevear China Co.*, (1879) 11 Ch. D. 560.
4. *Heinekey v. Earle*, (1857) 120 E.R. 153 ; 112 R.R. 627.
5. *G.I.P. Rly. Co. v. Hanmandas*, (1890) 14 Bom. 57 ; see also *Naraindas v. Official Assignee*, A.I.R. 1936 Sind 106 : 163 I.C. 875.
6. *Ex-parte Barrow*, (1857) 6 Ch. D. 783 ; *Smith v. Goss*, (1808) 170 E.R. 958 ; 10 R.R. 684.
7. *Schotsmans v. Lancashire Railway*, (1867) 2 Ch. App. 332.
8. *Fraser v. Witt*, (1868) 7 Eq. 64.
9. See *Rodger v. Comptoir D'Escompte De Paris*, (1869) 16 E.R. 618 ; *Noble v. Adams*, (1816) 129 E.R. 24, 1 R.R. 445 ; *Tannar v. Scovell*, (1845) 153 E.R. 375, 69 R.R. 644.
10. *Kendall v. Marshall*, (1883) 11 Q.B.D. 356 ; *Foster v. Frampton*, (1826) 108 E.R. 392, 39 R.R. 255.



although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purpose of transmission and delivery until they arrive at the actual possession of the consignee or at the possession of his agent who is to hold them at his disposal with them accordingly."

This delivery to the buyer or his agent may be either at the actual destination or the buyer may even obtain the goods at a place short of the destination. Parke B. said :<sup>1</sup>

"The law is clearly settled that the unpaid vendor has a right to retake the goods before they arrived at the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee."

As regards the term "destination," Lord Esher says that it means sending the goods to a particular place to a particular person who is to receive them, and not sending them to a particular place without saying to whom.<sup>2</sup> Transit embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract of conveyance."<sup>3</sup>

Delivery of the goods to the buyer means more than mere arrival of the goods at the destination ; the buyer must take actual or constructive possession of them. This could be inferred from some act or conduct of the buyer e.g. when after arrival the freight is paid by the buyer or his assigns<sup>4</sup>. The arrival which is to divest the vendor's right of stoppage in transit must be such as that the buyer has taken actual or constructive possession of the goods ; and that cannot be so long as he repudiates them."<sup>5</sup> In *G.I.P. Ry. v. Hanmandas*<sup>6</sup>, the transit was held to be determined on payment of freight by an endorsee of the Railway Receipt who also loaded the goods in carts though he became insolvent before the goods left the compound of the Railway Station. In *Jackson v. Nichol*<sup>7</sup> transit was not at an end though the goods reached the port of destination and were put on lighters.

The buyer may take delivery from the carrier or other bailee by taking possession of the goods from him or by attornment or acknowledgment of his carrier, etc., to the buyer indicating that he is holding the goods on his behalf.<sup>8</sup> Where the carrier enters into an agreement with the buyer to hold the goods as agent of the consignee, but not as a carrier, the transit will be put an end to.<sup>9</sup> But where the attornment of the carrier is relied on, that

1. *Whitehead v. Anderson*, (1842) 152 E.R. 219 (226), 60 R.R. 819.  
2. *Ex-p. Miles*, (1885) 15 Q.B.D. 39, at p. 43, C.A.  
3. Per Lord Fitzgerald in *Kemp v. Falk* (1882) 7 App. Cas. 573, at p. 588.  
4. See *Lilladhar v. Wreford*, (1893) 17 Bom. 62, 91.  
5. *Bolton v. L. & Y. Ry.*, (1866) L.R. 1 C.P. at P. 440.

6. (1890) 14 Bom. 57.  
7. (1839) 5 Bing. N.C. 508.  
8. See *Reddall v. Union Castle, etc. Co.*, (1914) 84 L.J.K B. 360 ; goods were intercepted by the buyer at an intermediate stage of transit, held, the transit was at an end.  
9. *Lyons v. Hoffnug*, (1890) 15 A.C. 391; *Whitehead v. Anderson*, supra ; *Ex-parte Cooper*, (1879) 11 Ch. D. 68.



attornment must be founded on mutual assent. If the carrier does not assent to hold the goods for the buyer or if the buyer does not assent to his so holding them, there is no attornment.<sup>1</sup>

The fact that the freight is unpaid is strong, though not conclusive evidence that the carrier is in possession of the goods, as such, and not as the buyer's agent.<sup>2</sup>

The course of transit may be fixed either by the contract, or subsequently by directions given by the buyer to the seller.<sup>3</sup> Where goods are consigned partly by one route, and partly by another, and those sent by one route are effectively stopped in transit, the stoppage does not revert in the seller the right to the possession of the goods by the other route, the transit whereof has ended.<sup>4</sup> But the seller's lien being entire, he may exercise it over the goods stopped for the price of all the goods.<sup>5</sup>

Any tortious act of the carrier after the goods are "at home" will not prolong the transit.<sup>6</sup> In *Bird v. Brown*<sup>7</sup>, a pretended notice to stop the goods in transit was given by some merchants, who had, however, no authority from the seller to give it. Subsequently, the assignees of the bankrupt buyer formally demanded the goods from the carrier, tendering the freight at the same time. The carrier refused to deliver to them and on the same day delivered them to the merchants, who had given the ineffectual notice to stop. The transit was held to be at an end and both the carrier and merchants were liable in trover; and a later attempt by the seller to ratify the stoppage of the goods by the merchant was of no effect.

The principles underlying this sub-section have been very lucidly explained in *Bethell v. Clark*.<sup>8</sup> In that case the buyer brought goods of Messrs Clark and Co., the defendants at Wolverhampton, and after the contract made, sent them a consignment note in these terms: "Please consign the ten hogshead hollowware to S.S. 'Darling Downs' to Melbourne, loading in the East India Docks here." The goods were sent by railway, and the railway company shipped them, and obtained and sent the mate's receipt to the buyer, but the latter did nothing with it. The sellers gave notice to the railway company stopping the goods, but too late to prevent shipment, and the ship sailed with the goods on board. But before she arrived at Melbourne the sellers gave notice to the ship-owners<sup>9</sup> claiming the goods as their property. After the arrival at Melbourne the trustee in bankruptcy of the buyer demanded the bills of lading from the master. *Held*, the goods had been effectually stopped the transit not terminating until the ship had reached Melbourne.

1. See *James v. Griffin*, supra: offer to attorn not accepted by buyer; *Kemp v. Falk*, supra (carrier not agreeing to change his character).  
2. *Kemp v. Falk*, supra.  
3. *Re Love*, Ex-parte *Watson*, (1877) 5 Ch. D. 35, C.A.; *Bethell v. Clark*, supra.  
4. *Wentworth v. Outhwaite*, (1842) 10 M.

& W. 436, 62 R.R. 664.  
5. See *Benjamin on Sale*, 8th Edn., page 902.  
6. *Lilladhar v. George*, (1893) 17 Bom. 62, 68.  
7. (1850) 154 E.R. 1433; 80 R.R. 775.  
8. 19 Q.B.D. 553, 20 Q.B.D. 615, C.A.  
9. See section 52 (1).



Cave J. in 19 Q.B.D. at p. 561 said :

"In all cases of stoppage *in transitu*, it is necessary first of all to ascertain what is the *transitu* or passage of the goods from the possession of the vendor to that of the purchaser. The moment that the goods are delivered by the vendor to a carrier to be carried to the purchaser the *transitu* begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouse-man for the purchaser and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale or by directions given by the purchaser to the vendor. But however fixed, the goods have arrived at their destination, and the *transitus* is at an end, when they have got into the hands of some one who holds them for the purchaser and for other purpose than that of the merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor.<sup>1</sup> The difficulty in each case lies in applying these principles."

Lord Esher M.R. (*same case on appeal*— 20 Q.B.D.) observed at p. 617 :

"When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit has begun. The way in which that question has been dealt with is this. Where the transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists ; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit and the right to stop is gone. So also if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached the place, and any further transit is a fresh and independent transit."

The delivery of goods to a servant is delivery into the actual possession of the master. If, therefore, the buyer sends his own cart or his own vessel, for the goods, they have as a rule reached the buyer's *actual possession* as soon as the seller has delivered in the cart or vessel.<sup>2</sup>

Goods in passage on the buyer's own cart or vessel are not *in transitu*.

1. The case of Rosevear China Clay Co., *supra*, however, shows that it is not absolutely necessary that the destina-

tion should be actually named.  
2. See Benjamin on Sale, 8th Edn., p. 891 and the authorities cited thereunder.



But if the seller desires to restrain the effect of a delivery of goods on board the buyer's own vessel, he may do so by taking bills of the lading so expressed as to indicate that the delivery is to the master of the vessel as an *agent for carriage*, not an agent to receive possession for the purchaser, as where the seller takes the bill of lading to his own order, or to that of his agent, where he reserves the right of disposal.<sup>1</sup>

In S. 51 (1) delivery to the carrier and taking delivery from the carrier present two different capacities of the carrier. As a result of first-mentioned delivery which is for purposes of transmission, the carrier is an agent of the buyer but while actually delivering to the buyer he is the agent of the seller. This distinction became necessary because the seller has a right, if unpaid and if the buyer has become insolvent, to retake the goods before they are actually delivered to the buyer or some one who is named as his agent, and on that ground it is only the actual delivery to the buyer or his agent that puts an end to the course of transit. But, if all the rights of the seller have been merged in the buyer with the result that the seller has no longer any right either of lien or stoppage in transit or reclamation of the property, this distinction between constructive and actual delivery comes to an end.<sup>2</sup>

**(4) Sub section (2)—buyer obtaining delivery before goods reaching destination.**

Though the seller may have directed delivery by the carrier at a certain place, it is open to the carrier by arrangement with the buyer to deliver wherever the latter directs. In such a case, according to sub-section (2), the transit is at an end.<sup>3</sup> The vendee may thus "anticipate the place of destination if he can succeed in getting the goods out of the hands of the carrier."<sup>4</sup> The carrier and consignee might agree together for the delivery of goods at any place they please.<sup>5</sup>

The agent mentioned in sub-section (2) is the buyer's agent to take delivery so as to determine the transit, not an agent for transmission to the appointed destination.<sup>6</sup> The buyer may obtain delivery of goods by the carrier's attornment to him during the transit. And a test of such an attornment, when the goods are intercepted by the buyer, is whether they will again be set in motion without fresh orders of the buyer. If they will not, the transit is ended.<sup>7</sup>

In *Whitehead v. Anderson*,<sup>8</sup> Parke B. observed that "if the vendee takes the goods out of the possession of the carrier into his own before their arrival at the destination, *with or without the consent* of the carrier, there seems to be no doubt that the transit would be at an end, though, in the case of the absence of carrier's consent, it may be wrong to him, for which he would have a right of action." This was not

Consent of both  
buyer and carrier  
seems necessary.

1. Ibid ; see also section 25 (2) ante.  
2. Ramkrishna Commercial Society Ltd.,  
Anakapalli v. State of Andhra, A.I.R.  
1961 A.P. 86.  
3. Mills v. Ball, supra.  
4. Kendall v. Marshall, (1883) 11  
Q.B.D. 356 (360).

5. L. & N. W. Ry. Co. v. Bartlett, (1861)  
7 H. & M. 400, 31 L.J. Ex. 92.  
6. See Benjamin on Sale, 8th Edn.,  
p. 907.  
7. Reddall v. Union Castle Co., (1914) 84  
L.J.K.B. 360 : 112 L.T. 910.  
8. (1842) 9 M. & W. 514 at p. 534.



assented to by Blackburn<sup>1</sup> and the doubt suggested seems to be justified by decision in *Bird v. Brown*,<sup>2</sup> which is just the converse of the case supposed of a tortious taking of possession by the purchaser from the carrier. In that case the carrier tortiously refused possession to the purchaser when the goods had arrived at their destination ; and it was *held* that the purchaser's rights could not be impaired by the carrier's wrongful refusal to deliver, that the transit was at an end, and the right to stoppage gone.<sup>3</sup> It, therefore, seems clear that consent of both the buyer and the carrier seems necessary.

It is a question of fact in each case in which capacity the carrier is holding the goods. One test of his character is whether he receives the instructions necessary for forwarding from the seller or buyer. The transit is at an end when the goods reach the hands of a forwarding agent appointed by the buyer even though the goods were intended for an ulterior and subsequent destination.<sup>4</sup> In *Valpy v. Gibson*<sup>5</sup>, the goods were sent to a forwarding house under buyer's instructions. They were then returned to the seller under the buyer's instructions for repacking them into eight packages instead of four and the sellers accepted the instructions. It was *held* that the transit was at an end and redelivery to the seller for a new purpose did not revive the right of a lien. In *Ex-parte Miles*<sup>6</sup>, transit was at an end when the goods reached the forwarding agent at the destination to which they were sent by the seller, the further carriage being under the direction of the buyer.

**(5) Sub-section (3)—attornment of carrier to buyer on reaching destination.**

If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer. This is attornment of carrier to the buyer and in such a case the transit is at an end. As Parke B. observed in *Whitehead v. Anderson* :<sup>7</sup>

“A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee or his agent, not for the purposes of expediting them to the place of original destination pursuant to the contract, but for the purpose of custody on his account and subject to some new or further order to be given to him.

Such attornment of the carrier to the buyer may be express or implied, but it can only be with mutual consent.<sup>8</sup> As the sub-section

1. Contract of Sale, p. 259, 3rd Edn., pp. 406, 407.

2. (1850) 4 Ex. 786, 19 L.J. Ex. 154 ; 80 R.R. 775, *supra*.

3. See also *L. & N.W. Ry. Co. v. Bartlett*, *supra* and section 2(2) ante defining delivery as a voluntary transfer of possession.

4. *Kendall v. Marshall*, (1883) 11 Q.B.D. 356.

5. (1847) 4 C.B. 837.

6. (1885) 15 Q.B.D. 39. See also *Ex-*

*parte Watson*, (1877) 5 Ch. D. 35, where there was an express agreement as to transit.

7. (1842) 152 E.R. 219, *supra* ; also *Foster v. Frampton*, (1826) 108 E.R. 392 ; 30 R.R. 255.

8. *Ex-parte Barrow*, (1877) 6 Ch. D. 783: where the buyer absconded and so could not give his assent ; *James v. Griffin*, (1837) 2 M. and W. 623 ; the wharfinger could not receive the goods for the buyer without his assent.



itself states, the mere fact that the buyer indicates a further destination for the goods for his own purposes, will not have the effect of prolonging the transit.<sup>1</sup>

It is open to the carrier to attorn to the buyer subject to his lien.<sup>2</sup> Consequently, it follows that the mere fact of retaining the lien is not conclusive against the factum of attornment.<sup>3</sup>

The word "destination" in this sub-section has a local signification. The "appointed destination" is the place to which *under the contract* the goods are to be consigned ;<sup>4</sup> the "further destination" is the place to which the buyer intends for his own purposes that the goods shall go, and with which the seller has no concern.<sup>5</sup>

It may be observed that the mere arrival of the goods at the appointed destination is not sufficient to end the transit, but there must be a delivery of the goods either to the buyer or his agent to take delivery ; or else the carrier must attorn to the buyer or his agent.<sup>6</sup> In *Jobson v. Eppenheim*<sup>7</sup>, transit was considered to be at an end when the goods were received by the buyer's agent at the place where the buyer asked them to be sent though they were destined for a further destination.

#### (6) Sub-section (4)—goods rejected by the buyer.

If the buyer refuses to take the goods, they remain in the possession of the carrier as such and are therefore still in course of transit.<sup>9</sup> But if the rejection is made after buyer's agent has taken possession of them, it will not prolong the transit.<sup>10</sup> The buyer's rejection does not amount to a fraudulent preference of the seller within the meaning of the law of bankruptcy.<sup>11</sup> In *Bolton v. L. & Y. Co.*<sup>12</sup>, the buyer after accepting part of the goods rejected the rest when tendered and ordered them to be returned. The seller refused to take them back and ordered them back to the buyer who again refused to take them, and then the buyer became bankrupt when the seller stopped the goods in the hands of the carrier. *Held*, transit did not end.

#### (7) Sub-section (5)—ship chartered by buyer.

Whether a vessel chartered by the buyer is to be considered his own ship, depends on the nature of the charter-party. If the charterer is in the language of the law merchant, owner for the voyage, that is, if the ship has been demised to him, and he has employed the captain so that the captain is his servant, then a delivery on board of such a ship would be

1. *Ex-parte Cooper*, (1879) 11 Ch. D. 68 ; *Taylor v. G.E. Ry. Co.*, (1901) 17 T.L.R. 394 ; assent implied.
2. *Allan v. Gripper*, (1832) 149 E.R. 94 ; 37 R.R. 682.
3. *Kemp v. Falk*, *supra*.
4. *Per cur.* in *Mechan v. N.E. Ry. Co.*, (1911) S.C. 1348 : appointed destination was not the arrival station but the buyer's yard, that being the agreed place where delivery was to be given.
5. *Benjamin on Sale*, 8th Edn., p. 903.
6. See *Bethell v. Clark*, *supra* ; *Bapuji v. Clan Line Steamer*, (1910) 34 Bom.

- 640 : transit may not be at an end by the arrival of the goods at the shipping station.
7. (1905) 21 T.L.R. 468. See also *Ex-parte Golding*, (1880) 18 Ch. D. 628.
8. *James v. Griffin*, *supra*.
9. *Bolton v. Lancashire & Yorkshire Ry. Co.*, (1866) L.R. 1 C.P. 431 ; 35 L.J.C.P. 137.
10. *Jobson v. Eppenheim*, (1905) 21 T.L.R. 468.
11. *Re McLaren*, *Ex-parte Cooper*, *supra*, per Brett L.J. at P. 73.
12. (1866) L.R. 1 C.P. 431.



a delivery to his buyer; but if the owner of the vessel has his own captain and men on board so that the captain is the servant of the owner and the effect of the charter is merely to secure to the charterer the exclusive use and employment of the vessel, then a delivery by the seller of goods on board is not a delivery to the buyer, but to an agent for carriage. It is a pure question of intention in every case, to be mentioned by the terms of the charter-party.<sup>1</sup>

In *Berndston v. Strang*<sup>2</sup>, the buyer had sent a chartered vessel for the goods (the original contract, however, having provided that the seller was to send them on a vessel, delivered f.o.b.), and the seller took a bill of lading, deliverable to "order or assigns," and endorsed the bill of lading to the buyer in exchange for the buyer's acceptance for the price. It was held that the effect of taking the bill of lading in that form from the master of the chartered ship was to interpose him, as a carrier, between the seller and the buyer, and to preserve the right of stoppage to the former.

In *Schotsmans v. Lancashire and Yorkshire Ry. Co.*,<sup>3</sup> the goods were delivered on board a ship belonging to the buyer, which was employed as a general trader. By the bill of lading the goods were deliverable to the buyer or his assigns. This was held to be a delivery to the buyer, so as to preclude the right to stop in transit before the arrival of the goods at the port of consignment.

Before a bill of lading is taken the seller preserves his lien if he has taken or demanded the receipt for the goods in his own name, though this state of facts is sometimes treated as giving ground for the exercise of the right of stoppage.<sup>4</sup> If, however, the vessel were purchaser's own vessel, and he has paid for the goods and received the bill of lading, and the receipt contained nothing to show that a bill of lading was to be delivered by which the seller's control over the goods was to be retained, the seller's retention of the receipt would be wrongful, the principle in *Schotsmans v. L. and Y. Ry. Co.*, *supra* would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage.<sup>5</sup>

The same principles as in the case of a vessel apply to the seller's or buyer's hired vehicles or, presumably to aircraft.<sup>6</sup>

#### (8) Sub-section (6)—wrongful refusal by carrier to deliver.

Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end. This sub-section is based on the decision in *Bird v. Brown*.<sup>7</sup> It assumes that the buyer is entitled to obtain delivery, and the proper inference is that if the carrier rightfully refuses delivery, the transit is not deemed to be at an end. Thus, where the carrier or other bailee rightfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is not deemed to be at an end. In this case there was a tortious

1. Benjamin on Sale, 8th Edn., pp. 892, 893 and the authorities cited thereunder.

2. (1867) L.R. 4 Eq. 481; 36 L.J. Ch. 879.

3. (1867) L.R. 2 Ch. App. 332.

4. *Craven v. Ryder* (1816) 6 Taunt. 433; 16 R.R. 644; *Ruck v. Hatfield*, (1822)

5. B. & Ald. 632; 24 R.R. 507.

6. *Cowasjee v. Thompson*, (1845) 5 Moo. P.C.C. 165; 70 R.R. 27; see Benjamin on Sale, 8th Edn., p. 894.

7. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 132, f.n. (c).

8. (1850) 154 E.R. 1433; 80 R.R. 775.



taking possession of the goods by the buyer from the carrier who refused to deliver as he was served by the seller with a notice which however was invalid. *Held*, the transit did not end.<sup>1</sup>

It has been observed<sup>2</sup> that the language of sub-section (6) is wide enough to cover the case of a refusal to deliver the goods on a demand made before the arrival of the goods at their destination, a demand which a consignee is competent to make. But the carrier will be entitled to demand his full freight. In *Jackson v. Nichol*<sup>3</sup> (carrier's wrongful refusal to deliver on tender of freight), however, a demand of goods before the end of the journey was held to be insufficient to terminate the transit, there being no actual delivery and no attornment by the carrier, but it has been observed that it is doubtful whether this case is good law.<sup>4</sup>

**(9) Sub-section (7)—effect of part delivery.**

Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods. Section 48, *ante*, contains the analogous provision with regard to the unpaid seller's lien.

The agreement to give up possession referred to in the sub-section would appear to be an agreement between the buyer or his agent on the one hand, and the carrier, on the other, and not one between the buyer or his agent and the seller.<sup>5</sup> It rests with the party who relies on the part delivery as a constructive delivery of the whole to prove an intention to that effect. This proof may be established: (1) from the circumstances under which the delivery took place, *e.g.*, the purchaser may at the time with the carrier's consent express his intention to take the whole of the goods, although he actually takes only a part; or may, with such consent, take the part expressly in the name of the whole; or an intention to take all may be inferred from the character in which the person takes part delivery, as where he is the buyer's assignee for the creditors; or (2) from the intrinsic nature of the goods delivered, as *e.g.* where the cargo consists of an entire machine, and an essential portion of it is delivered to the purchaser.<sup>6</sup>

The fact that the carrier retains his lien for the freight of the goods is relevant to show that a part delivery is not intended to be a constructive delivery of the whole,<sup>7</sup> but it is not conclusive.

If goods are sent partly by one route, and partly by another and one parcel reaches the buyer, and the other is stopped before it does so, the seller can hold the part successfully stopped until the price of the whole is paid.<sup>8</sup>

1. See also *London & N.W. Ry. Co. v. Bartlett*, (1861) 7 H. & N. 400; demand made before the arrival of the goods.

2. Halsbury, *Laws of England*, 3rd Edn. Vol. 34, p. 132, f.n. (u).

3. 5 Bing. N.C. 508; 8 L.J.C.P. 294; 50 R.R. 777.

4. Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 132, f.n. (u).

5. *Re McLaren, Ex-parte Cooper*, (1879) 11 Ch. D. 68 C.A. at p. 78.

6. *Benjamin on Sale*, 8th Edn., p. 910; see also notes under section 48, *ante*.

7. *Re McLaren, Ex-parte Cooper*, *supra*; *Kemp v. Falk*, *supra*.

8. *Wentworth v. Outhwaite*, (1842) 10 M. & W. 436; 62 R.R. 664. See also notes under section 54.



**(10) Public wharves.**

In *Lilladhar v. George Wreford*<sup>1</sup>, Farran J. considered the effect of lading goods at wharves belonging to public bodies like the Trustees of the Port of Bombay, constituted by Bombay Act VI of 1879, and after citing *Barbar v. Meyerstein*<sup>2</sup> and *Glyn Mills & Co. v. East and West India Dock Co.*<sup>3</sup> observed: "From this it would seem to follow that so long as (the goods) are subject to a lien for freight, the transit is not ended. The goods are not at home. The converse proposition would, however, seem also to be true, that when the ship-owner lands the goods under the statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforward the goods are held by the statutable wharfingers for the consignee alone."

**Postal packets.**

Chalmers states<sup>4</sup>: "Packets containing goods sent by post by a seller to a buyer are not while in the course of transit by post, delivered to or in the possession of a carrier or other bailee, as no contract of bailment can arise. They cannot therefore be stopped in transit."<sup>5</sup>

For the position in India, see the provisions of the Indian Post Office Act, 1898 (Act VI of 1898), and the rules framed under that Act. Meanings of "in course of transmission by post" and "delivery" are defined in section 3 of that Act. See also section 18 of that Act, which relates to 'redelivery to sender of postal article in course of transmission by post.'

**52.** (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall redeliver the goods to, or according to the direction of the seller. The expenses of such redelivery shall be borne by the seller.

**Synopsis**

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|--|---|
| (1) <i>How stoppage in transit effected.</i> | <i>duties of the carrier and the</i>        |
| (2) <i>Notice to principal.</i>              | <i>seller.</i>                              |
| (3) <i>Sub-section(2)—effect of notice—</i>  | (4) <i>Stoppage by unauthorised person.</i> |

1. (1892) 17 Bom. 62 at pp. 91-92.

2. (1870) L.R. 4 H.L. 317.

3. (1882) 7 App. Cas. 591.

4. Sale of Goods Act, 16th Edn., pp. 182, 183.

5. Postmaster General v. W.H. Jones & Co., (1957) N.Z.L.R. 829, applying *Triefus & Co. v. Post Office*, (1957) 2 All E.R. 387.



**(1) How stoppage in transit effected.**

This section is based on section 46 of the English Sale of Goods Act, 1893 (See Appendix A). The rules contained in that section correspond to old sections 104 and 105 of the Indian Contract Act, 1872 (See Appendix B).

This section mentions two modes of stoppage, namely, (1) actual possession of the goods by the unpaid seller; (2) notice by him of his claims to the carrier or other bailee in whose possession the goods are. It has been suggested with reference to the English Act, that the use of the words "may" indicates that the section is not exhaustive.<sup>1</sup>

"At one time it seems to have been supposed," wrote Lord Blackburn, "that in order to make a good stoppage *in transit* there must have been an actual taking possession of the goods by the vendor or his agent, but it is now clearly settled that the vendor's rights are complete on giving the person who has the possession of the goods notice of the vendor's claim to stop the goods at a time when he can obey it, although there is neither an actual taking of possession by the person stopping the goods, nor such an assent on the part of the holder as would amount to a constructive possession."<sup>2</sup>

No particular form of notice is prescribed by the Act and it need not be in writing. It may be given to the carrier etc. or his agent.<sup>3</sup> The usual mode is a simple notice to the carrier stating the seller's claim, forbidding delivery to the buyer, or requiring that the goods shall be held subject to the seller's order. But the seller need not prove his title to the carrier, that is to say the existence of the facts justifying a stoppage. He takes the risk of the stoppage being justified. The carrier or other bailee in possession of the goods is bound to give effect to the claim as soon as he is satisfied that it is made by the seller unless he is aware of the legal defeasance of the claim.<sup>4</sup>

So, where a seller sent two telegrams, namely, 'don't deliver' and 'deliver' to a third man and in subsequent letter stated that delivery ought to be made to a third party but made no mention of his claim as that of an unpaid seller, it was *held* that the telegrams were sufficient notice under section 104 of the Indian Contract Act, 1872, and that the intention of the telegrams was to stop the goods in transit.<sup>5</sup>

The stoppage must be intended as such, and in virtue of a right adverse to that of the buyer, and must be done by an act showing an intention to resume possession, though the act may in fact be done with the buyer's consent. Thus, a direction by the seller to the consignee to hold the proceeds of the goods to his order is not a valid stoppage (assuming a valid notice could be directed to the consignee), as it implied that the goods themselves will be delivered to the buyer, but is only a direction how the proceeds shall be dealt with after delivery.<sup>6</sup> Whether

1. See Halsbury, Laws of England, 3rd Edn., Vol. 34, page 134, f.n. (u).  
2. Blackburn on Sale, 1st edition (1845), p. 267, 3rd Edn., p. 414.  
3. *Bohtlingk v. Inglis*, (1803) 3 East 381 : notice by seller's agent to the master of the ship was held sufficient.

4. *The Tigress* (1863) Br. & Lush. 38 ; 32 L.J.P.M. & A., 97 at p. 101.  
5. *Raghunath v. Michumal*, 8 Sind L.R. 65 : 26 I.C. 424.  
6. *Phelps v. Comber*, (1885) 29 Ch. D. 813, C.A. ; see also *Lilladhar v. Wreford*, 17 Bom. 62.



the stoppage is effected on behalf of the seller by one who has no authority to act for him, a subsequent ratification by the seller will be too late, if made after the transit is ended, the principle of the law of agency being that a ratification to be valid must be made at a time and in circumstances in which the person ratifying could himself do the act ratified.<sup>1</sup>

It is not stated how the unpaid seller is to take possession of the goods in transit, but it would seem that the seller would be justified in getting his goods back by any means not criminal, before they reached the possession of an insolvent buyer.<sup>2</sup>

## (2) Notice to principal.

Sub-section (1) further lays down that notice by the unpaid seller of his claim to the carrier or other bailee in whose possession the goods are, may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

Where the transit is by sea, the expression 'principal' includes the ship-owner, who is the person most likely to know where the ship and its master are to be found. On this point, Lord Blackburn observed in *Kemp v. Falk* :<sup>3</sup>

"I had always myself understood that the law was that when you become aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a very good way of stopping them *in transitu* was to give notice to the ship-owner in order that he might send it on. He knew where his master was likely to be, and he might send it on ; and I have always been under the belief that, although such a notice, if sent, cast upon the ship-owner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage *in transitu*. I have always thought that when ship-owner, having received such a notice, used reasonable diligence and sent the notice on, and it arrived before the goods were delivered, that was a perfect stoppage *in transitu*."

Notice to be effectual must be so given that the principal can by the exercise of due diligence communicate with his servant or agent. "The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery."<sup>4</sup> So, where notice was given to the ship-owner and he endeavoured to stop the goods but the assignees of the bankrupt obtained delivery before the communication could reach the person in actual possession, it was *held* that the notice was ineffectual.<sup>5</sup>

1. See *Dibbins v. Dibbins*, (1896) 2 Ch. 348 ; per curiam in *Lyall v. Kennedy* (1899) 14 App. Cas. 437, 461, 462 ; see *Bird v. Brown*, *supra* ; but see *Hutchings v. Nunes*, (1863) 1 Moo. P.C.C. (N.S.) 248 ; 138 R.R. 511 ; cf. section 200, Indian Contract Act, 1872.

2. *Snee v. Prescott*, (1744) 1 Atk. 245, at p. 250 ; per Lord Hardwicke L.C. ; 26 E.R. 157, L.C.

3. (1885) 7 App. Cas. at p. 585.

4. Per Parke B. in *Whitehead v. Anderson*, (1842) 9 M. & W. 518, 534, 60 R.R. 819, 832.

5. *Ibid.*



But where notice to the principal is given in time and under the circumstances giving the principal sufficient opportunity to communicate with the agent in actual possession if he had acted with the diligence, the mere fact that the principal failed to communicate with the agent in time to stop delivery will not destroy the seller's right and in such case if the seller cannot be restored in possession of the goods he is entitled to claim damages from the principal for the loss due to his negligence.<sup>1</sup>

The sub-section also implies that it is the duty of the principal to use such diligence, and if the principal took no steps to communicate with his agent when it was open to him to do so, he would be liable to the seller for a breach of the obligations imposed upon the carrier by the next sub-section.<sup>2</sup>

It has been held that the unpaid seller may effectually exercise his right of stoppage by demanding the bills of lading from the ship-owner who has retained them as security for unpaid freight.<sup>3</sup> A request by telegram may also be sufficient.<sup>4</sup>

It appears doubtful whether a notice to the consignee or to his official assignee in case he is already declared insolvent, is sufficient for the purposes of the section.<sup>5</sup>

### **(3) Sub-section (2)—effect of notice—duties of the carrier and the seller.**

The effect of the notice to stop in transit when given effectually, whether to the person in actual possession of the goods or his principal, is to revert the right to the *possession*<sup>6</sup> of the goods in the seller. After that the carrier holds them as his agent, and, subject to the carrier's lien on the goods for their freight, which arises from the common law whether the carrier be a carrier by land or sea, and prevails against the rights of seller as well as those of the consignee, he must deliver them as the seller directs. If after receiving such notice the carrier delivers the goods to the consignee, or refuses to redeliver them to the seller, he is guilty of a conversion of the goods and is liable for damages.<sup>7</sup>

Similarly, if by mistake, or by reason of the principal not using due diligence to communicate with his agent to stop the delivery, the goods are delivered to the buyer, the carrier is liable for damages for conversion and the buyer or his trustee in bankruptcy must restore them on demand to the seller, and on his failing to do so, is also liable to be sued in trover by the seller.<sup>8</sup> In case of doubt the safest course for the carrier is to file a

1. Lilladhar v. Wreford, 17 Bom. 62(89); Remfry, p. 393.

2. See Litt v. Cowley, (1816) 7 Taunt, 169; 17 R.R. 482.

3. Ex-parte Watson, (1877) 5 Ch. D. 35, C.A.

4. Ex-parte Falk, (1880) 14 Ch. D. 446; Raghmal v. Michumal, (1915) 18 I.C. 424 (Sind).

5. (cf.) Phelps Stokes & Co. v. Comber, (1885) 29 Ch. Div. 813, 822, 825, C.A., Lilladhar v. Wreford, 17 Bom. 62.

6. Not the property as stated in some of

the older cases.

7. The Tigress, (1863) 32 L.J.P.M. & A. 97, at p. 102; United States Steel Products Co. v. G.W. Rly., supra; Portifex v. Midland Rail Co., (1877) 3 Q.B.D. 23; Ormnode v. Bailey, (1895) 11 T.L.R. 219.

8. Litt v. Cowley, 2 Marsh 457; 7 Taunt. 169; 17 R.R. 482, cited in Lilladhar v. George Wreford, (1892) 17 Bom. 92; Re Deveze, ex-parte Cote, (1873) L.R. 9 Ch. App. 27.



suit of inter-pleader,<sup>1</sup> or take an indemnity from the person to whom he delivers the goods, as he would render himself liable to an action by the buyer for conversion if he restores the goods to the seller after the transit has ended.<sup>2</sup>

Where a railway company is in possession of goods as carriers when the sellers give notice of stoppage in transit, and a sum of money is owing by the buyers to the railway company, the railway is not entitled to set up in priority to the seller's right of stoppage in transit a general lien exercisable by the company against the buyers as owners of the goods.<sup>3</sup>

The seller may also enforce his rights by injunction or if the goods are in the hands of the master, by arrest of the ship.<sup>4</sup> The seller has a preferential right against a creditor of the buyer who has attached the goods during transit.<sup>5</sup>

A seller who stops in transit, and persists in the stoppage, is under an obligation to the carrier to take, or give directions as to the delivery of the goods and to discharge the freight ; and if he repudiates this obligation he is responsible to the carrier in damages for any loss incurred by the latter by reason of the non-completion of the transit. These damages will if the conduct of the seller prevents the goods going to their ultimate destination amount to the whole freight of the voyage to that destination, which would otherwise have been completed.<sup>6</sup>

If the notice be given to the principal, but not so as to enable him by the use of due diligence to stop the delivery to the buyer by his agent, neither he nor the agent will be liable to the seller, and the buyer will have lawfully obtained possession, and the transit will have come to an end. This follows from the previous sub-section.<sup>7</sup>

This sub-section also provides that as between the seller and the carrier, the expenses of redelivery shall fall on the seller. Where an unpaid seller stops goods sent by sea at a port short of their destination, he is liable for the freight, not only to the port where the goods were actually landed, but also to the port of their ultimate destination.<sup>8</sup> It may be that the seller would be able to prove for the expenses against the buyer's estate.<sup>9</sup>

#### (4) Stoppage by unauthorised person.

A stoppage in transit made on account of the seller even by a person unauthorised in that behalf is effectual, if it is ratified before the transit has terminated.<sup>10</sup> But as under the general law of agency a ratification is

1. *The Tigress*, supra ; *Chhangan Lal v. B.B.C.I. Rly.*, (1915) 17 Bom. L.R. 339 : 23 I.C. 948 (2) ; *Amer Chand v. Ramdas*, (1914) 38 Bom. 255 : 21 I.C. 343 ; *Meyerstein v. Barber*, (1866) L.R. 2 C.P. at p. 55 ; *Glyn v. East and West India Dock Co.*, (1882) 7 A.C. 591.  
2. *Taylor v. G.E. Rly.*, (1901) 1 K.B. 74.  
3. *U.S. Steel Products Co. v. G.W. Rly.*, (1916) 1 A.C. 189.  
4. *The Tigress*, supra.

5. *Smith v. Goss*, (1808) 1 Camp. 282.  
6. *Booth Steamship Co. v. Cargo Fleet Iron Co.*, (1916) 2 K.B. 570 ; 85 L.J.K.B. 1577 (C.A.). See also *Benjamin on Sale*, 8th Edn., p. 916.  
7. See also *Whitehead v. Anderson*, supra.  
8. *Booth S.S. Co. v. Cargo Fleet Iron Co. Ltd.*, supra.  
9. See *Chalmers, Sale of Goods Act*, 16th Edn., p. 184.  
10. See *Bird v. Brown*, (1850) 4 Exch. 786 ; *Aggarwala's Law of Agency*, p. 479.



not effectual unless it is made at the time when the principal could himself do the act ratified, it cannot be ratified after the transit has terminated.<sup>1</sup> In the latter cases another principle of the law of agency, namely, a ratification cannot prejudice a third person's vested rights, also comes into play and makes the act of the unauthorised person ineffectual.<sup>2</sup> The despatch during the transit by the seller to the person making the stoppage in transit of a letter of authority is however held to be sufficient ratification notwithstanding that the letter may not be received by the unauthorised agent until after the termination of the transit.<sup>3</sup>

### Other illustrations

(1) In *Plischke v. Allison Bros. Ltd.*<sup>4</sup>, buyers in London bought goods from sellers in Hamburg, 'free house Hamburg'. On arrival of the goods in London, the carriers asked buyers where they wanted the goods delivered, and the buyers instructed them to put them into a specified warehouse pending payment of the customs duty. A few days later buyers became insolvent and the sellers gave the carriers notice of stoppage in transit. Branson J. held that the transit ended when the carriers warehoused the goods on the instructions of buyers and that sellers were too late in exercising the right of stoppage.

(2) In *Reddall v. Union Castle Mail Steamship Co.*,<sup>5</sup> a purchaser of goods consigned them to a destination abroad, the transit being in several stages. At the end of one of such stages, he intercepted the goods, and they thereafter remained in the custody of the carriers who charged him warehouse rent in respect of them. The unpaid vendors having claimed to stop the goods in transit, it was held that the original transit had been terminated by the purchaser, and the right of the vendors to stop the goods in transit was therefore lost.

(3) In *Ex-p. Rosevear China Clay Co., Re Cock*,<sup>6</sup> a contract was entered into for the sale of some china clay to be delivered free on board at a specified port ; and to be paid for by an acceptance of the purchaser. Afterwards the purchaser chartered a ship and gave notice to the vendors, who then delivered the clay on board the specified ship at the port agreed upon. The destination of the clay had not been communicated to the vendors. Before the ship left the harbour the vendors heard of the insolvency of the purchaser, and give notice to the master of the ship to stop the clay in transit. No bill of lading had been signed, nor had the purchaser given any acceptance for the price of the clay. The Chief Judge held that so soon as the clay was delivered on board the ship the transit was at an end, and the vendors had no right afterwards to stop the clay in transit. The Court of Appeal held that the clay being in the possession of the master of the ship only as carrier, the transit was not at an end, and the notice to stop was given in time. It was observed :

Delivery of goods by the vendor to a carrier, even though the carrier be nominated and hired by the purchaser, is only constructive,

1. *Bird v. Brown*, supra.

2. See Aggarwala's Law of Agency, pp. 273 to 284.

3. *Hutchings v. Nunes*, 1 Moo. P.C.C. (N.S.) 243 ; Halsbury, Vol. 34, (3rd

Edn.) Art. 225, p. 136.

4. (1936) 2 All E.R. 1009.

5. (1914) 84 L.J.K.B. 360.

6. (1879) 11 Ch. D. 560, 571.



not actual delivery to the purchaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts. Till the goods are in the actual possession of the purchaser the transit is not at an end, and it makes no difference that their ultimate destination has not been communicated by the purchaser to the vendor.

(4) In *United States Steel Products Co. v. Great Western Railway*,<sup>1</sup> sellers, an American Company, contracted with the railway company to forward goods to buyers upon the terms of a consignment note which provided that 'all goods delivered to the company will be.....subject to a lien for money due to them for the carriage.....and also to a general lien for other moneys due to them from the owners of such goods upon any account.' Buyers who by transfer of the bill of lading had become owners of the goods, became insolvent when the goods were in the possession of the railway company and sellers stopped them in transit ; the freight for the goods had been prepaid and the railway company had no claim in that respect, but buyers owed the company £ 1,170 on other accounts, and the railway company refused to redeliver the goods to sellers before their general contractual lien was discharged with respect to that sum. The House of Lords decided that the demand was unjustified.

### Transfer by Buyer and Seller

**53.** (1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto :

Effect of sub-sale  
of pledge by buyer.

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

1. (1916) 1 A C. 189.



## Synopsis

- |   |   |
|---|---|
| (1) <i>Analogous law.</i>   | (3) <i>Proviso to sub-section (1)—transfer of documents of title.</i> |
| (2) <i>Sub-section (1)—effect of sub-sale by buyer—seller's right not affected by the buyer's dealing with the goods.</i> | (4) <i>Sub-section (2)—other securities—marshalling.</i>              |

**(1) Analogous law.**

sub-section (1) is based on section 47 of the English Sale of Goods Act, 1893 (Appendix A). It combines the provisions of old sections 98 and 101 of the Indian Contract Act, 1872, while the proviso covers the same ground as sections 102 and 103 of that Act, (Appendix B). The words in section 103 "having obtained" were unsatisfactory as they would include cases where the document is got tortiously. Consequently, the language of the English Act "lawfully transferred" was substituted. Again, to make the proviso applicable to warrants and delivery orders, the word "issued" was added.

Sub-section (2) is new. It introduces the right of marshalling by an unpaid seller in cases of pledge of other securities along with documents of title by the buyer.

**(2) Sub-section (1)—effect of sub-sale by buyer—seller's right not affected by the buyer's dealing with the goods.**

As already explained,<sup>1</sup> an assent by the seller to a sub-sale or pledge is a renunciation of the seller's right of *lien* as against the sub-buyer or pledgee; and on principle, it would be unreasonable that a seller should, after such an assent, be able by a subsequent stoppage to resume a lien which he had parted with absolutely.

The rule presupposes that the sub-sale is made while the goods are still in transit: if the transit is at an end as regards the buyer, there cannot be a new transit with regard to the sub-purchaser.

A sub-purchaser cannot be in a better position than that of the purchaser himself unless there is assent or estoppel on the part of the seller. The assent is to the sale or other disposition of the property and may be express or implied. This section deals with both lien and stoppage in transit.

In *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*,<sup>2</sup> the sellers had, by issuing to the buyer a warrant which was by custom treated as a representation that the goods were free from any seller's lien, assented to the buyers dealing with the goods. Part of the goods, at the time of the buyer's insolvency, were still at the seller's works and part had been sent by rail and warehoused by the railway company in the name of the buyer's agents. The sellers gave the railway company notice not to deliver the goods. The endorsees of the warrant claimed a charge on all the goods. *Held*, that the sellers, after issuing the warrant, could not set up any claim for unpaid purchase money. Jessel M.R. observed in the case:

"Any man who gives this warrant understands that it shall pass from hand to hand for value by endorsement, and that the endorsee

1. See also Benjamin on Sale, 8th Edn., pp. 869 and 920.

2. (1877) 5 Ch. D. 205; 46 L.J. Ch. 418.



is to have the goods free from *any* vendor's claim for purchase-money. He is not to be asked whether he has a claim or not; if he chooses to issue it in this shape he tells all the trade *that they may safely deal on the faith of that warrant*.....Having given it as a statement on the face of the warrant that the holder for value by endorsement would have the goods free from the lien, and having given the warrant for the purpose of its being so dealt with, I think it is clear on general principles of equity that such a defence (that the sellers were unpaid) could not be set up."

In this statement of the common law, Jessel M.R., seems to have made no distinction between lien and right of stoppage *in transitu* for he proceeds to consider, only on the supposition that his view was wrong, whether the *transit* of the goods was at an end, and he held that it was. This view of the law is adopted by the English Act.<sup>1</sup>

Lord Blackburn stated the rule as follows :

A purchaser who has acquired ownership may sell the goods subject to the first vendor's rights, and if he does so, the property is transferred to the second purchaser by the second bargain and sale without any delivery of possession. But though the second purchaser acquires by his bargain and sale the legal property in the goods and every right which his immediate bargainer had in the goods, yet (if there be not an assignment of the bill of lading) he acquires no greater right; he takes the property subject to the same restriction that his immediate vendor held it under.<sup>2</sup>

The above statement must, however, be read with the proviso to sub-section(1).

Thus a buyer cannot defeat the unpaid seller's right of lien or stoppage in transit by selling or otherwise disposing of the goods, unless the seller has assented to such disposition.<sup>3</sup> As a general rule, the buyer who resells the goods cannot give a better title than he himself has. The subsequent vendee who does not take possession gets only a title defeasible on non-payment of the price by the first vendee.<sup>4</sup> A mere acknowledgment by the seller of the buyer's sub-contract does not deprive him of the rights of lien or stoppage in transit; for it is quite consistent with the seller thinking that neither the first nor the second buyer will be entitled to delivery unless the price is paid. Pickford J. observed in *Mordaunt v. British Oil Cake Mills* :<sup>5</sup>

"The assent which affects the unpaid vendor's right of lien must be such an assent as in the circumstances show that the seller intends to renounce his right against the goods. It is not enough to show that the fact of a sub-contract has been brought to his notice and that he has assented to it merely in the sense of acknowledging the receipt of the.....His assent to a sub-contract may simply mean that

1. See Benjamin on Sale, 8th Edn., p. 920.

2. Blackburn on Sale, 3rd Edn., p. 418.

3. *Craven v. Ryder*, (1816) 6 Taunt. 433; 16 R.R. 644; *Dixon v. Yates* (1833) 5 B. & Ad. 313; 39 R.R. 489; *Ewan v. Smith*, (1849) 2 H.L.C. 309; 81 R.R. 166; cf. old section 98, Indian

Contract Act, 1872.

4. *Dixon v. Yates*, supra; *Craven v. Ryder*, supra.

5. (1910) 2 K.B. 502; see also *Stoveld v. Hughes*, (1811) 14 East 308, 104 E.R. 619; cf. *Mount v. Jay & Jay*, (1959) 3 All E.R. 307, per Salmon J. at p. 311.



he acknowledged the right purchaser under the sub-contract to have the goods, subject to his own paramount right under the contract with his original purchaser to hold the goods until he is paid the purchase money.....”

Where, however, the seller by his conduct assures the subsequent buyer that the goods are at his disposal free from any adverse claim by the seller, he is estopped.<sup>1</sup> The rule has nothing to do with constructive delivery. The seller is deemed to assent where by his words or conduct he expressly or impliedly represents to the transferee from the buyer that goods will be delivered to him free from the seller's right of lien and stoppage in transit.<sup>2</sup>

In *Knights v. Wiffen*,<sup>3</sup> the defendants sold 80 maunds of barley out of a granary to M who sold 60 maunds to the plaintiff before the goods had been ascertained by the defendant. The plaintiff paid M, obtained and presented a delivery order to the defendant, who expressed willingness to forward the barley on being requested to do so. It was *held* that the seller had recognised the title of the sub-buyer and therefore was estopped from exercising the lien which he had waived.

In *Ganges Manufacturing Co. v. Sourujmull*,<sup>4</sup> where the sub-buyer produced delivery orders to the sellers who endorsed on them that they were willing to give delivery, but after delivery of part refused to deliver the rest on the ground that the first buyer had not paid the price, it was *held* that the sellers were estopped.

To effect the lien the assent must be given in such circumstances as to show an intention on the part of the unpaid seller to renounce his right against the goods sold by the buyer. In *Mordaunt Brothers v. The British Oil and Cake Mills Ltd.*,<sup>5</sup> the defendants sold a quantity of oil to some merchants, who resold a portion to the plaintiffs giving them delivery orders addressed to the defendants, requiring the latter to deliver to the plaintiffs “*ex our contract*”. The defendants retained the orders when presented, and either made no comments when doing so, or told the plaintiffs that they were in order, and entered the plaintiffs' name in their books. The merchants, who bought from the defendants, at first kept up their payments, and the defendants duly delivered the Oil to the plaintiffs. Later the merchants fell into arrears with their payment and thereupon the defendants, claiming to exercise their right of lien, refused to make further deliveries to plaintiffs. It was *held* that the defendants were entitled to do so.

Even at common law, if the original seller recognized the title of a subsequent buyer without reserving his own rights, he is estopped from claiming a lien,<sup>6</sup> and a sub-sale may even take effect by way of estoppel,

1. See Pollock and Mulla's Indian Contract Act.

2. See Merchant Banking Co. v. Phoenix Bessemer Ch., (1877) 5 Ch. D. 205; *Knights v. Wiffen*, (1870) 5 Q.B. 660; *Pearson v. Dawson*, (1858) 120 E.R. 576; 113 R.R. 724; *Stoveld v. Hughes*, *supra*.

3. (1870) L.R. 5 Q.B. 660.

4. (1880) 3 Cal. 669. See also *Anglo-India Jute Mills Co. v. Omademull*, (1910) 38 Cal. 127.

5. (1910) 2 K.B. 502.

6. *Knights v. Wiffen*, *supra*; see also *Woodley v. Coventry*, (1863) 2 H. & C. 164, 133 R.R. 633. Compare *Pearson v. Dawson*, (1851) E.B. & E. 448, 113 R.R. 724.



notwithstanding that no specified goods had been appropriated as between the seller and the first buyer, though it may be more difficult to establish that it is when the goods are specific.<sup>1</sup>

**(3) Proviso to sub-section (1)—transfer of documents of title.**

The usual way in which the seller's right of stoppage *in transitu* was at common law defeasible was when the goods are represented by a bill of lading, which is a symbol of property, and when the buyer, being in possession of the bill of lading with the seller's assent, transfers it to a third person, who *bona fide* gives value for it. But it is necessary that there should be a transfer by the *buyer* of the bill of lading. Thus, the right of stoppage was not at common law, *and is not now*, affected by a transfer of the bill of lading by the seller to the buyer or by the fact that it is issued in the first instance by the carrier to the buyer, or at any rate without the privity of the seller to a sub-buyer.<sup>2</sup> The existence of a bill of lading made out in the sub-purchaser's name but not delivered to him is not sufficient.<sup>3</sup> Neither is any kind of agreement with the sub-purchaser, even for payment, unaccompanied by endorsement of the bill of lading.<sup>4</sup>

Under the English law, all documents of title have now been placed on the same footing by the Factors Act of 1889, which repealed the Factors Act, 1877.

As an exception to the rule laid down in sub-section (1) of section 53 of the Act, the *proviso* to the said section lays down that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition, for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of transferee. He has still the right to stop all the property which remains in the buyer, but he must either pay the mortgagee or pledgee the amount secured by the mortgage, or pledge, or content himself with receiving any surplus realized by the sale of the goods over the amount so secured. The expression "document of title to goods" is defined in section 2 (4) ante. It includes warrants and orders for the delivery of goods, which are really issued and not transferred. The word "issued" (which does not occur in the English Act) has therefore, been inserted before the words "lawfully transferred" in the proviso.<sup>5</sup>

1. See *Farmeloc v. Bain*, (1876) C.P.D. 445; *Mordaunt Brothers v. British Oil and Cake Mills Ltd.*, supra.

2. *Benjamin on Sale*, 8th Edn., pp. 920, 921, and the authorities cited therein.

3. *Ex-parte Golding, Davis & Co.*, (1880) 13 Ch. Div. 628, C.A.; *Bapuji Sorab v. The Clan Line Steamers*, (1913) 34 Bom. 640; 7 I.C. 650; *Aliter* if the bill of lading is actually delivered to the sub-purchaser in whose name it has been made out. *Ramendra Nath*

*Roy v. Brajendra Nath Das*, (1919) 46 Cal. 831; 53 I.C. 986.

4. *Kemp v. Falk*, supra. "No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage in transitu unless there was an endorsement of the bill of lading." per Lord Blackburn at p. 582.

5. See Report of Special Committee, note on clause 53 of the Bill.



The document of title to goods must be "lawfully transferred." It must be transferred in the manner appropriate to the instrument, as by endorsement and delivery or by mere delivery, as the case may be. The transferor, as held under the English law, should also have a right to transfer it, for even a bill of lading and a *fortiori* any other document of title, is not negotiable in the same sense as a bill of exchange and therefore the mere honest possession of a bill of lading indorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. The endorsement of a bill of lading gives no better right to the goods than the endorser himself had (except in cases where a mercantile agent, or person in the position of such agent, may transfer it to a *bona fide* holder under the Factors Act) so that if the owner should lose or have stolen from a bill of lading endorsed in blank, the finder or the thief could confer no title upon an innocent third person.<sup>1</sup>

But the title of *bona fide* third person will prevail against the seller who has *actually* transferred the bill of lading to the buyer although he may have been induced by the buyer's fraud to do so, a transfer obtained by fraud being only voidable not void.<sup>2</sup>

The transfer of the document of title to goods, in order to affect the seller's right of stoppage in transit or of lien must be to a third person who takes in good faith. 'Good faith' means without notice of such circumstances as render the document of title to goods *fairly and honestly assignable*<sup>3</sup> e.g. that the buyer is insolvent. Knowledge that the goods are still unpaid for does not constitute bad faith<sup>4</sup> and is not sufficient by itself to prevent the assignee from defeating the seller's right to stop. This section assumes that the buyer is properly in possession of the bill of lading or other document of title. Section 30 (2), *ante*, governs the cases in which he has obtained or retained possession of it fraudulently. The second buyer must have no notice of that defect in the buyer's title. If he has no such notice, his position is the same as under this section.

The burden of proving that the transfer was made in good faith and for consideration lies on the subsequent buyer.<sup>5</sup>

As has been stated before, a bill of lading or a document of title is not a negotiable instrument, but the transferee can acquire a better title than that of the transferor if he takes *bona fide* and for value as the seller's right of lien or stoppage in transit is not available against him though it may be available against the transferor.

1. Benjamin on Sale, 8th Edn. p. 3 and the authorities cited therein. See also *Gurney v. Behrend*, (1854) 3 E. & B. 622; *Cahn v. Pockett's*, (1899) 1 Q.B. 643.  
2. *Pease v. Gloahcc*, (1866) L.R. 1 P.C. 219: where the buyer obtained the bill of lading fraudulently, the assignee was held not affected. For position in India see section 20(3) *ante*.

3. *Cuming v. Brown*, (1808) 9 East 506; 9 R.R. 603; *Salomons v. Nissen*, (1788) 2 T.R. 674. See also S. 3 (20) of the General Clauses Act, 1897.  
4. *Cuming v. Brown*, *supra*; *Vertue v. Jewell*, (1814) 4 Camp. 31.  
5. *Rash Behari v. Narain Das*, A.I.R. 1939 Cal. 112; 56 Cal. 339; see also *Lakshmi Kanta v. Emperor*, (1919) 46 Cal. 825; 50 I.C. 669.



In *Cahn v. Pockett's etc. Co.*,<sup>1</sup> the seller forwarded to the buyer a bill of lading endorsed in blank together with a draft for the price of the goods for acceptance. The buyer without accepting the draft made over the bill of lading to a sub-purchaser who acting in good faith paid him for the goods. The seller thereafter stopped the goods in transit. In an action by the sub-purchaser against the carrier for non-delivery, it was *held* that the seller had lost his right of stopping the goods in transit.

It is to be noted that under the section the seller's right is defeated against a transferee who takes in good faith and for consideration, and though in the case of pledge the right is to be exercised subject to the right of the pledgee, in the case of assignment by way of sale there is no reservation as to payment of consideration or any part of it.

Transfer must be for value. Under old section 103, Indian Contract Act, which was based on a decision of the Judicial Committee in *Rodger v. Comptoir d'Escompte de Paris*,<sup>2</sup> an antecedent debt of the buyer to the second buyer was not sufficient consideration for the transfer of a document of title. But in *Leask v. Scott*,<sup>3</sup> this opinion was dissented from, and the present section being based on section 47 of the English Act makes no distinction between an antecedent debt, and an advance made specially on the document transferred.

But, although an antecedent debt may be the basis of a good consideration for the transfer of a document of title, yet to defeat the unpaid seller's rights, the facts connected with the transfer must show that it was *agreed* that such debt should be the consideration. Thus the transfer will be ineffectual if the transfer be unknown to the transferee.<sup>4</sup> And the pledgee of a bill of lading specifically for a definite sum does not entitle the pledgee to hold the goods against the seller *also* in respect of the pledgee's general balance of account against the buyer, even although the pledgee be the buyer's factor.<sup>5</sup>

In *Patten v. Thompson*,<sup>6</sup> the buyers were in the habit of consigning goods to their factors for sale, and the factors used to accept bills drawn by the buyers in respect of a general account between them. The buyers endorsed to these factors a bill of lading received from the sellers, and representing goods of less value than the acceptances of the factors then current, but they made no appropriation of the bill of lading to any specific draft or balance. *Held*, that on the buyer's insolvency the seller's right of stoppage had not been defeated by the endorsement of the bill of lading as it was transferred to the factors without reference to any balance due to them, and therefore to them not as pledgee, but to enable them to obtain possession of the cargo *qua* factors only.

It would appear that the proviso will include the case of a transfer of the bill of lading to a second buyer where the sale is on credit and the term of credit has not expired.<sup>7</sup>

1. (1899) 1 Q.B. 643. The case was decided on S. 25(2) of the English Act which corresponds to S. 30(2) of the Indian Act but the decision also illustrates the present section.

2. (1869) 2 P.C. 393.

3. (1877) 2 Q.B.D. 376; (cf.) *Glegg v. Bromley*, (1912) 5 K.B. 474.

4. *Glegg v. Bromley*, *supra*; *Wigan v.*

*English Ass. Corp.*, (1909) 1 Ch. 291.

5. *Spalding v. Ruding* (1843) 6 Beav. 376, 12 L.J. Ch. 503, 63 R.R. 120; see also *Peacock v. Baijnath*, (1891) 18 Cal. 573, 590, 591.

6. 5 M. & S. 350; 17 R.R. 350.

7. See *Pollock and Mulla's Sale of Goods Act*, 1930, page 272.



If the holder of the bill of lading resells the goods or otherwise disposes of them for value to a third person, who pays the money, such third person acquires his interests in the goods subject to the original seller's right of stoppage *in transitu*, unless he gets a transfer of the bill of lading.<sup>1</sup>

In *Ex p. Golding Davis & Co.*<sup>2</sup>, the buyer resold the goods and became insolvent: the bill of lading was made out in the name of the sub-purchaser but not delivered to him and when the goods were stopped he had not paid the price. It was *held* that the original seller was entitled to stop the goods for the original purchase money. This decision was followed in *Ex-p. Falk*.<sup>3</sup> But in the House of Lords, Lord Selborne seemed to doubt the rule laid down in *Ex-p. Golding Davis & Co.* saying that he assented to the "proposition that where the sub-purchasers get a good title as against the right of stoppage *in transitu*, there can be no stoppage *in transitu*, as against the purchase-money payable by them to their vendors. I am bound to say, that it is not consistent with the idea of the right of stoppage in transit that it should apply to anything except to the goods which are in transit." The other Lords declined to give any opinion on the point.<sup>4</sup>

The Bills of Lading Act, IX of 1856, had not affected the law on these matters.

The document should be a document of title, that is, one which represents the goods, and not, *e.g.*, a mere engagement to delivery.<sup>5</sup>

Documents of title.

In *Ant. Jurgens Margarine Fabrieken v. Louis Dreyfus & Co.*<sup>6</sup>, the defendants entered into a contract to sell a quantity of seed, payment to be made in London on vessel's arrival before Hamburg by cash in exchange for shipping documents and/or delivery order. Subsequently, the buyers sold 500 tons of the seeds to the plaintiffs on the same terms as to payment. The defendants received a consignment of 6,400 bags, at Hamburg, and in exchange for the buyer's cheque for the price of 2,640 bags gave them two delivery orders to their Hamburg house for 960 and 1,680 bags respectively from that consignment. The buyers endorsed those orders to the plaintiffs in exchange for the price. The cheque given by the buyers to the defendants was dishonoured and the defendants thereupon refused to deliver any seed to the plaintiffs. It was *held* that this refusal was wrongful.

Apart from any established trade custom a delivery chit or a delivery order is nothing more than a token of authority to receive possession of the goods which it covers. A delivery chit which is part and parcel of a contract on Sukkur Pass Godown delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent.

Delivery chit.

1. *Kemp v. Falk*, (1882) 7 App. Cas. 573, at p. 582, per Lord Blackburn.  
 2. (1880) 13 Ch. D. 628 at p. 637, C.A.  
 3. (1880) 14 Ch. D. 446 at p. 457, C.A. See also *Hugill v. Masker*, (1889) 22 Q.B.D. 364, 369.  
 4. *Kemp v. Falk*, *supra* at p. 577; see

*Chalmers, Sale of Goods Act*, (1893), 13th Edn., p. 140.  
 5. See *Laurie and Morewood v. Dudin*, (1925) 2 K.B. 383.  
 6. (1914) 3 K.B. 40; cf. *Anglo-India Jute Mills v. Omademull*, (1911) 38 Cal. 127; 10 I.C. 859.



of the price of goods is not a document of title within the meaning of S. 2 (5) of the Act. The delivery chit does not represent the goods or transfer possession thereof or entitle the holder to receive delivery from the original seller. Irrespective of whether he had received the purchase price of the goods the original seller is entitled to refuse delivery to the holder of the chit of lien as unpaid vendor. The delivery chit therefore does not fall within the purview of S. 53 (1) of the Act.<sup>1</sup>

In *D.F. Mount Ltd. v. Jay & Jay (Provisions) Co. Ltd.*, (1959) 3 All E.R. 307, it has been held under S. 47 of the (English) Sale of Goods Act, 1893, [corresponding to S. 53 (1) of the Indian Sale of Goods Act, 1930] :

Applicability to unascertained goods.

There is no reason why S. 47 should not apply to unascertained goods, although an inference can in some circumstances more readily be drawn against the seller in the case of sale of specific goods than in the case of a sale of unascertained goods.

The assent contemplated by S. 47 means an assent given in such circumstances as to show that the unpaid seller intends that the sub-contract shall be carried out irrespective of the terms of the original contract and must be such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods. (1910) 2 K.B. 502 followed.

Where A being anxious to get rid of the goods on a falling market, sells them to B, knowing that B could only pay for them out of the money to be obtained from his customers against delivery orders in favour of those customers, the true inference is that A assents to B reselling the goods in the sense that A intended to renounce his rights against the goods and to take risk of B's honesty.

The proviso is confined to cases where a document is transferred to the buyer and the same document is then transferred by him to the person who takes in good faith and for valuable consideration. The person who transfers the documents of title to the buyer may originate it himself and need not have received it from some third party in order to transfer it within the meaning of the proviso. However, on the plain language of the section, it must be that very document which is transferred by the buyer for the proviso to operate.

#### (4) Sub-section (2)—other securities—marshalling.

This sub-section is new. It gives to the unpaid seller the right to insist on the pledgee marshalling the securities. In other words, it entitles the unpaid seller to force the creditor to exhaust any other securities held by him towards satisfying his claim before proceeding against the goods of the unpaid seller.<sup>2</sup> The doctrine of marshalling has been recognised in the case of sale and mortgage of immoveable property in sections 56 and 81 of the Transfer of Property Act, 1882.

1. *Hukumat Rai Arjandas v. Nandu Virumal*, A.I.R. 1941 Sind 78 : 195 I.C. 137.

2. See *Re Westzinthus*, (1833) 5 B. &

Ad. 817 ; 39 R.R. 665. See *Bapuji Sorabji v. The Clan Line Steamer*, (1910) 34 Bom. 640, at p. 658 et seq. : 7 I.C. 650.



**54.** (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

*Sale not generally rescinded by lien or stoppage in transit.*

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien of stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

### Synopsis

- |   |   |
|---|---|
| (1) <i>Analogous law.</i>   | <i>to the buyer.</i>  |
| (2) <i>The effect of a stoppage in transit is to restore the goods to seller's possession, not to rescind the sale generally—sub-section (1).</i> | (6) <i>When no due notice is given to the buyer.</i>                                      |
| (3) <i>Unpaid seller's right of re-sale—sub-section (2)—effect of re-sale.</i>  | (7) <i>Sub-section (3)—position of the second buyer.</i>                                  |
| (4) <i>For re-sale the seller must act in a reasonable manner—invalid re-sale.</i>  | (8) <i>Sub-section (4)—right of re-sale expressly reserved by seller in the contract.</i> |
| (5) <i>Goods re-sold must be contracted for—sub-section (2) will apply only where property has passed</i>   | (9) <i>Right of re-sale does not bar other remedies.</i>                                  |
|   | (10) <i>Tortious re-sale of goods by the seller.</i>                                      |
|   | (11) <i>Alternative claim for damages.</i>  |

#### (1) Analogous law.

This section relates to the right of re-sale of an unpaid seller, and is based on section 48 of the English Act (See Appendix A). Old section



170 of the Indian Contract Act (see Appendix B) contained a similar provision. The present section embodies the following principles :

(1) Before the seller exercises his right of re-sale, he should give notice to the buyer of his intention to re-sell.

(2) In default of such a notice, the seller should have no right to claim any damages for loss on re-sale from the buyer and should be under an obligation to pay over the profits, if any, arising from the re-sale to the purchaser.

(3) Whether or not the requisite notice is given, the purchaser from a seller should get an absolute and clear title.<sup>1</sup>

**(2) The effect of a stoppage in transit is to restore the goods to seller's possession, not to rescind the sale generally—sub-section (1).**

The rights of an unpaid seller to retain possession of the goods or, if he has parted with the possession, to resume and thereafter to retain it, and the circumstances in which these rights may be exercised, have already been dealt with. This section deals with his further rights and remedies, when in possession, against the goods.

Sub-section (1) clearly declares that the exercise by the unpaid seller of his rights of lien or stoppage in transit does not amount to rescission of the contract except to the extent provided by the other sub-sections. The rights of lien or stoppage in transit are given to the seller to enforce payment of the price : these rights cease on payment or tender of price. The property continues to be in the buyer, and but for the right of re-sale the seller would have been compelled to hold the goods indefinitely until the default on the part of the buyer amounted to a repudiation of the contract, when the seller could cancel the contract and regain the property in the goods. Sub-section (1) confirms the view held at common law also.<sup>2</sup>

As observed by Lord Atkinson in *United States Steel Products Co. v. Great Western Ry. Co.*<sup>3</sup>, "the vendor by stopping the goods *in transitu* does not thereby regain the property in them, nor does he thereby cancel the sale. In no proper sense, does he by the stoppage become the owner of the goods."

The provisions of this section also apply to the case of a person in a position analogous to that of a seller, such as commission agent who is personally liable for the price.<sup>4</sup> Under the Act there is no question about it that the commission agent is entitled to the remedy given to an unpaid seller in section 45 and in section 46 unpaid seller has a right of re-sale as limited by the Act. Under section 54, the unpaid seller can re-sell after giving a due notice.<sup>5</sup>

1. Vide Report of the Special Committee (Notes on Clauses).

2. *Greaves v. Ashlin*, (1813) 3 Camp. 426; *Martindale v. Smith*, (1841) 1 Q.B. 389; *Page v. Cowasjee*, (1866) L.R. 1 P.C. 127 at p. 145; *Kemp v. Falk*, (1882) 7 App. Cas. 573 at p. 581; *Booth S.S. Co. v. Cargo Fleet Co.*, (1916) 2 K.B. 570.

3. (1916) 1 A.C. 189; see also *Jainarain v. Narain*, A.I.R., 1922 Lah. 369 : 3 Lah. 296 : 69 I.C. 583.

4. See section 45(2). *Harilal Chimanlal v. Pelhadrai & Co.*, A.I.R. 1929 Bom. 260 : (1929) 31 Bom. L.R. 508 : 120 I.C. 337.

5. *Jagram Das v. Banarsi Das*, A.I.R. 1936 Oudh 308 : 162 I.C. 745. See also *Kishenchand Chellaram v. Vishandas Amarnath*, A.I.R. 1949 Bom. 334 cited at p. 640 ante—buyer leaving goods at the door of the seller against his will; seller re-selling the goods; liability.



Even the buyer's insolvency does not *per se* operate as a rescission of the contract.<sup>1</sup> The benefit of the contract vests in Buyer's insolvency. the official assignee and it may still be possible and proper to complete the contract for the benefit of the creditors.<sup>2</sup> Conduct on the part of the insolvent and his trustee "which practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts" may, however, amount to a refusal of performance entitling the seller to rescind under section 39 of the Indian Contract Act.<sup>3</sup> If the seller does not elect, or is not entitled to rescind, he has his remedy against the bankrupt buyer's estate for any damage suffered by the breach of contract.<sup>4</sup>

The seller is not entitled to treat the buyer as insolvent merely because he is in some temporary embarrassment. It must appear by his own admission or by other sufficient proof that he is unable to pay the price due in a reasonable time, and therefore does not expect or intend to pay it.<sup>5</sup>

Default in payment of the price at the due date does not of itself rescind or entitle the seller to rescind the contract. The Buyer's default in payment. buyer therefore may put an end to the seller's lien and entitle himself to delivery by payment or tender of the price within a reasonable time.<sup>6</sup>

### (3) Unpaid seller's right of re-sale—sub-section (2)—effect of re-sale.

As already observed, the mere fact that the buyer has failed to pay, or is insolvent, and the goods have been stopped in transit, does not entitle the seller to rescind the contract. The unpaid seller, though in possession of the goods, has not the right merely because he is unpaid to resume a complete right of property, so as to divest totally the buyer's right of property in the goods. Still less has he the right to do so by re-taking them out of the buyer's possession after delivery. This is an actionable trespass and the buyer can recover the full value of the goods as damages, though it does not preclude the seller from suing, or counter-claiming for the price, for the tort of the seller does not rescind the contract.<sup>7</sup>

In order to apply the provisions of S. 54(2) of the Act, one of the pre-conditions is that the seller must give notice to the buyer of his intention to resell. The opening words of S. 44 of the Act indicate that the seller must be ready and willing to deliver the contracted goods.<sup>8</sup>

1. Cf. sec. 38 and the notes thereunder.

2. *Ex-parte Chalmers*, (1873) L.R. 8 Ch. App. 289, 294; *Jaffer Mehar Ali v. Budge Budge Jute Mills Co.*, (1906) 34 Cal. 289.

3. *Ex-parte Chalmers*, *supra*, at pp. 293, 294; *Morgan v. Bain*, (1874) L.R. 10 C.P. 15, 27, per Bratt. J.; *Jiwan Vurjung v. Haji Osman Haji Oomar*, (1903) 5 Bom. L.R. 373.

4. *Boorman v. Nash*, (1829) 9 B. & G. 145; 32 R.R. 607.

5. *Re Phoenix Bessemer Steel Co.* (1875) 4 Ch. D. 108, C.A.

6. *Martindale v. Smith*, (1841) 1 Q.B. 389, 55 R.R. 285; see also notes under section 11, *ante*.

7. See Pollock and Mulla, *Indian Sale of Goods Act*, page 278; *Stephens v. Wilkinson*, (1831) 2 B. & Ad. 320; *Gillard v. Brittan*, (1841) 8 M. & W. 575; *Page v. Cowasjee Eduljee*, (1866) L.R. 1 P.C. 127. See also *Firm Bachhraj Amolakchand v. Firm Khupchand Narsingdas*, A.I.R. 1949 Nag. 199 cited at p. 382 *ante*—buyer repudiating contract by not taking delivery; plaintiff after notice to buyer re-selling goods.

8. *M/s. Endupani Narasimham v. M/s. Mahadevram Udmiram*, (1973) (2) C.W.R. 1442; 39 C.L.T. 1256. See *Yearly Digest*, 1973, Column 1829,



What is then a seller to do if the buyer, after notice to take the goods and pay the price, remains in default? Must he keep them until he can obtain judgment against the buyer and sell them on execution? What if the goods be perishable, like a cargo of fruit, or expensive to keep, as cattle or horses?

Sub-section (2) provides that where the goods are of a perishable nature, or where the unpaid seller who has exercised the right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a *reasonable* time pay or tender the price, re-sell the goods within a *reasonable* time and recover from the original buyer damages for any loss occasioned by his breach of contract. The buyer is not entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller is not entitled to recover such damages and the buyer is entitled to the profits, if any, on the re-sale.

Sub-section (3) of section 48 of the English Sale of Goods Act, 1893, corresponds to sub-section (2) of the present Act. The English Act does not specifically deal with the case where notice is not given by the unpaid seller to the buyer. The Indian Act, on the other hand, definitely declares that if notice is not given, the unpaid seller is not entitled to recover damages or any loss occasioned by the breach of contract, and the buyer is entitled to the profit, if any, on the re-sale.

What does the right of the unpaid seller in fact amount to? Does it mean a mere right to retain possession until he is paid or something more, that is to say, a right to interfere not only with the buyer's right of possession but also with his right of property in goods? Lord Blackburn observed on this point:<sup>1</sup>

"Viewing it as a practical question, the most convenient doctrine would be to consider the vendor as entitled in all cases to hold the goods as a security for the price, with a power of re-sale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances. If the re-sale was conducted by the vendor in a fair and reasonable manner, the original purchaser who was in default would have no right to complain; if the re-sale produced a sum greater than the unpaid portion of the price, the purchaser would be entitled to the surplus; if there was a deficiency, he would still remain indebted to the vendor for that amount.

As sub-section (4) declares the contract to be rescinded by a re-sale, and sub-section (2) contains no such declaration especially as by section 46 (c), the seller has only a right of re-sale "as limited by the Act"—the natural inference would be that a re-sale falling under sub-section (2) does not rescind the contract. If this be so, the buyer is still the owner of the goods so as to be liable for the price under section 55(1), and entitled to any profit on re-sale.<sup>2</sup> The point is treated as doubtful in English law.<sup>3</sup>

In order to apply the provisions of S. 54(2), Sale of Goods Act, it is necessary (1) that the property in goods sold should have passed on to the buyer; (2) that the goods sold should be in actual possession of the unpaid seller; (3) that the buyer should have failed to pay or tender

Essentials of applicability of S. 54(2).

1. Blackburn on Sale, 3rd Edn., p. 482.

2. See Benjamin on Sale, 8th Edn., p. 945.

3. Ibid.



the price within reasonable time from being called upon to do so ; and (4) that the goods should be re-sold within reasonable time from the date of the notice. Thus, where the contract was not proved to be for specific ascertained goods, the seller was not in possession of the goods and he had to import them in order to supply them to the buyer. There was no clear notice of re-sale as contemplated by S. 54. The re-sale was therefore not binding on the defendants ; nor could they be held liable for the loss suffered by the plaintiff on account of it. The normal damages could not be awarded as the difference between the contract rate and the rate prevailing on date of breach, were not proved.<sup>1</sup>

In *Ram Saran Das Raja Ram v. Lala Ramchander*, A.I.R. 1968 Delhi 233, the seller delivered his goods to the railway company, obtained the railway receipt in respect thereof in his own name, endorsed the railway receipt in favour of the Bank and delivered a hundi with a direction that the railway receipt should be delivered to the buyer only when the hundi was honoured and the price of the goods was paid. It was held : **The title of the goods did not pass to the buyer.** The seller in such a case is not entitled to resell the goods under the terms of S. 54 (2) of the Act. His only remedy is to sue the buyer for damages for breach of contract and the damages would represent the loss suffered by the seller because of the difference between the contract price and the market value of the goods on the date of the breach. If, however, in such a case the seller resells the goods and the re-sale is a genuine transaction, the price obtained as a result of re-sale can be taken into account as indicative of the market value of the goods on the date of the breach. The price realised as a result of the re-sale would thus become relevant for determining the quantum of damages.<sup>2</sup>

The mere fact that the buyer falsely denied the making of the contract is not sufficient to take the case out of the purview of S. 54 (2).<sup>3</sup>

Where the goods are of a perishable nature, no notice by the unpaid seller to the buyer of his intention to re-sale is necessary. If the buyer does not within a *reasonable* time pay or tender the price, the unpaid seller may re-sell the goods within a *reasonable* time and recover from the original buyer damages for any loss occasioned by his breach of contract and the buyer is not entitled to any profit which may occur on the re-sale.

There is no definition of "perishable goods". It is presumed that goods will be considered as of perishable nature, not only when they are such as to deteriorate physically by being kept, but also when they are such as to be subject to deterioration in a commercial sense, so as to be likely to become unmerchantable as such.<sup>4</sup> At common law a close resemblance

1. *Kanhaiyalal v. Kasturchand*, A.I.R. 1957 M.B. 168.

2. See also *P.S.N.S.A.C. & Co. v. Express Newspapers*, A.I.R. 1968 S.C. 741 cited at pp. 379, 380 ante—On the date of the re-sale, property in the goods had not passed to the buyer ; consequently the respondent had no right to resell the goods under S. 54 (2). This was followed in *Kirorimal Kashiram v. B.R. Venkatachalapathy*, A.I.R. 1973 Mad. 256,

3. *Kalka Prasad Ramcharan v. Harish Chandra*, A.I.R. 1957 All. 25.

4. *Asfar v. Blundell*, (1896) 1 Q.B. 123 : dates become unmerchantable as dates being impregnated with sewage although they were of considerable value for the purpose of distillation ; *Dakin v. Oxley*, (1864) 15 C.B. (N.S.) 648 ; *Duthie v. Hilton*, (1868) L.R. 4 C.P. 138 : cement becoming wet had lost its properties as cement,



has been judicially discerned between the perishable quantity of the goods themselves and of their price.<sup>1</sup> But it appears that the fact that the goods are likely to deteriorate in value by reason of a fall in the market price does not make them of a perishable nature under the Act.<sup>2</sup>

In *M/s. Bhajan Singh Hardit Singh and Co., Delhi v. Karson Agency (India) and others*, (A.I.R. 1967 Delhi 101), a Full Bench of the Delhi High Court held : It is difficult to regard worsted woollen cloth as perishable goods within the meaning of sub-section (2). Even if the words "perishable goods" are taken to include goods which are apt to deteriorate in a mercantile sense or in the sense of their price being liable to fall rapidly, it cannot be held, in the absence of evidence to show that the woollen cloth in question was such as was likely to deteriorate or that there was a likelihood of a rapid fall in the price of the woollen cloth, that the goods in question are perishable goods within the meaning of sub-section (2).

In the case of the goods which are not perishable an unpaid seller who has exercised his right of lien or stoppage in transit, may give notice to the buyer of his intention to re-sell, and if the buyer does not within a *reasonable* time pay or tender the price, he may re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract. In this case the buyer is not entitled to any profit which may occur on the re-sale.

When once the goods have passed to the purchaser and the question of re-sale arises in consequence of the refusal of the purchaser to take delivery of the goods and pay the balance of the price, the vendor would be bound to give notice of re-sale before the actual re-sale takes place. When once the goods have been selected and purchased and despatched to the purchaser after payment of advance towards a part of the price and when according to the arrangement entered into between the parties it was proposed that the money should be collected through the instrumentality of a certain bank, the property of the goods must be held to have passed to the purchaser. In such a case the mere despatch of goods by rail and R. R. being sent to the bank for collection of the balance of unpaid sale price would not mean that the property in the goods had not passed to the purchaser.<sup>3</sup>

It is to be noted that the unpaid seller can exercise this right of re-sale after he has exercised his right of lien or stoppage in transit ; thus if there is no valid lien or stoppage in transit there could be no valid re-sale.

It is clear that the unpaid seller can re-sell under this section when the property has passed to the buyer ; but it is not clear whether the effect of a valid re-sale is to rescind the contract so that the seller is re-selling as owner, though the provision that the buyer is not entitled to any profit arising from such re-sale indicates that the seller is not selling as buyer's agent but in his own right. The test is whether after a valid re-sale the seller has any claim for price or whether the buyer can get the delivery of the goods by payment or tender of the price. The provision in the section

1. *Macleane v. Dunn*, (1828) 4 Bing. 722 at 728, 729.

2. See Benjamin on Sale, 8th Edn., p.

947.

3. *Vishwanathan N.K. v. Sanna G.S.*, A.I.R. 1952 Mad. 185.



that the seller after re-sale is entitled to damage for the breach of contract seems to negative any such right.<sup>1</sup> The consequences of a valid re-sale are clearly indicated in the section and so the question whether a re-sale under the section amounts to a rescission of the contract is not of much practical importance. But in the case of the invalid re-sale the contract exists for the benefit of the buyer and he is entitled to any profit arising from such re-sale, though under section 54 (3) he may have no right to recover the goods against the second buyer. It should be noted that under section 54 (4) it is expressly provided that a re-sale under a re-sale clause rescinds the contract.

In *M/s. Dhanrajmal Gobindram v. M/s. Shamji Kalidas and Co.*,<sup>2</sup> it has been held by the Supreme Court : Where a seller under right of re-sale, re-sells with prior notice to buyer, profits on re-sale do not go to buyer. The seller does not act as agent of buyer.

The object of giving notice to the buyer is to enable him to make payment. The buyer should have a reasonable time to pay after he has notice of re-sale.<sup>3</sup> The seller would not be justified in re-selling if the buyer tenders the price after notice of re-sale.<sup>4</sup> If the buyer repudiates the contract, the seller may rescind the contract by accepting the repudiation and re-sell the goods as his own but if the seller does not rescind the contract, it exists and the buyer is entitled to notice of re-sale under the section. The condition in this sub-section that the buyer shall pay or tender the price within a reasonable time applies both where the goods are perishable and where the seller gives notice of re-sale. What is a reasonable time is a question of fact, and in the case of perishable goods it should, it seems, be measured from the date of contract, if no time for delivery be provided and otherwise from that time. Where the seller gives a notice of re-sale reasonable time will no doubt be calculated from the date of the notice and the reasonableness of any period specified in the notice will depend upon whether there was or was not undue delay previous thereto.<sup>5</sup>

Notice of the time and place of re-sale should generally be given as the object of giving notice is to enable the buyer to pay before re-sale takes place. In an American case (*Pollen v. L. Ray*)<sup>6</sup> it has been held that the giving of time and place of re-sale in the notice was not essential.

The re-sale also must be within a reasonable time. In *Parthasarathy v. Gajapathi*<sup>7</sup>, where goods which had a reasonable value were re-sold eight months after, at a very low price, the court held the delay unreasonable. In *Prag Narain v. Mool Chand*<sup>8</sup>, a delay of eleven months was similarly held unreasonable.

1. See *Maclean v. Dunn*, (1827) 4 Bing. 722 as to the position at common law.

2. A.I.R. 1961 S.C. 1285.

3. See *Compton v. Bagley*, (1892) 1 Ch. 320, 321.

4. *Martindale v. Smith*, (1841) 1 H.B. 389; *Walter v. Smith*, 5 B. & Ad. 439; *Buchanan v. Audall*, (1857) 15 B.L.R. 276, 292.

5. See *Benjamin on Sale*, 8th Edn., p. 947.

6. 30 N.Y. 549.

7. A.I.R. 1925 Mad, 1258; (1925) 48

Mad. 787.

8. (1896) 19 All. 535. See also *Nikku Mal y. Gur Parshad*, A.I.R. 1931 Lah. 714; 12 Lah. 452; 134 I.C. 777; *Abdul Hakim v. Jantzen*, (1924) Lah. 319; 72 I.C. 772; *Coorla Spg. & Weaving Mills v. Vallabhdas*, (1925) 27 Bom. L.R. 1168; 94 I.C. 575; *Raggu Mal v. Ram Sarup*, A.I.R. 1935 Lah. 593; *Sheo Narain v. N.S.S. & G. Co.*, A.I.R. 1938 All. 272; *Jasrat Mal v. Jaini*, (1937) 39 P.L.R. 945.



Where the contract is for the purchase of goods to be taken delivery of in instalments, on the breach by the purchasers of such contract, the sellers get a right to cancel the sale and to re-sell the goods and recover damages ; it is the duty of the sellers to sell the goods relating to each instalment within a reasonable time after the breach to take delivery on the respective dates. But where the delay in the exercise of this right is due entirely to the conduct and action of the purchaser, the sellers are entitled to claim damages with reference to the rates at which they actually sold the goods. The Sale of Goods Act does not prevent parties from making any contract they please. There is nothing to prevent the parties from agreeing between themselves that in spite of the fact that the property in goods has not passed or there has been no appropriation by either of them of the goods towards the contract, the seller will have the right to re-sell against the defendant in breach and also to recover godown rent, insurance charges etc. Section 62 of the Act expressly recognises that right.<sup>1</sup>

*Prima facie*, the measure of damages that could be got from a defaulting purchaser is the difference between the contract price and the *price realised* together with the expenses of re-sale.<sup>2</sup> But a *re-sale commission* cannot be charged.<sup>3</sup> Where the goods contracted for have not been appropriated to the particular contract, damages will be measured by the difference between the contract rate, and *the market rate on the date of breach*.<sup>4</sup> Seller is entitled to these damages whether he relies on his statutory or contractual right of re-sale, S. 54 (2) and (4).

Section 54 (2) of the Act makes distinction between two classes of cases : Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit (1) gives notice to the buyer of his intention to sell, and (2) where no such notice is given. In the former case, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, *but the buyer shall not be entitled to any profit which may occur on the re-sale*. In the other case, if such notice is not given, unpaid seller *shall not be entitled* to recover such damages and the *buyer shall be entitled* to the *profit*, if any, on the re-sale.

It is to be noted that the corresponding section 48 (3) of the (English) Sale of Goods Act, 1893, simply provides : Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by the breach of

1. Sheo Narain Gopi Ram v. The New Savan Sugar & Gur Refining Co., A.I.R. 1938 All. 272 : 175 I.C. 552.  
2. Ex-parte Stapleton, (1879) 10 Ch. D. 586 ; Nikku Mal v. Gur Parshad, (1931) 12 Lah. 452 : A.I.R. 1931 Lah. 714 : 134 I.C. 777 ; Muhammed Abdul Subhan v. Ghulam Hussain, A.I.R. (1935) Nag. 66 : 156 I.C. 156 ; Page v.

Cowasjee, (1866) L.R. 1 P.C. 127, 145 ; Noble v. Edwards, (1877) 5 Ch. D. 378.  
3. Gillanders Arbuthnot v. Official Assignee, A.I.R. 1951 Sind 26 : 129 I.C. 912.  
4. Angullia v. Sassoon, (1912) 39 Cal. 568.



contract. It has been held that this sub-section of the English Act enables the seller to make the time of payment of the essence of the contract, so that when he later re-sells the seller is treating the buyer's failure to pay as a repudiation of the contract, and is re-selling as full owner.<sup>1</sup> In that case the seller is entitled to keep any extra profit.<sup>2</sup>

Under the Indian Act if a notice has been duly served on the buyer, he is not entitled to any profit which may occur on the re-sale under sub-section (2) of this section. Of course, as already noted, he will bear the loss. In a case arising under the Indian Contract Act, the Allahabad High Court had held that the buyer was entitled to any surplus remaining after re-sale.<sup>3</sup> The law on this point is changed now.

If, however, the seller is not selling under this section but as an agent of necessity of the buyer, he is accountable to the buyer for the sale proceeds and make over to him any excess after deducting the price.<sup>4</sup>

It has been held under the English law that a deposit is not recoverable by the buyer, for a deposit is a guarantee that the buyer shall perform his contract and is forfeited on his failure to do so. As regards recovery of part payments, the question must depend on the terms of the particular contract. If the contract distinguishes between the deposit and instalments of price and the buyer is in default, the deposit is forfeited and that is all. And in ordinary circumstances, unless the contract otherwise provides, the seller, on rescission following the buyer's default, becomes liable to repay the part of the price paid.<sup>5</sup> The same suggestion has been made in cases in India of payment in advance of part of the price to construe the term profit as surplus realised by re-sale after giving credit for advance payment.<sup>6</sup> This is a matter which still requires judicial decision.

The position appears to be that where the deposit is made as a guarantee for the performance of the contract by the purchaser he cannot recover it if the sale goes off through his default. If there is a forfeiture clause, the rights of parties will be governed by such a clause. But every payment made by the purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his contract. The court has to determine the intention of the parties in each case from all the terms of the contract.<sup>7</sup> It was *held* that it is just and proper that the right to specific performance of a contract, or in the alternative, to a return of earnest money, should be determined in the same suit.<sup>8</sup> In *Balvanta v. Vira*<sup>9</sup>, it was *held* that the purchaser could not recover the

1. *R.V. Ward, L'd. v. Bignall*, (1967) 2 All E.R. 449, overruling *Gallagher v. Shilcock*, (1949) 1 All E.R. 921. See also S. 10 of the English Act (corresponding to S. 11 of the Indian Act).  
2. See Chalmers, 16th Edn., p. 188.  
3. See *Pearey Lal v. Dev Karan Das*, A.I.R. 1930 All. 886 : 125 I.C. 592.  
4. See *Prager v. Blatspiel*, (1924) 1 K.B. 566.  
5. See Benjamin on Sale, 8th Edn., page 946 ; see also Halsbury, Laws of England, 3rd Edn., Vol. 34, page 143 wherein it is stated that in calculating

the loss by the buyer's default the seller must take into account any deposit on the price which may have been paid by the buyer.

6. See Pollock and Mulla, Sale of Goods Act, page 280.

7. See *Nawab Habibullah v. Arman Dewan*, 29 C.W.N. 40 ; *Ibrahimbhai v. Fletcher*, (1896) 21 Bom. 827, 857 F.B.

8. *Dhanrajgiri v. Tata & Sons*, (1924) 49 Bom. 1. See also *Raghunath v. Chandra*, (1912) 17 C.W.N. 100.

9. (1897) 23 Bom. 56.



deposit as the sale went off through his default and that refusal of specific performance does not necessarily mean forfeiture of deposit.<sup>1</sup> It has also been held in *Tikam Chand etc. v. (Firm) Kakhan Lal etc.*<sup>2</sup>, that the use of the word "deposit" in contract implies an agreement that the sum deposited may be forfeited in case of breach by the depositor.

**(4) For re-sale the seller must act in a reasonable manner—invalid re-sale.**

The seller must act as a reasonable man of business in like circumstances, otherwise he cannot claim the benefit of this section.<sup>3</sup> The seller who omits to sell within a reasonable time will not be entitled to recover his actual loss, but only the difference between the contract rate and the market rate on the date of default. If the re-sale price exceeds that difference, the seller must make over the excess to the buyer; the seller may also be liable for any loss the buyer may be put to if there is any negligence in conducting the re-sale.<sup>4</sup> The liability of the seller to refund the profit, arises from the fact that in case of an invalid resale the contract is not put an end to and the seller is selling buyer's goods as his agent and as such is accountable to him. If, however, on default of or repudiation by the buyer the seller rightfully rescinds the contract, a subsequent resale of the goods at a profit does not ensure for the benefit of the buyer; for after the contract has been put an end to, the re-seller is re-selling his own goods with which the buyer has no concern.<sup>5</sup>

Does the rule as to sale within a reasonable time apply where the seller is, as it were, given *carte blanche* to re-sale when he chooses?<sup>6</sup> In *Sital Prasad v. Ranjit*,<sup>7</sup> a case under old section 107 of the Contract Act, it has been pointed out by the Allahabad High Court that this is a mandatory provision of law and that a re-sale contravening it will be invalid unless there is a trade usage sanctioning it.

In *Macklin v. Newbury Laundry*<sup>8</sup>, the re-sale was conducted in such a way as not to fetch the proper price; hence damage on re-sale basis was not granted.

Whether re-sale should be private or by public auction would depend on what is the customary manner of selling the commodity in question and what is likely to fetch the best price.<sup>9</sup>

1. See also *Chiranjit v. Har Sarup*, 50 M.L.J. 629 P.C.; *Mohammad Habibullah v. Mohammad Shafi*, (1919) 41 All. 324; *Subbarayar v. Muniswami*, 50 Mad. 161; *Piare Lal v. Mina Lal*, (1928) 50 All. 82; *Roshan Lal v. Delhi Cloth etc. Co.*, (1910) 33 All. 177; *Nadiar Chand v. Satish Chandra*, (1928) 55 Cal. 638; *Vellore Taluk Board v. Gopalswami*, (1915) 38 Mad. 801.

2. A.I.R. 1937 Lah. 842.

3. See *Mackertich v. Nobo Coomar*, (1903) 30 Cal. 477; 7 C.W.N. 433, under the Indian Contract Act.

4. *Hari Chand v. Gosbo Kabushiki*

(1925) 49 Bom. 25; *Nikku Mal v. Gur Parshad*, A.I.R. 1931 Lah. 714; 12 Lah. 452; 134 I.C. 777; *Shamli Dayal v. Durga*, 59 I.C. 647; *Maung Gyi v. Moosaji*, 36 I.C. 252; *Raggu Mal v. Ram Sarup*, A.I.R. 1935 Lah. 593; 16 Lah. 538; 37 P.L.R. 525.

5. See *Jamal v. Moola Dawood*, (1916) 43 Cal. 493 P.C.

6. See *Ramier v. Durwas J. Subbier*, A.I.R. 1927 Mad. 352; *Pearl Mill Co. v. Ivy Tannery Co.*, (1919) 1 K.B. 78.

7. A.I.R. 1931 All. 583; 136 I.C. 158.

8. (1919) Sol. Jour. 337.

9. See *Pollen v. L. Ray*, 30 N.Y. 549.



In *Narsinggirji Manufacturing Co. v. Budan Saheb*<sup>1</sup>, though the damage was claimed on the basis of re-sale, there being no valid re-sale, the court granted damages on the basis of the difference of contract rate and market rate without amendment of plaint. In *Buchanan v. Audall*<sup>2</sup>, relief was claimed on the basis of re-sale which was invalid on account of concealment. It was *held* that the conduct of the seller deprived him of the right to claim damage on the basis of the difference between contract rate and market rate.

The mere fact the one of the partners of the vendor and vendee firms is common, that is, one and the same person, will not in the least make the sale by one firm to another firm invalid on the ground of there being a common partner.<sup>3</sup>

One of the partners of vendor and vendee firms common.

Even if the re-sale is a bad sale, that does not at all affect plaintiff's claim for damages for breach of contract. It is well established that when a contract has been broken the party who breaks the contract is liable to pay to the injured person such damages as may accrue within a reasonable time after the breach has occurred. The measure of damages should, therefore, be determined by the rate prevailing on the date of the breach, or within a reasonable time thereafter. The market value at the date of the breach is the decisive element, whether the breach is by the seller to deliver, or whether the breach is committed by the buyer himself.<sup>4</sup>

Re-sale invalid—  
Effect — Contract Act, S. 73.

**(5) Goods re-sold must be contracted for—sub-section (2) will apply only where the property has passed to the buyer.**

As the rights of lien and stoppage in transit can only arise after the property in the goods has passed to the buyer, it follows that the right of re-sale under the present sub-section can only be exercised where the property has so passed.<sup>5</sup> The same fact has been emphasised in *Har Parsad v. Girdar Prasad*.<sup>6</sup> The case where the contract itself provides a re-sale clause, falls under sub-section (4).

The goods re-sold must be the goods contracted for. In cases arising under old section 107 of the Contract Act, it has been *held* that before a plaintiff can substantiate a claim for loss on re-sale, he must show that

1. A.I.R. 1924 Bom. 939. But see *Angullia v. Sassoon*, (1912) 39 Cal. 568.  
2. (1875) 15 B.L.R. 276.  
3. *Gopalji v. Nagarmal Baijnath*, A.I.R. 1956 Pat. 441.  
4. *Ibid*.  
5. See *P.S.N.S.A.C. & Co. v. Express Newspapers*, A.I.R. 1968 S.C. 741 followed in *Kirorimal Kashiram v. B.R. Venkatachalapathy*, A.I.R. 1973 Mad. 256; *Duraswami Mudaliar v. Subbana*, A.I.R. 1927 Mad. 880 : 105 I.C. 613; *Asa Ram v. Kishan Chand*, A.I.R. 1930 Lah. 386 : 120 I.C. 166; *Nanak Chand v. Panna Lal*, A.I.R. 1930 Lah. 389; *Sunder Singh v. Gulab*,

A.I.R. 1927 Lah. 269; *Ishar Das v. Dhanpat Rai*, A.I.R. 1927 Lah. 687; *Narsinggirji v. Budan Sahib*, A.I.R. 1924 Bom. 390; *Hari Das v. Kalumull*, (1930) 30 Cal. 649; *Clive Jute Mills v. Ebrahim*, (1896) 24 Cal. 177; *Yule & Co. v. Mohammed Hussain*, (1896) 24 Cal. 124; *Mohan Lal v. Gyani Ram*, A.I.R. 1935 Nag. 111 : 155 I.C. 778; *Ujagar Mal v. Nanhe Mal*, 155 I.C. 963; *Coorla, etc. Mills v. Vallabh Das*, (1925) 27 Bom. L.R. 1668.  
6. A.I.R. 1934 Lah. 191; see also *Zippel v. Kapur & Co.*, A.I.R. 1932 Sind 9 : 131 I.C. 114; *Hunt v. Sin Gee*, (1921) 66 I.C. 510.



the goods re-sold by him were goods which the defendant would have been obliged to take under the contract.<sup>1</sup>

**(6) When no due notice is given to the buyer.**

Where no notice is given to the buyer, the unpaid seller is not entitled to recover any damages from him for any loss occasioned by his breach of contract, and the buyer is entitled to the profit, if any, on the re-sale. In this case the goods are evidently sold as the buyer's goods and the seller is in the position of a trustee who must account to the buyer for any profit resulting from the re-sale. Probably the reason for denying the right to recover damages to the seller is that he deprives the buyer of the opportunity to pay or tender the price which he should have before the goods are re-sold. In cases of urgency, it appears, the seller in possession of the goods may be justified in selling them on behalf of the buyer, acting as an "agent of necessity".<sup>2</sup>

In *Kalka Prasad Ramcharan v. Harish Chandra*<sup>3</sup>, it was held: The object of introducing the last sentence in S. 54 (2) is obvious. If notice is given to the buyer, he can arrange for purchasers or can otherwise take steps to secure better price for his goods. But if the seller deprives him of this opportunity and sells the goods behind his back, he cannot saddle him with damages which, if he had been informed, he might have taken steps to avoid. The position, therefore, is that if S. 54 applies and the sale takes place without notice to the buyer, the seller cannot claim any damages from him.

**(7) Sub-section (3)—position of the second buyer.**

Sub-section (3) prescribes that where an unpaid seller who has right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer. It is thus made clear that a buyer at a re-sale, even though wrongful, acquires a good title. The object of this rule is to protect the second buyer who may not be aware of any defect in the conduct of the re-sale, the first buyer having his remedy against the sale proceeds in the hands of the seller. Even at common law he practically did so, the reason given being that the first buyer being in default had not that immediate right to possession of the goods which was essential to enable him to maintain trover.<sup>4</sup>

The sub-section does not in terms require good faith and absence of notice on the part of the second buyer.<sup>5</sup>

1. *Chidambara Nadar v. Vadivelu Nadar*, A.I.R. 1926 Mad. 47 : 159 I.C. 1031; *Parthasarathy v. Gajapathi*, A.I.R. 1925 Mad. 1258; *Buchanan v. Audall*, (1875) 15 Bom. L.R. 276; *Phul Chand v. Jugal Kishore*, A.I.R. 1927 Lah. 693. See also *Majety Balakrishna Rao v. M/s. Mook Devassy*, A.I.R. 1959 Andhra Pradesh 30 cited at p. 454 ante—Goods delivered to railway company—Railway receipt in

name of seller along with hundi sent to bank—Title in goods when passes—Right of re-sale.

2. *Prager v. Blastpiel*, (1924) 1 K.B. 566.

3. A.I.R. 1957 All. 25.

4. See *Lord v. Price*, (1874) 9 Ex. 54; *Milgate v. Kebble*, (1841) 134 E.R. 1073, 60 R.R. 475.

5. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, page 141, f.n. (s).



Sub-section (2) has no application when the first buyer is not in default, for instance, if before the re-sale he has duly tendered the purchase price. In such circumstances, the second buyer must rely upon the provisions of section 30 and will only obtain good title as against the first buyer if he acted in good faith and without notice of the seller's defective title.

Where the re-sale has been held without justifying circumstances (*e.g.*) before the due date for payment, the buyer may treat it as a ground for repudiation.<sup>1</sup>

The first buyer cannot sue the second buyer for trespass, or for the conversion or for the detention of the goods, for the second buyer has a statutory title under this sub-section.

It may be noted that the law is different when one in possession of goods with a mere lien on them unlawfully sells them. A buyer from him acquires no title against the owner and is liable to be sued in trover for the full value of the goods.<sup>2</sup>

**(8) Sub-section (4)—right of re-sale expressly reserved by seller in the contract.**

When the seller expressly reserves a right of re-sale in case the buyer should make default and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages. The rule in this sub-section is based on the decision in *Lamond v. Davall*.<sup>3</sup> There was no corresponding provision in the Contract Act and there was some doubt as to whether the re-sale under a re-sale clause rescinded the contract.<sup>4</sup> But the section makes the law clear.

Sub-section (4) read with sub-section (2) clearly indicates that the power to re-sale may be either statutory or it may be conferred on the seller by the terms of the contract of sale. As has already been observed, for the exercise of the statutory right under sub-section (2), it is essential that the property in the goods must have passed to the buyer; the right under the terms of the contract can be exercised even if the property in the goods has not passed to the buyer. Thus, where it is provided in a contract of "indent" that on default on the part of the buyer to pay for and take delivery of the goods, within a specified time, the seller would be at liberty to re-sell the goods and that the buyer would pay all the loss arising on the contract with interest, the seller is entitled to re-sell the goods on default on the part of the buyer even if the property in the goods has passed to the buyer, and to sue the buyer for the loss on re-sale.<sup>5</sup>

1. *Kishori Lal v. Jiwan Lal*, A.I.R. 1923 All. 242 : 67 I.C. 231.

2. See *Mulliner v. Florence*, (1878) 3 Q.B.D. 484 C.A. This marks this distinction between the seller's lien and an ordinary lien.

3. (1847) 9 Q.B. 1030, 72 R.R. 502.

4. See *Jainarain v. Narain Das*, (1922) 3 Lah. 296.

5. *Moll Sehutte & Co. v. Luchmi Chand*, (1898) 25 Cal. 505, dissenting on this

point from *Yule & Co. v. Mohammad Hussain*, (1896) 24 Cal. 124 ; *Basdeo v. John Smidt*, (1899) 22 All. 55, 56 ; *Best v. Haii Mohammad Sahib*, (1898) 23 Mad. 18 ; *Bubby Hurry & Co. v. M. Hertz & Co. Ltd.*, A.I.R. 1923 Lah. 541 : 4 Lah. 215, 222 : 73 I.C. 421 ; *Macleay v. Dunn*, (1828) 4 Bing. 722 ; the seller by reselling does not lose his right to claim damage for breach of contract.



In *Jamal v. Moola Dawood*<sup>1</sup>, the re-sale clause ran thus: "In the event of the buyer not making payment on the settlement day the seller should have the option of re-selling the shares by auction and any loss arising should be recoverable from the buyers". On the shares being tendered by the sellers the buyers refused to accept and pay for them. The sellers gave notice of re-sale but subsequently claimed damages on the basis of the difference of the contract rate and the market rate on the date of default. The sellers subsequently sold the shares at a profit. As to the effect of the re-sale clause the Privy Council stated: "Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages and the stipulation in question was in His Lordship's opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option, he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price." It was *also held* that the purchaser was not entitled to the benefit of re-sales at a higher price as the loss to be ascertained was the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the purchaser is entitled to the benefits of it, but he is not entitled to the benefits of subsequent sales by the purchaser.

But ordinarily, even where the power of sale is provided by the contract, the goods must be ascertained or appropriated for the purpose of the contract.<sup>2</sup> If there has been no such appropriation, there is, strictly speaking, nothing on which to exercise the power of re-sale.<sup>3</sup>

The parties may, however, provide for the exercise of the power of re-sale, even if no goods are appropriated to the contract.<sup>4</sup> And though the contract may provide for a power of re-sale, the seller is not bound to exercise it.<sup>5</sup> The seller has a right to re-sell, but no statutory duty is cast upon him to do so.<sup>6</sup> In *Robinson v. Behar*<sup>7</sup>, the conditions of sale in a sale by auction provided that "goods purchased and not paid for or removed within a reasonable time shall be re-sold and the deficiency (if any) made good by the defaulter." *Held*, that "shall" was permissive and not mandatory, and the auctioneer was entitled to maintain an action for the price of the lot paid for or removed.

It may be observed that the re-sale may be by auction, and if the seller buys in the goods at the auction, re-sale is still valid.<sup>8</sup> A buyer in default cannot set up that contract has been rescinded by the re-sale as a defence against the seller's action for damages for his loss.<sup>9</sup>

1. (1916) 20 C.W.N. 105 : 43 Cal. 493 P.C.
2. *Dayal Singh v. Beli Ram*, A.I.R. 1529 Lah. 38 : 115 I.C. 77.
3. *Angullia v. Sassoon*, (1912) 39 Cal. 568 : 18 I.C. 705.
4. *Rattan Lal v. Tek Chand*, A.I.R. 1930 Lah. 379 : 120 I.C. 785 ; *Ishar Das v. Dhanpat Rai*, A.I.R. 1927 Lah. 687 : 8 Lah. 514 : 106 I.C. 59.
5. *Jamal v. Moola Dawood*, (1915) P.C.

- 48 : 43 Cal. 398 : 31 I.C. 919.
6. *Mohammad Abdul Subhan v. Ghulam Hussain*, A.I.R. 1935 Nag. 66 : 156 I.C. 156.
7. (1927) 1 K.B. 513.
8. *Rattan Lal v. Tek Chand*, *supra* ; *Nathu Mal Ram Das v. B.D. Ram Sarup & Co.*, A.I.R. 1932 Lah. 169 : 12 Lah. 692.
9. See Benjamin on Sale, 8th Edn., p. 951.



Where a contract of sale of goods contains an arbitration clause, and the seller expressly reserved a right of re-sale in case the buyer should make default, the arbitration clause is not wiped out on the rescission of the contract by the exercise of his right on re-sale under the contract and hence reference to arbitration can be made in pursuance of the arbitration clause.<sup>1</sup>

*Per Ramlal and Mahajan JJ.*—The arbitration clause in a contract can be regarded as a thing apart from the main conditions of a contract and it is not a necessary clause in the contract. The main contract deals with the performance of mutual obligations and how they are to be performed whereas the arbitration clause deals only with the procedure for determining liabilities created by the contract and the arbitration clause itself creates no liability. It embodies the agreements of both parties that, if any dispute arises with regard to the obligation which the one party has undertaken to the other, such a dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other can in general be specifically enforced and breach of them results only in damages, the arbitration can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement.<sup>2</sup>

The term “rescission” as used in section 54 (4) does not mean complete and total annulment of the contract and by such rescission the parties are not placed in the same position as if they had never entered into contract. As sub-section (4) reserves to the seller the right to claim damages in spite of rescission, the contract must be regarded as existing at least for the purpose of claiming such damages. Consequently, it must be regarded as existing for providing the means for claiming such damages.<sup>3</sup>

There is no real distinction between rescission of contract under section 60 and that under section 54 (4). Under section 60, one party may accept the other's repudiation and thereby relieve himself from all further obligations under the contract. In other words, he can regard the contract as rescinded and he, by his option, rescinds the contract. Under section 54, sub-section (4), the seller is not bound to re-sell when power is given to him to re-sell in the contract. But if he elects to re-sell, he thereby rescinds the contract or treats it as rescinded. The rescission is as much at the option of the party not in default under section 54, sub-section (4), as it is under section 60. In both the cases it is by the act of the party not in default that the contract is rescinded. Once the party who is not in default has elected to pursue a certain course, he puts an end to the contract and it is rescinded. Both are cases of rescission without prejudice to a right to claim damages. In other words, both are cases of rescission absolving the parties from all future obligations, but in each case the contract is kept alive for the purpose of assessing damages for breach.<sup>4</sup>

1. *Firm Karam Narain Daulat Ram v. Messers Volkart Bros.*, A.I.R. 1946 Lah. 116 (F.B.); *Chandulal Parma Nand v. Grahams Trading Co. (India) Ltd.*, A.I.R. 1941 Lah. 427; and *Radha Kishan v. Bombay Co. Ltd.*,

A.I.R. 1943 Lah. 295 : 45 P.L.R. 287 overruled.

2. A.I.R. 1946 Lah. 116, pp. 120, 121.

3. *Ibid*, pp. 130, 131.

4. A.I.R. 1946 Lah. 116, p. 123.



It must be noted that the buyer must be in default in order that the seller may claim damages against him on a re-sale, whether under the Act or the contract. A buyer might lawfully reject the goods as not answering the description ; in such a case if the seller re-sells them at less than the contract price, he can recover nothing.<sup>1</sup> The *onus* seems to be in such a case on the seller who re-sells to show that the goods in fact answered the description.<sup>2</sup>

What default of buyer will justify a re-sale ? In *Ogg v. Shuter*<sup>3</sup>, Leating J. laid down the law that the seller's right of re-sale depends upon whether there has been an absolute refusal by the buyer to perform his part; in other words, whether there has been a repudiation, so as to entitle the seller to rescind the contract and re-sell the goods. The view that the right of re-sale rests wholly upon the buyer's repudiation has been endorsed by the Court of Appeal in *Cornwall v. Henson*.<sup>4</sup>

In this case also re-sale must be exercised within a reasonable time and in a reasonable manner. If it is not so exercised, the seller is not entitled to recover the loss resulting from the re-sale, but is entitled to damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach.<sup>5</sup> A sale was not held valid where it was hurried on in an unusual manner and without proper advertisement.<sup>6</sup> Where a right of re-sale is allowed to a seller, it must be exercised within a reasonable time of the date when the contract was finally repudiated by the buyer. Where there has been undue delay, the belated re-sale cannot afford a proper basis for the assessment of damages. In such a case the damages should be calculated on the difference between the contract rate and the rate prevailing in the market on the date of the breach.<sup>7</sup>

**Section 54 (4)—Forest Act, 1927, S. 82—Re-sale of Government forest coups—Claim for loss falls under S. 54 (4) of the Sale of Goods Act and not under S. 82 of the Forest Act, 1927, and cannot be recovered as arrears of land revenue.**

In *Dalmet v. State of Mysore*,<sup>8</sup> the petitioner, who had successfully tendered for some forest coups, failed to deposit the 25 per cent. of the price, as required and therefore the sale in his favour was cancelled and the coups were re-sold and the Divisional Forest Officer claimed to collect the loss suffered by Government as if it were an arrear of land revenue under S. 82 of the Forest Act, 1927. It was *held* : The claim did not fall within the ambit of S. 82 of the Forest Act, 1927, and, therefore, the same could not be recovered as if it were an arrear of land revenue.

1. Parthasarthy Chetty & Co. v. Gajapathi Naidu & Co., *supra*.

2. *Ibid* ; Phul Chand v. Juggal Kishore, A.I.R. 1927 Lah. 693 : 8 Lah. 501 : 106 I.C. 10 ; cf. Jackson v. Rotax Motor & Cycle Co., (1901) 2 K.B. 937, at p. 945, C.A.

3. (1875) L.R. 10 C.P. 159, at p. 165.

4. (1900) 2 Ch. 298 (C.A.).

5. See in this connection Hari Chand v. Goshu Kabushiki Kaisha, (1925) 49 Bom. 25 : A.I.R. 1925 Bom. 28.

6. Buchanan v. Audall, (1875) 15 B.L.R. 276.

7. Jasrat Mal v. M.L. Jaini & Co., 39 P.L.R. 945.

8. A.I.R. 1965 Mys. 109. See also to similar effect Goverdhandas Kailash Nath v. Collector of Mirzapur, A.I.R. 1956 All. 721 ; but see to the contrary Gajjan Man Mohan Lal v. State of Himachal Pradesh, A.I.R. 1957 Himachal Pradesh 1.



The sale in the petitioner's favour had been cancelled. Certain amount was claimed against him as damages, the basis of the claim being that under the terms of the tender notice, which the petitioner had accepted, he was liable to make up the loss incurred by the State by re-selling the coups for which he had successfully tendered. A case of that nature fell under S. 54 (4) of the Sale of Goods Act, 1930. After the cancellation of the sale the relationship between the State and the petitioner was not of a seller and buyer. There was no existing sale and consequently no price due from the petitioner to the State. What was claimed by the State was merely damages, for the loss occasioned by breach of contract.

**(9) Right of re-sale does not bar other remedies.**

As already observed, no statutory duty is cast upon the seller to re-sell the goods.<sup>1</sup> Where property in goods sold had passed to the purchaser, and after paying the delivery of a part, he wrongfully declined to take delivery of the rest and the undelivered portion was subsequently destroyed by fire, it was *held* in a suit by the vendor for the balance of the purchase money, that though he might have sold the undelivered portion under this section after the defendant had refused to perform his contract he was not bound to do so, and the omission to take that course did not affect his right to recover the balance sued for.<sup>2</sup>

The present section does not any more than did section 107 of the Indian Contract Act, which it replaces, deprive unpaid seller of goods of any other remedy he may have ; and therefore he is still at liberty to rescind the contract under section 55 of the Indian Contract Act, if it applies.<sup>3</sup>

"We are bound, I think, to determine questions of this kind so far as we can by reference to the Contract Act, and not to English law, and sections 51-58 appear to contain general provisions which are applicable to all cases of reciprocal promises."<sup>4</sup> "No doubt section 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small satisfaction for the vendor to re-sell."<sup>5</sup>

**(10) Tortious re-sale of goods by the seller.**

It has been held under the law that where goods have not been delivered, a re-sale by the seller without the buyer's default is wrongful, and the buyer may elect either to sue him for non-delivery or to treat the re-sale as a repudiation of the contract by the seller and rescind it himself accordingly, and recover any part of the price paid, as well as damages for non-delivery. And if the buyer is at the time entitled to the possession of the goods, such re-sale is a conversion. The seller is also liable in detinue if the buyer within the contract time tender the price and demand the goods.<sup>6</sup> A seizure and re-sale of the goods by the seller after delivery is tortious, and the buyer, even if he has committed a breach of contract,

1. See pages 705, 706.

2. *Baldeo Dass v. Howe*, (1880) 6 Cal. 64 ; see also *Mohammad Abdul Subhan v. Ghulam Hussain*, A.I.R. 1935 Nag. 66, and *Robinson, Fisher & Harding v. Behar*, (1927) 1 K.B. 513.

3. *Baldeo Dass v. Howe*, *supra*.

4. *Ibid.*, per Garth C.J. at p. 68.

5. *Ibid.*, per Pontifex J. at p. 69 ; see also *Buchanan v. Audall*, (1875) 15 B.L.R. 276, 292.

6. See *Benjamin on Sale*, 8th Edn., p. 950.



may sue the seller for conversion or in trespass and detainue and may recover as damages the full value of the goods. In such action the seller cannot set off the unpaid price but may sue or counterclaim for it. Such a re-sale cannot be treated by the buyer as rescission of the contract. Accordingly, he cannot recover back any part of the price paid, or refuse to pay the remainder of it or the whole price, as the case may be, when due. Where, however, the property in the goods has not passed to the buyer, a seizure of them by the seller after delivery operates as a rescission of the contract, even although the seizure were pursuant to an express power in that behalf exercisable on the buyer's default.<sup>1</sup>

Forms of action are immaterial now and it may be stated as a matter of substantive law that in the case of a wrongful or tortious re-sale of goods by the seller, the buyer shall be entitled to recover his actual loss and no more. If the re-sale results in a profit, the difference between the contract price and the price raised on re-sale will *prima facie* represent the buyer's loss and he is fully compensated if he recovers the difference from the seller. If on re-sale the amount realised is less than the contract price, the seller must suffer the loss.<sup>2</sup>

After lawful sale of undelivered goods, the buyer is no longer liable for the price.

#### (11) Alternative claim for damages.

Where in a case for damages for breach of contract a party claims damages on the basis of a re-sale and fails to prove it, it cannot in appeal set up an alternative claim for damages on the basis of a market price.<sup>3</sup>

#### *Further illustration*

Where the title to the goods has not passed and there is no clause in the agreement giving the seller a right to re-sell the goods and there is a breach of contract, the seller can only claim the difference between the contract rate and the rate prevailing on the date of the breach. If, however, the title to the goods has passed, the seller is entitled to claim difference between the contract price and the price realised at the re-sale, provided he has sold the goods within a reasonable time and after due notice. But the goods that were sold must be the goods that were meant for the buyer and he must establish that the goods that he re-sold were the goods which, so far as he was concerned, he had appropriated towards the contract and had intended to deliver to the buyer.<sup>4</sup>

#### *Miscellaneous cases*

##### (i) Sections 54 (2) and 55—Difference in rights under.

An unpaid seller has two rights *viz.*, a right of re-sale under S. 54 (2) and an independent right under S. 55 to sue for the price of the goods. It is

1. See Benjamin on Sale, 8th Edn., pp. 951, 952.

2. The position appears to have been different under old section 107 of the Indian Contract Act. See *Sital Prasad v. Ranjit Singh*, A.I.R. 1931 All. 583 ;

See also Pollock & Mulla, Indian Sale of Goods Act, page 280.

3. *Hore v. Milner*, (1917) 1 Peake 979, per cur. in *Maclean v. Dunn*, *supra*.

4. *Motilal v. Mool Chand*, 1950 All. L.J. 583.



open to him not to sell the goods and to sue for the price leaving it to the purchaser to take delivery of the goods lying with (the seller) at his own convenience. He has to sue, in that case, for the entire amount and not for the amount that according to him remains due to him after deducting the price fetched by the goods re-sold.<sup>1</sup>

The remedy under S. 54 (2) is only one of the remedies which the seller can resort to according to his own choice. The other remedy available is to sue for the price of the goods as provided by S. 55 (1).

The plaintiff can claim damages against the defendant if the property in the goods has not passed to the defendants. But if the property had passed, he could either sue for recovery of price or for damages. He can resort to either of the remedies available to him and if he chooses to sue for recovery of price, his suit cannot be said to be untenable on that account.<sup>2</sup>

**(ii) Sections 54 (2), 59—Improper re-sale—Benefit of—Buyer when entitled to—Breach of warranty—Suit for rendition of accounts—Maintainability.**

The law relating to improper re-sale is that if there is a profit in the case of an improper re-sale, the buyer is entitled to get it from the seller and in every other case the right of the buyer and of the seller is one for damages.

Where a buyer agreed to purchase goods 'as is and where is' and deposited certain amount as security but later on refused to take goods as they were alleged to be unsaleable and therefore asked for the refund of the security money and on its refusal and on being informed that if the goods were not taken they would be re-sold at the buyer's risk, the buyer filed a suit for rendition of accounts, it was *held* :

There was nothing in S. 54(2) to support the buyer's prayer and the suit for rendition of accounts did not lie.<sup>3</sup>

**(iii) Sub-section (4)—Contract for sale of goods—Arbitration clause providing machinery for settling disputes—Right to re-sell in case of buyer's default given to seller under contract—Re-sale by seller on buyer's default—Effect on arbitration clause—Arbitration Act, 1940, S. 20.**

In *M/s. Gulabchand Rawatmal v. M/s. Sarangpur Cotton Manufacturing Co. Ltd.*<sup>4</sup>, it was *held* : Sub-section (4) of S. 54 itself provides that though the original contract of sale is rescinded, that is without prejudice to the seller's claim to recover damages. It does not mean, therefore, that the contract in its entirety becomes non-existent or inoperative. The seller's right to recover damages is expressly saved by virtue of sub-section (4) of S. 54 and that must necessarily save the machinery which may be provided by the contract to settle the disputes, if any, regarding damages and for their being ascertained and assessed. Hence, where the contract for the sale of goods provides that all disputes in respect of the contract

1. *Kalka Prasad Ramcharan v. Harish Chandra*, A.I.R. 1957 All. 25.

2. *Premasukhdas v. Phoolchand*, 1958 M.P. L.J. (Notes) 158.

3. *Union of India, New Delhi v. Munna Lal Mulraj*, A.I.R. 1956 Punj. 34.

4. A.I.R. 1959 Bom, 158 : 60 Bom. L.R. 337.



have to be referred to the arbitration of certain Association and gives the rights to the unpaid seller to re-sell the goods in case of buyer's default, and the seller re-sells the goods on buyer's default, the machinery which is provided under the contract would not fall by virtue of sub-section (4) of S. 54 of the Sale of Goods Act in so far as the dispute as to damages claimed by the plaintiff from the defendant is concerned.

**(iv) S. 54 (2)—Re-sale of goods after notice—Assessment of damages.**

In *M/s. Hirji Bharmal v. Bombay Cotton Ltd.*<sup>1</sup>, it was held: S. 54 (2) does not permit an unpaid seller to exercise his right of re-sale without a notice. If the seller does it, he does it at his own peril. If he sells the goods, he must content himself with what the goods fetch and not ask for anything more. But as soon as the seller gives the notice, his right to re-sell arises, and if for any reason (such as, re-sale taking place after an unreasonable time of the giving of notice) the re-sale is not proper, it does not mean that the seller is deprived of the damages contemplated by S. 54(2). In such a case the damages are to be ascertained not at the difference between what the re-sale realises and the price of the goods but the difference between what the Court holds should have been realised by a seller on a proper re-sale and the purchase price.

**(v) Sections 4, 54—Breach of contract—Forfeiture of earnest money.**

In *Kanpur Iron, Brass Works & Flour Mills v. Banarsi Das*,<sup>2</sup> a contract was entered into between the parties on 2-1-1946. On that date, two documents came into existence. Both of them were written simultaneously, and were part of the same transaction. The first document viz., the letter, was on a printed form. It bore the name of Kanpur Iron, Brass Works and Flour Mills. This letter proceeded to state as follows :

“Sirs,

I/We hereby agree to your terms of which a few have been noted below and have pleasure to place the following order and deposit a sum of Rs. 3,000 as advance.”

The other document viz., the receipt was executed on the same date immediately after the contract as a concluding part of the same transaction. The receipt was executed by the same party i.e., the defendant, in whose printed letter form the contract was signed. In this receipt which was of this very amount of Rs. 3,000, this was described as having been received by the defendant as biana. Subsequently, a notice was given on behalf of the defendant to the plaintiff in which it was stated that the kolhus ordered by the plaintiff were ready and if the plaintiff did not take delivery of the same within 15 days, the defendant would have no alternative but to re-sell them at the risk of the plaintiff. It was further stated that the defendant will hold the plaintiff responsible for the resultant losses, if any. It also stated that the defendant would appropriate the sum of Rs. 3,000 towards the losses, if any, sustained by the defendant and would claim the balance from the plaintiff. Out of 20 kolhus 8 kolhus had been accepted by the plaintiff. It was held :

This was not a case of advance simpliciter, but a case of advance by way of deposit. The use of the word ‘advance’ in the letter was no less

1. A.I.R. 1958 Bom. 411 : 59 Bom. L.R. 4.      2. A.I.R. 1959 All 755.



significant. It indicated that the payment was being made at the very inception of the contract. It served as a kind of signal of confirmation of the contract that had been entered into by the party. The amount of Rs. 3,000 was to serve a double purpose. First it was to serve as a token of ratification of the contract already entered into, and secondly, it was to serve as an offer of security for its further performance by the party tendering it. The first purpose was emphasised by the use of the word 'advance' and the second was emphasised by the use of the word 'deposit'. There could be no question of any payment of price at that stage for the goods were not then in existence at all. There was a well-recognised usage in India to make such payments in the beginning to serve the two-fold purpose mentioned above.

Even if the letter was considered to be ambiguous, that ambiguity was cleared up by the receipt. The word 'biana' clearly means 'earnest money'. The plaintiff did not object to the description of this amount as 'biana' in the receipt. Under the circumstances, it must be held that this amount was given by way of earnest money. As this sum of Rs. 3,000 was advanced by way of security or guarantee by the plaintiff for the fulfilment of the contract which was being entered into by him with the defendant, whether it was called deposit, or advance, or earnest money did not make any difference at all. All these various expressions would be but different ways of describing the same situation. The fact that there was no express or specific term in the contract that this amount should be forfeited in case of breach was quite immaterial. Such a term would be implied in the very nature of the deposit and would be implicit in the circumstances of the case. The amount of Rs. 3,000 was a consolidated amount which should be treated as a security for the performance of the entire contract.

Even supposing that the sum of Rs. 3,000 which was in deposit with the defendant was treated as an advance simpliciter, the plaintiff would even then not be entitled to its recovery in the present case as the defendant still regarded the contract as subsisting.



## CHAPTER VI

### SUITS FOR BREACH OF THE CONTRACT

**\*55.** (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

Suit for price.

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

#### Synopsis

- |  |  |
|--|--|
| (1) <i>Suit for price—where property has passed—sub-section (1).</i> | (3) <i>Suit for recovery of price—forum.</i> |
| (2) <i>Sub-section (2)—where property has not passed.</i>            | (4) <i>Exchange rate.</i>                    |

This section is based on sub-sections (1) and (2) of section 46 of the English Sale of Goods Act, 1893 (Appendix). The provision in sub-section (3) of that Act dealing with interest has been included in section 61 of the Act. Chapter VII of the Indian Contract Act, 1872, was silent on the point and under that Act resort was to be had to the general provisions of the Act relating to the breach of contract.

#### **(1) Suit for price—where property has passed—sub-section (1).**

When the property in the goods has passed to the buyer the seller can always sue for the price whether the goods are in the possession of the seller or buyer. If the goods are in the possession of the seller, he can exercise his right of lien but as the contract is not rescinded by the exercise of this right, the seller can sue for the price until the goods are re-sold by him in which case the seller can only claim damages.<sup>1</sup> If both the property and possession are with the buyer, the seller has no other remedy against the goods or for damages; he can only sue for price. The principle at common law is, that the goods have become the property of the buyer, and that the seller has agreed to take for them the buyer's *promise* to pay the price.<sup>2</sup> The seller's remedy is limited to an action for the breach of that promise, the damages being the amount of the price promised, to which may be added interest in certain cases.<sup>3</sup>

\*Analogous law.

Sub-sections (1) and (2) of section 49 of the English Sale of Goods Act, 1893—See Appendix A.

1. See *Lamond v. Davall*, (1847) 9 Q.B. 1030; *P.R. & Co. v. Bhagwandas*,

(1909) 34 Bom. 192.

2. See *Martindale v. Smith*, (1841) 1 Q.B. 389.  
3. See *Benjamin on Sale*, 8th Edn., p. 829.



It may be stated generally that the seller may recover the price of goods sold, either where the goods have been *sold and delivered* to the buyer, or where they have been only *bargained and sold* to him. The latter forum of action is applicable *where the property has passed*, and the contract has been completed in all respects except delivery. If the passing of the property depends upon the fulfilment of some condition and that condition is not fulfilled, the seller cannot sue for the price, even if the non-fulfilment of the condition is due to the default of the buyer. In such a case the seller must bring an action for damages under the next section.<sup>1</sup> If, on the other hand, the property has passed and the payment of the price depends upon the fulfilment of some condition, and that condition is not fulfilled owing to the default of the buyer, then the seller may sue for the price, and this holds good even if by the terms of the contract the non-fulfilment of the condition reverts the property in the seller.<sup>2</sup>

In considering whether the terms of a transaction constitute an out and out sale or a mere agreement to sell, the court must endeavour to ascertain when it was the intention of the parties that the property in the goods, the subject of sale, was to be transferred. Where it is plain from the terms that the time when they were entered into the seller could not have dealt with the property, and had he attempted to do so, the buyer could clearly have restrained him by injunction immediately and when further the buyer was to be at liberty to deal with the property and to take steps to realise it, the intention of the parties must be held to be that the property in the goods should pass from the seller to the buyer forthwith. The fact that the buyer is given some time for paying the money fixed as the sale price can in such cases be taken only as an option given to the buyer and to amount to the seller agreeing to give credit to the buyer for that period of time. If in such a case the buyer wrongfully refuses to pay the price, the seller is entitled to maintain an action for the price under S. 55 (1) of the Act. Even if it be held in such a case that the property in the goods has not passed, the seller would be, nevertheless, entitled to maintain his claim under S. 55 (2).<sup>3</sup>

The seller cannot sue for the price unless the buyer wrongfully neglects or refuses to pay.<sup>4</sup> *Prima facie*, payment of the price must be made against delivery,<sup>5</sup> but the parties may agree that the payment shall be postponed, as when the sale is on credit, or payment is made to depend on a contingency.<sup>6</sup> In the case of a sale on credit, no suit is competent until the expiry of the credit period.<sup>7</sup> Where a bill is given for the price the seller cannot sue during the currency of the bill. In case of dishonour of the bill on presentment, the seller has the option of suing for the price or on the bill, in case he has not negotiated it. But if he has

1. Colley v. Overseas Exporters, (1921) 3 K.B. 302; Mitchell Reid & Co. v. Baldeo Dass, (1887) 15 Cal. 1 (buyer refusing to take delivery); Stein Forbes & Co. v. County Tailoring Co., (1916) 115 L.T. 215.  
2. Mackay v. Dick, (1881) 6 A.C. 251.  
3. Vithaldas Vishram v. Jagjivan Gordhandas, A.I.R. 1939 Bom. 84;

180 I.C. 858 (2).  
4. Vithaldas v. Jagjivan, A.I.R. 1939 Bom. 84; (1939) 41 Bom. L.R. 33.  
5. See section 32, ante.  
6. See Calcutta Co. v. De Mattos, (1863) 32 L.J.Q.B. 322 at p. 328; 139 R.R. 752, 762.  
7. Helps v. Winterbottom, (1831) 109 E.R. 1203, 36 R.R. 609.



negotiated the bill away, he cannot sue for the price as long as the bill is in the hands of the third party. The seller must have taken up the bill himself before action brought in order to entitle him to sue for the price.<sup>1</sup>

Credit allowed is revocable when it is not a term of the contract.<sup>2</sup>

The defendant having purchased the concern of the plaintiff and undertaken to pay the amount held was not entitled to repudiate the transaction relating to the property with himself. Repudiation in such circumstances is tantamount to wrongful neglect or refusal to pay.<sup>3</sup>

Where there is an agreement for payment of the price by a bill payable at a future day, and the bill is not given, the seller cannot sue for the price till the bill would have matured. His remedy before that time is by action for damages for breach of the agreement.<sup>4</sup> The same rule applies, at any rate, if the contract be entire, if the price is payable partly in cash and partly by bill.<sup>5</sup> Where, however, part of the goods are delivered and the buyer repudiates the contract, the seller may sue for the price of those actually delivered at once.<sup>6</sup> If, on the other hand, the buyer owing to the seller's default refuses to give a bill, the seller cannot sue for the price of the goods actually delivered until the expiration of the time at which the bill would have matured.<sup>7</sup>

Where a bill or cheque is given for the price, the general rule is that it operates as conditional payment.<sup>8</sup> If the bill is dishonoured, the debt revives, and the buyer may be sued either on the bill or on the consideration.<sup>9</sup>

Where the price is payable in a foreign currency, the exchange must be calculated at the rate in force at the time when the debt became due.<sup>10</sup>

If the giving of the bill or note be the condition to credit being allowed at all, as, for example, where the goods are sold for "cash with option of bill" and the bill is not given, the seller may sue at once for the price.<sup>11</sup> When the seller agrees to take the buyer's acceptance for the price, it is his duty to tender a bill to the buyer to get the acceptance.<sup>12</sup>

1. *Davis v. Reilly*, (1898) 1 Q.B. 1 : cf. *Belshaw v. Bush*, (1851) 11 C.B. 191, 87 R.R. 639 (bill given by a third person and accepted by seller as conditional payment and endorsed away by him, not taken up at the time of action brought for the price).

2. *De Symons v. Minchwick*, (1795) Esp. 430.

3. *Aruldas v. Narayan Rao*, 55 Mys. H.C.R. 167.

4. *Paul v. Dod*, (1846) 2 C.B. 800. The measure of damages is the amount of the bill less discount at the time of action brought, *Gordon v. Whitehouse*; (1856) 18 C.B. 747.

5. *Paul v. Dod*, supra; *Hoskins v. Duperoy*, (1808) 9 East 498, refusal to give a bill or note does not make the price immediately payable, though the seller may sue for damages caused by the refusal.

6. *Bartholomew v. Markwick*, (1864) 15 C.B.N.S. 711, 137 R.R. 729.

7. *Wayne's Merthyr Steam Coal Co. v.*

*Morewood*, (1877) 46 L.J.Q.B. 746.

8. *Goldshede v. Cottrell* (1836) 2 M. & W. 20; *Gunn v. Bolckow Vaughan & Co.*, (1875) 10 Ch. App. 491, at p. 501 cited at p. 634 ante. See also *Bolt and Nut Co. (Tipton) Ltd. v. Rowlands Nicholls & Co. Ltd.*, (1964) 1 All E.R. 137.

9. See *Chalmers, Sale of Goods Act*, 1893, 16th Edn., p. 191 and the authorities cited thereunder. As to payment by cheque to agent authorised only to receive cash, see *Bradford & Sons v. Price* (1923) 92 L.J. K.B. 871; for the converse case, see *International Sponge Co. v. Watts*, (1911) A.C. 279.

10. *Peyrae v. Wilkinson*, (1924) 2 K.B. 166.

11. *Rugg v. Weir*, (1864) 16 C.B. (N.S.) 471; 139 R.R. 582.

12. *Reed v. Mestaer*, (1802) 2 Comyn on Contract, 229; *Chalmers, Sale of Goods Act*, 16th Edn., p. 192.



Where the buyer's banker gives a confirmed credit to the seller, and agrees to pay for the goods on presentation of the invoice, the banker is liable to the seller if he refuses to pay on the invoice being duly presented, even though he does so under the buyer's instruction.<sup>1</sup>

Chalmers<sup>2</sup> observes : "A bill of exchange is generally treated as cash not only as between remote parties, but also as between immediate parties. Where, therefore, the seller sues upon a bill given to him as payment for goods sold, he is entitled to judgment for the whole amount of the bill, without any stay of execution, even if the buyer has a cross-claim in damages against him in respect of the goods. The buyer must pay upon the bill and bring his cross-claim afterwards. But when a bill of exchange is given on the sale of goods, then, if the consideration wholly fails, as between the immediate parties the buyer who has accepted it is not liable upon it."

## (2) Sub-section (2)—Where property has not passed.

Sub-section (2) relates to a case where property in the goods has not passed to the buyer. In cases falling under this sub-section, the delivery is not a condition precedent to payment of the price. Where the price is payable unconditionally on a fixed day, the buyer is bound to pay it on that day, whether the property has passed or not, and irrespective of delivery.<sup>3</sup> "If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act *before* performance, for it appears that the party relied upon his *remedy*, and did not intend to make the performance a condition precedent."<sup>14</sup>

In *Swastika Scientific Engineering Co., Ambala Cantt. v. Union of India*<sup>5</sup>, it was held : In a suit for price of goods, where it is not established that the property in goods had passed to the buyer, seller cannot raise the point in such a suit that the goods were wrongly rejected. The remedy is to file a suit for damages for breach of contract.

The sub-section requires that the price, or part of it, shall be payable, not only "irrespective of delivery, but on a day certain, which means at a time specified in the contract not depending on a future or contingent event."<sup>6</sup> It applies to instalments of the price as well as to a lump sum. Accordingly, it applies to an instalment contract where the price of each

1. *Urquhart Lindsay & Co. v. Eastern Bank*, (1922) 1 K.B. 318 at p. 323.
2. *Sale of Goods Act*, 1893, 16th Edn., p. 192 citing *All Trades Distributors, Ltd. v. Agencies Kaufman, Ltd.* (1969) 113 Sol. Jo. 995, C.A.
3. *Dunlop v. Grote*, (1845) 2 Car. & Kir., 153.
4. *Notes to Pordage v. Cole*, 1 Wms. Saunders (ed, 1871), p. 551.
5. 63 Punj. L.R. 653.
6. *Shell-Mex, Ltd. v. Elton Cop Dyeing Co. Ltd.*, (1928) 34 Com. Cas. 39 at

p. 43, per Wright J. citing the *Merchant Shipping Co. v. Armitage*, (1873) L.R. 9 Q.B. 99 (a case relating to a lump sum freight under a charter party). See also *Amarnath Nikkuram v. Mohan Singh*, A.I.R. 1954 M.B. 134—Forfeiture and refund of earnest money, earnest money and penalty distinguished. *Madan Mohan v. Jwala Parshad*, A.I.R. 1950 E.P. 278—Part payment of purchase money—no forfeiture if transaction falls through.



instalment is separately payable on a named day.<sup>1</sup> But these instalments must also be payable on certain days irrespective of delivery. Where certain shipments of sheepskins were agreed to be paid "for net cash against document on arrival of the steamer," and the first two instalments were accepted and paid for, and the defendants refused to take up the documents in the case of the third instalment, in an action for the price by the sellers, it was *held* that the price was not recoverable although the defendants had broken their contract. This decision was based on the ground that the property in the goods had not passed to the defendants and the price was not payable "on a day certain irrespective of delivery," it being payable expressly against delivery on the arrival of the vessel.<sup>2</sup>

If the goods are delivered under an agreement of sale, the price to be paid on certain days by instalments, the property in the goods to remain in the seller until the instalments are paid, with the right reserved to the seller, to retake possession of the goods on the buyer's failure to pay an instalment, and the seller avails himself of that right, he cannot then sue for the unpaid instalment;<sup>3</sup> and perhaps in the absence of an express stipulation in the contract entitling him to retain all instalments actually paid, he may have to return these.<sup>4</sup> His remedy is to sue for damages for breach of contract. He may, however, leave the goods in the possession of the buyer and sue for the instalments as they fall due: and apparently if the contract authorises it, he may retake possession of the goods and exercise his lien upon them, in those cases in which the property has passed to the buyer, to secure the payment of unpaid instalments.<sup>5</sup> In the latter case he is affirming the contract, in the former he is in effect putting an end to it.<sup>6</sup>

A provision in a contract of sale for postponement of delivery until payment of the entire price will not *per se* stay the passing of the property in the goods sold. Where a vendor sold his ascertained specific deliverable goods to the vendee on condition that the vendor would keep the goods locked up until the vendee paid the price and if the price was not paid by a certain date, the vendor was to be at liberty to re-sell the goods after giving a week's notice to the vendee and the vendee failed to pay as

1. *Workman, Clark & Co. v. Lloyd Brazileño*, (1903) 1 K.B. 998; *Shell-Mex v. Elton Co.*, *supra*.

It is not clear whether it will apply for instance to a case where the price is payable by instalments as and when the ship reaches certain stages of construction. The case may fall under section 38(2).

2. *Stein, Forbes & Co. v. County Tailoring Co.*, (1916) 115 L.T. 215, 86 L.J. K.B. 448. See also *Colley v. Overseas Exporters*, (1921) 3 K.B. 302.

3. *Attorney-General v. Pritchard*, (1928) 97 L.J.K.B. 561, 44 T.L.R. 490; *Hewison v. Ricketts*, (1894) 71 L.T. 191. *Aliter*, if the contract is not a contract of sale but of hiring. In that case he may sue for the unpaid instalments and keep those already paid. *Brooks v. Beirnsstein*, (1909) 1 K.B. 98; *Abdul Quadeer v. Watson &*

*Sons*, A.I.R. 1930 Rang. 193 : 8 Rang. 236 : 125 I.C. 361, dissenting from *Maung Ba Oh v. Motor House Co.*, A.I.R. 1929 Rang. 368 : 7 Rang. 431 : 120 I.C. 132.

4. *Hewison v. Ricketts*, *supra* : cf. *The Auto Supply Co. v. Raghunatha Chetty*, A.I.R. 1929 Mad. 884 : 2 Mad. 829 : 121 I.C. 593 ; but see *Workman Clark & Co. Ltd. v. Lloyd Brazileño*, *supra*.

5. *Bhimji Dalal v. Bombay Trust Corporation*, A.I.R. 1930 Bom. 306 : 54 Bom. 381 : 124 I.C. 800. (If an agreement in the form made in that case were made to-day, the property in the goods would not be held to have passed, so no question of lien would arise).

6. See *Pollock & Mulla, Indian Sale of Goods Act*, page 289.



contracted and the vendor brought a suit to recover the balance of price ; *held*, that intention of the parties was that property should pass as a matter of fact, because the vendor did not reserve the right of disposal of the goods until the price was paid and hence the suit was valid. *Held further*, that the vendor had a right to sue for price of goods sold under section 55(2), as the statement in the contract of sale that the seller would have the right to re-sell after notice did not deprive him of his legal right to sue for the price if he desired.<sup>1</sup>

Where the buyer deals with the goods in a manner inconsistent with the seller's right, the latter may sue in trover.<sup>2</sup>

It may be noted that a claim for the price of the goods is quite different from a claim of non-acceptance.<sup>3</sup>

Where there is breach of contract of sale of goods by purchaser, re-sale of goods by the seller without due notice is illegal.<sup>4</sup>

### Illustrations

(1) In *Colley v. Overseas Exporters*,<sup>5</sup> unascertained goods were sold f.o.b. Liverpool. The seller sent them to Liverpool, but owing to the failure of the buyer to name an effective ship, the seller was prevented from putting the goods on board. *Held*, that the default of the buyer did not have the effect of placing the seller in the position in which he would have been if the goods had been put on board ; that in the absence of an agreement that the price should be payable on a day certain irrespective of delivery, he could not sue for the price but can only maintain an action for damages.

(2) In *Alexander v. Gardner*<sup>6</sup>, there was sale of butter to be shipped from London and to be paid for by bill at two months from the date of landing. Goods in conformity with the contract were despatched, but the ship was lost. The buyer was held liable to pay the price, for the property in the goods passed to him on shipment, and the terms relating to payment merely indicated the time at which payment was to be made and the arrival of the goods was not a condition precedent to the liability to pay.

(3) In *Helps v. Winterbottom*<sup>7</sup>, there was sale and delivery of goods on six months' credit payment to be made by a bill at two or three months, at the purchaser's option. It was *held* : This was in effect a nine months' credit, and consequently, an action for goods sold and delivered within six years from the end of nine months was in time to save statute of Limitations.

(4) In *Dunlop v. Grote*<sup>8</sup>, a quantity of iron was sold. It was to be delivered between the 3rd March and 30th April, if the buyer so required ;

1. *Firm Shanker Lal Kundan Lal v. Firm Jamna Das Piyare Lal*, A.I.R. 1938 Lah. 30.

2. *Peruvian Guano Co. v. Dreyfus*, (1892) A.C. 166.

3. *Anderson Wright v. Kalagarla Surji Narain*, (1885) 12 Cal. 339.

4. *Sita Ram v. Kunj Lal*, A.I.R. 1939 All. 206.

5. (1921) 3 K.B. 302 ; 90 L.J.K.B. 1301.

6. (1835) 1 Bing. N.C. 671, 41 R.R. 651.

7. (1831) 2 B. & Ad. 431, 36 R.R. 609.

8. (1845) 2 Car. & Kir. 153, 80 R.R. 834.



the price to be paid in any event on the latter date. By the 30th April, a portion only had been delivered, as the buyers had not required delivery of more. *Held*, the sellers may recover the whole price and not merely the damages which they had sustained by the buyers' breach of contract, and they need not show that they have appropriated to the contract any specific iron to complete the delivery of remainder.<sup>1</sup>

### (3) Suit for recovery of price—forum.

The general rule is that the debtor must find out the creditor. When the price becomes payable it becomes a debt and unless there is a contract that the price is payable elsewhere than where the contract was made or where the goods were at the time of sale, such latter price is generally the forum of the suit. Where a seller sues for the price, discount may be allowable by the contract or by trade usage and the buyer can claim a set-off for such discount if he is entitled to it.<sup>2</sup>

### (4) Exchange rate.

In a suit to recover the value of the goods agreed to be paid for "as per home invoice" the rate of exchange for the conversion of sterling into rupees should be that prevailing on the date on which payment was to be made under the contract and not that prevailing on the date of judgment.<sup>3</sup>

**56.** Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

Damages for non-acceptance.

### Synopsis

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|--|---|
| (1) <i>Analogous law.</i>              | (5) <i>Contract for purchase of car at fixed retail price—Breach of contract—Damages—Burden of proof.</i> |
| (2) <i>Damages for non-acceptance.</i> |   |
| (3) <i>Measure of damages.</i>         |   |
| (4) <i>Mitigation of damages.</i>      |   |

#### (1) Analogous law.

This section is based on section 50 of the English Act (Appendix A.) In this section as well as in other sections (57 and 59) the provisions of the English Act relating to the measure of damages have been omitted, as they are provided for in sections 73 and 74 of the Indian Contract Act, which run as follows :

**73.** "When a contract has been broken, the party who suffers by such a breach is entitled to recover from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things for such breach, or which the parties knew,

Compensation for loss or damage caused by breach of contract.

1. Cf. *Joachimson v. Swiss Bank*, (1921) 26 Com. Cas. 196 (210) ; *Rein v. Stein*, (1892) 1 Q.B. 753 C.A.

2. *Ex-parte Worthington*, 3 Ch. D. 503.  
3. *Shakoor & Co. v. Finlay Flaming & Co.*, 79 I.C. 391 (Bur.).



when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Compensation for failure to discharge obligation resembling those created by contract.

*Explanation.*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying inconvenience caused by the non-performance of the contract must be taken into account.

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Compensation for breach of contract where penalty stipulated for.

*Explanation.*—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Exception.

A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to an act in which the public are interested.”

Explanation.

## (2) Damages for non-acceptance.

This section serves as a residuary provision for the remedies of the seller for the default of the buyer and covers all those cases which are not covered by section 55.<sup>1</sup> It lays down that when the buyer wrongfully neglects or refuses to accept or pay for the goods, the seller may sue him for damages for non-acceptance. When the seller has not transferred

1. *Boswell v. Kilborn*, (1862) 15 Moo.

P.C. 309 ; 137 R.R. 86.



to the buyer property in the goods—as where the agreement is for the sale of goods not specific or of specific goods which are not in a deliverable state or, which are to be weighed and measured before delivery—the breach of the buyer of his promise to accept and pay can only affect the seller by way of damages. The goods are still his. He may re-sell or not at his pleasure. But his only action against the buyer under the contract of sale as a general rule<sup>1</sup> is for damages for non-acceptance. He can in general only recover the damage that he has sustained, not the full price of the goods.<sup>2</sup> Where the property has passed, the seller may sue, either for the price<sup>3</sup> under section 55 (1) or for damages for non-acceptance or can exercise his right of lien for the unpaid price and re-sale of the goods and recover loss as damages under section 54. Section 44 of the Act provides that, where the buyer makes default in taking delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal, and also for reasonable charges for the care and custody of the goods.

But before the seller can sue, there must be wrongful neglect or refusal by the buyer. So, if the seller fails to perform a condition precedent, there is no right of suit, unless the buyer has waived it.<sup>4</sup>

### (3) Measure of damages.

As Already stated, the provisions of section 50 of the English Act which relate to the measure of damages for non-acceptance are omitted from the present Act, as sections 73 and 74 of the Indian Contract Act contain general provisions with regard to the measure of damages embodying the principles underlying sub-sections (2) and (3) of section 50.<sup>5</sup> Section 50 (2) of the English Act adopts the first part of the rule laid down for breaches of contract generally in *Hadley v. Baxendale*<sup>6</sup>, section 50 (3) being only most common application of it.<sup>7</sup> Section 73 of the Indian Contract Act is based on the same rule.

“Where a contract to deliver goods at a certain price is broken, the proper measure of damage in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy.<sup>8</sup> So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them; in fact it is his duty to do so to mitigate the loss.”<sup>9</sup> Sections 50 and 51 of the English Act (corresponding to sections 56 and 57 of the Indian Act) summarise the provisions as follows :

1. As to when the seller may sue for the price, though the property has not passed, see section 55(2).
2. Per Parke B., in *Laird v. Pim*, (1841) 7 M. & W. 474, 478; *Atkinson v. Bell*, (1828) 8 B. & C. 277; *Boswell v. Kilburn*, (1862) 15 Moo. P.C. 309; 137 R.R. 86.
3. Unless he has re-sold, in which case he must sue for damages, *Lamond v. Davall*, *supra*.
4. *Graves v. Legg*, (1854) 9 Exch. 709; 96 R.R. 931; *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K.B. 543.
5. Compare the first paragraph of section 73 of the Indian Contract Act with

section 50(2) of the English Act and illustration (c) to section 73 with section 50(3); see also Report of the Select Committee.

6. (1854) 9 Exch. 341, 354; 96 R.R. 742.
7. Halsbury, *Laws of England*, 3rd Edn., Vol. 34, page 145, f.n. (m).
8. But special circumstances may show that the seller is entitled to greater damages. See the rule in *Hadley v. Baxendale*, *infra*.
9. *Barrow v. Arnaud*, (1844) 8 Q.B. 595, 605, 609, 70 R.R. 568, Exch. See also *Harishchandra v. Durga Sahai*, (1926) 54 Cal. 97.



“50. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.

51. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when the goods ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

In substance, therefore, the provisions of the English Act are the same as those contained in section 73 of the Indian Contract Act and the illustrations thereto, and, though the language is slightly different, both are declaratory of the common law.<sup>1</sup>

As already stated, the leading case on the point in England is *Hadley v. Baxendale*,<sup>2</sup> from which the language of section 73 of the Contract Act seems to have been taken. In that case there was unreasonable delay on the part of the defendants (common carriers) in carrying a broken iron shaft of the plaintiffs' flour mill as a result of which the mill could not be worked for some days and the plaintiffs incurred a loss of profit. The only facts communicated to the defendants were that the article to be carried was the broken shaft of a mill and that the plaintiffs were the owners of the mill. *Held*, under the circumstances, such loss could not be recovered in an action against the defendants as common carriers. “Damages should be such as fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it,”—p. 354. According to the finding of the court, the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. Alderson B. held that the

1. *Jamal v. Moola Dawood Sons & Co.*, (1916) 1 A.C. 175, 43 I.A. 6, 11 ; 43 Cal. 493, 503 ; 31 I.C. 449 ; *Ramalin-*

*gham v. Gokuldas*, A.I.R. 1926 Mad. 1021.  
2. (1854) 9 Ex. 341, 358.



defendants were not liable for the loss of profits caused by the stoppage of the mill for the additional five days.

Alderson B. stated the following two rules in the above case :

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered—

(1) either arising naturally *i.e.*, according to the usual course of things, from such breach of contract itself ;

(2) or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

The first rule of *Hadley v. Baxendale* deals with the recovery of general damages ; the second with the recovery of special damages. The first rule is reproduced in Ss. 50 (1), 51 (2) and 53 (2) of the English Sale of Goods Act, 1893. The second rule is saved though not reproduced in S. 54 of that Act.<sup>1</sup>

The propositions emerging from the cases explaining the rules in *Hadley v. Baxendale* are stated by Asquith L.J. in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*<sup>2</sup> as follows :

“(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can do so, as if his rights had been observed *Wertheim v. Chicoutimi Pulp Co.*<sup>3</sup> ; this purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss, *de facto* resulting from a particular breach however improbable however unpredictable. This, in contract at least, is recognised as, too harsh a rule.

(2) Hence, in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable, depends on the knowledge then possessed by the parties or at all events, by the parties who later commit the breach.

(4) For this purpose, knowledge ‘possessed’ is of two kinds : one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ordinary course of things and consequently what loss is liable to result from a breach of that ordinary course, is the subject-matter of the “first rule” in *Hadley v. Baxendale* but to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge when he actually possesses of special

1. See Schmitthoff, “The Sale of Goods,” p. 152.

2. (1949) 2 K.B. 528, 539 ; (1949) 1 All

E.R. 997.

3. (1911) A.C. 301.



circumstances outside the ordinary course of things of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule, it is necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord Du Parcq in the recent case of *Monarch Steamship Co. v. Karlshamns Olijefabriker (A/B)*).<sup>1</sup>

(6) Nor, finally, to make a particular loss recoverable, need it be proved that on a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is enough, to borrow from the language of Lord Du Parcq in the same case at p. 233, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or 'a real danger.' For short we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with same approach to accuracy.<sup>2</sup>

Whether consequences are 'reasonably foreseeable' is a question of fact.<sup>3</sup>

Schmitthoff observes :<sup>4</sup> "In practice the sources of the injured party's claim for damages will often depend on whether he can satisfy the court that the claim arises under the first and not under the second rule in *Hadley v. Baxendale* because he might be unable to prove that at the time when the contract was made, the contract-breaker actually knew the 'special circumstances' likely to cause more loss than is ordinarily 'on the cards.'"<sup>5</sup>

The manner of damages on breach by the buyer of goods agreed to be purchased by him is thus in general the difference between the contract price and the market price at the date of the breach. A rise or fall in the market price in the breach cannot affect the buyer.<sup>6</sup> Where the seller alleged there was no available market for the goods for a period subsequent to the breach, that the goods were consequently sold after the lapse of that period and the buyer is therefore liable for the difference between the contract price and the price at which the goods were actually sold, the onus lies on the seller of making out that very special case.<sup>7</sup> If there is no difference between the contract and market price, the court may award

1. (1949) A.C. 196 : (1949) 1 All E.R. 1.  
 2. See also notes under S. 59 infra.  
 3. *Mehmet Dogan Bey v. Abdeni & Co. Ltd.*, (1951) 2 All E.R. 162.  
 4. Schmitthoff, "The Sale of Goods", p. 154.  
 5. *Collins v. Howard*, (1949) 2 All E.R. 324; *Bunting v. Tory*, (1948) 64 T.L.R. 353 (of doubtful authority, in view of the later decision of the C.A. in the *Victoria Laundry (Windsor) Ltd. v.*

*Newman Industries Ltd.*, (1949) 2 K.B. 528).  
 6. (1916) 1 A.C. 175 : 43 I.A. 6 ; *British Westing-house Electric Co. v. Underground Electric Co.* (1912) A.C. 673 ; *Keshavlal v. Diwan Chand*, A.I.R. 1923 P.C. 164 (P.C.) ; 47 Bom. 563 ; 74 I.C. 396.  
 7. *Ramalingam v. Gokuldas*, A.I.R. 1926 Mad. 1021.



nominal damages.<sup>1</sup> In *Messrs. Mahan Bhasin Share Agency v. Khuda Baksh*,<sup>2</sup> the buyer agreed to purchase from the seller 200 shares in Heinze Tin Limited, but he broke the contract and refused to purchase the same in spite of seller's notices last of which was dated 29th June 1936 when the market had fallen considerably. The shares, however, were not re-sold until 6th September 1937 as the sellers did not give instructions to their brokers to sell them and no reasons were given why they waited so long. *Held*, that in order to succeed, the sellers had to show the market price at the date of the breach or at the date of sale affected as soon as reasonably possible after the breach and that the sellers were holding the shares in the hope of a rise, and hence the speculation was of the sellers and not of the buyers.

Ordinarily the general rule contained in section 73 of the Indian Contract Act is satisfied by ascertaining the difference between the value of the goods at the time of the breach and the contract price, and, if there has been a re-sale by the seller, the re-sale price is taken as evidence of the value.<sup>3</sup> If the subject-matter of the contract is not marketable at the place of delivery, the market price at the nearest place, less the cost of transport of thither or the price prevailing in the controlling market, or the price at the final destination of the goods, may be taken into consideration,<sup>4</sup> or the price for a brief period before or after that time,<sup>5</sup> or the value of the nearest substitute may be taken.<sup>6</sup> If no substitute is available, the re-sale price is assumed to furnish the proper measure of damages where the goods have been re-sold<sup>7</sup>, except in cases where the re-sale is not held within a reasonable time after breach.<sup>8</sup> If there has been no re-sale, the market value may be ascertained by adding to the price of the goods at the place where they were purchased the cost of carrying them to their place of destination and the usual importer's profit.<sup>9</sup>

In *Majety Balakrishna Rao v. M/s. Mook Devassy*<sup>10</sup>, it was *held* : Where in a suit for damages for the breach of a contract for the sale of goods the seller-plaintiff claims as the measure of damages the difference between the price which he realised on the re-sale of the goods and the contract price, the fact that the plaintiff has made a mistake in demanding damages on a wrong basis is not a reason for the court to refuse to set right the mistake by directing the damages to be calculated in the proper way unless the plaint is amended. For even without an amendment the court is entitled to award the proper measure of damages if there is sufficient evidence on record.

1. *Prehn v. Royal Bank of Liverpool*, (1870) L.R. 5 Exch. 92 (99).

2. A.I.R. 1939 Lah. 260 ; A.I.R. 1915 P.C. 48 relied on.

3. *Ellis, Lever & Co. v. Dunkirk Colliery Co.*, 43 L.T. 706 H.L. ; *Strand v. Austin & Co.*, (1883) Cab. & El. 119 ; *Jugmohan Das v. Nusserwanji Jehangir*, 26 Bom. 744. See also *K.R. Shah v. Municipal Committee, Dhamtori*, 1969 Jab. L.J. 589 ; 1969 M.P.L.J. (Notes) 49 - Difference between contract rate and market rate on date of breach of contract should be taken as measure of damages.

4. *Wertheim v. Chicoutimi Pulp Co.*, (1911) A.C. 301 P.C. ; *Ramalingam v. Gokuldas*, 1926 Mad. 1021.

5. *Cohen v. Platt*, 59 N.Y. 348 (352).

6. *Hinde v. Liddell*, (1875) 10 Q.B. 265 ; *Elbinger v. Armstrong*, (1874) 9 Q.B. 473.

7. *Maclean v. Dunn*, (1828) 130 E.R. 947 ; 22 R.R. 714 ; *Ex-parte Stapleton*, (1879) 10 Ch. D. 586 C.A. ; *Ryan v. Ridley*, (1902) 8 Com. Cas. 105.

8. See *Mohan Bhasin v. Khuda Baksh*, *supra*.

9. *Borries v. Hutchinson*, (1865) 18 C.B.N.S. 445, 144 R.R. 563 ; *Cooverjee v. Rajendra*, (1909) 36 Cal. 617 ; *Hajee Ismail v. Wilson*, (1918) 41 Mad. 709, 715.

10. A.I.R. 1959 Andhra Pra. 30,



In *Nagabhushanam & Co. v. Saith Kanhaiyalal Bhaiyalal*<sup>1</sup>, it was held : No doubt breach of contract entitles the party to claim damages and when the party is not able to substantiate the extent of loss he may be entitled to nominal damages at least, but when it is evident that the transaction did not end in loss at all and the plaintiff got at least as much as he would have if the contract was duly performed, he cannot set up any further claim.

In *Trojan & Co. v. Nagappa*, A.I.R. 1953 S.C. 235 (a transaction relating to **sale of shares**), the Supreme Court held : "...in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided, of course, that there was a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith which he had been induced to purchase by the fraud of the defendants. In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation, *i.e.* how much worse off was his estate owing to the bargain in which he entered into. The law on the subject has been very appositely stated in *Mc Connel v. Wright*, (1903) 1 Ch. 546.

"Ordinarily, the market rate of the shares on the date when the fraud was practised would represent their real price in the absence of any other circumstances. If, however, the market was vitiated or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a consideration of a variety of circumstances, disclosed by the evidence led by the parties. Thus, though ordinarily the market rate on the earliest date when the real facts became known may be taken as the real value of the shares, nevertheless, if there is no market or there is no satisfactory evidence of a market rate for some time which may safely be taken as the real value, then if the representee sold the shares, although not bound to do so, and if the re-sale has taken place within a reasonable time and on reasonable terms and has not been unnecessarily delayed, then the price fetched at the re-sale may safely be taken into consideration in determining retrospectively the true value of the shares on the crucial date. If there is no market at all or if the market rate cannot, for reasons referred to above, be taken as the real or fair value of the thing and the representee has not sold the things, then in ascertaining the real or fair value of the thing on the date when deceit was practised subsequent events may be taken into account, provided such subsequent events are not attributable to extraneous circumstances which supervened on account of the retaining of the thing. These, we apprehend, are the well settled rules for ascertaining the loss and damage suffered by a party in such circumstances."

If delivery is to be made in a foreign country, the measure of damages is to be ascertained by reference to the market price of the goods at that place. The figure then has to be arrived as expressed in the currency of that country, which must then be translated into Indian

1. 1958 Andh, L.T. 930,



currency, and the rate of exchange must be the rate prevailing at the date of the breach.<sup>1</sup>

The buyer who gives notice of his intention not to accept cannot diminish the damages on the ground that the seller is bound to accept the repudiation as a breach.<sup>2</sup> The seller may hold him to the contract and wait for the appointed time of performance.<sup>3</sup> He is also free to accept the repudiation as an immediate breach and the damages are then measured as on the date of the seller's acceptance of the repudiation.<sup>4</sup> There is, however, a tendency to modify the hard and fast rule that damages must be assessed with reference to the original date of performance.<sup>5</sup> Where a defaulting purchaser delays to take delivery of goods purchased by him, resulting in the deterioration of the goods in the ordinary course of things, e.g., by rainfall, he has to compensate the seller for any loss occasioned by reason of such delay, even though the property in the goods did not pass to him.<sup>6</sup> But a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum due to his own neglect.<sup>7</sup> Even in a contract subject to a condition that the plaintiff may upon a breach of it treat it as cancelled and not ask for damages, the defendants, in order to escape liability for damages, are bound to justify their refusal to perform the contract since they cannot themselves bring about the state of affairs which would avoid the contract.<sup>8</sup>

If there is no market for the goods, the seller is entitled to be put in the same position as if the contract had been carried out. Where there is non-acceptance of goods made to order, there being no available market, the seller is entitled to profit which he would have made if the contract was carried out.<sup>9</sup> In *Whitaker v. Bowater*,<sup>10</sup> there was sale of coal slack. On default by the buyer, the seller, who had entered into a contract with a coal merchant to supply him with coal, cancelled the contract with the merchant by paying him damages, as there was no market for the particular kind of coal in question. *Held*, the seller had acted reasonably and was entitled to recover from the buyer in addition to his own damage the amount which he had to pay to the coal merchant.

As to "available market" for goods, Halsbury summarises the English "Available market" law thus :<sup>11</sup> The existence of an available market is a question of fact.<sup>12</sup> It is immaterial whether the rise in price is occasioned by scarcity, or increased demand, or any other

1. *Di Ferdinando v. Simon Smits & Co.*, (1920) 3 K.B. 409, 414, 415, C.A.

2. *Frost v. Knight*, L.R. 7 Exch. 111 (113); *Roper v. Johnson*, L.R. 8 C.P. 167.

3. *Michael v. Hart & Co.*, (1902) 1 K.B. 482 C.A.; *Tredegar Iron & Coal Co. v. Hawthorn Brothers & Co.*, 18 T.L.R. 716 C.A.; *Maharaja Mahendra Chandra v. Aswani Kumar*, 32 Cal. L.J. 168.

4. *Shaw's Bro Iron Co. v. Birchgrove Steel Co.*, 6 T.L.R. 50 C.A., affirmed in 7 T.L.R. 24 (H.L.) *Maharaja Mahendra Chander v. Aswani Kumar*,

*supra*.

5. *Roth & Co. v. Taysen*, 1 Com. Cas. 306 C.A.

6. *Tara Chand v. Louis Drayfus & Co.*, 35 I.C. 449 (Sind).

7. *Jamal v. Moola*, *supra*.

8. *Shahabuddin v. Vilayat Ali Khan*, 95 I.C. 614 (Nag).

9. *Re. Vic. Mills Ltd.*, (1913) 1 Ch. 405.

10. (1918) 35 T.L.R. 115.

11. Halsbury, *Laws of England*, 3rd Edn. Vol. 34, p. 49, f.n. (k), pp 152, 153.

12. *Marshall & Co. v. Nicoll & Son*, (1919) S.C. H.L. 129.



cause.<sup>1</sup> Where there is no market at the place of delivery, the value at the nearest available place, less the cost of transport thither, may sometimes be taken as the market value;<sup>2</sup> as may also the value in controlling market.<sup>3</sup> If there is no market price at the place of delivery at the time when the goods should have been delivered, the price for a brief period before or after that may serve.<sup>4</sup>

Where there is no market for the goods in question, the courts must endeavour to ascertain the value of the goods in some other way. The price at which the goods have been re-sold to the buyer, may be evidence of their value,<sup>5</sup> as also may the cost of obtaining substituted goods,<sup>6</sup> but matters special to the buyer and not within the contemplation of the parties at the date of the contract of sale must be ignored.<sup>7</sup>

The date with reference to which damages have to be assessed will be the date fixed for performance by delivery and acceptance as fixed by the contract or where no time is so fixed, at the time of the refusal to perform.<sup>8</sup> The contract may provide a certain period during which delivery is to be made, such as a named fortnight or month; and in such case, in the event of a failure to deliver, the 1st day of such period is the day on which the breach must be taken to have occurred, and therefore, the day on which to assess the damages,<sup>9</sup> while if delivery is tendered at any time during that period and refused, the date of that refusal is the date of breach. Where time is fixed by reference to the happening of an event, as the arrival of a ship, the time is still fixed by the contract and the time at which the contract ought to have been performed is on the happening of that event.<sup>10</sup>

What is the position when no time is mentioned and the contract therefore is to be performed within indefinite period? Under the English law, in *Chapman v. Larin*<sup>11</sup>, the times of delivery were indefinite, at the option of the buyer. He had on May 7 agreed to buy 500 tons of hay f.o.b. a propeller on the canal "at such times and in such quantities" as he should order, each lot to be paid for on delivery. The buyer took delivery of 147 tons, and then refused to accept any more. After several requests

1. *Josling v. Irvine*, (1861) 16 H. & N. 512. In this case the seller sold an article which proved of much greater value than the parties were aware of at the time of the sale.
2. *Wertheim v. Chicoutimi Pulp Co.*, (1911) A.C. 301, P.C.; *Grand Tower Co. v. Phillips*, (1874) 90 U.S.R. 471; *Macauley v. Horgan*, (1925) 2 I.R. 1.
3. *Cohen v. Platt*, (1877) 69 New York State Reports 348, 352.
4. *Ibid.*
5. *Elbinger Acton Gesellschaft v. Armstrong*, (1874) L.R. 9 Q.B. 473, 474; *France v. Gaudet*, (1871) L.R. 6 Q.B. 199; *Hinde v. Liddell*, (1875) L.R. 10 Q.B. 265.
6. *Hinde v. Liddell*, *supra*; *Erie County Natural Gas and Fuel Co. v. Carroll*, (1911) A.C. 105 P.C.; *The Arpad*, (1934) P. 189, C.A.
7. *The Arpad*, *supra*; *Grébert-Borgnis*

- v. Nugent*, (1885) 15 Q.B.D. 865 C.A.
8. *Mackertich v. Nobo Kumar*, (1903) 30 Cal. 477; *Sharpe v. Nosawa*, (1917) 2 K.B. 814 (C.I.F. contract—date is the probable date when the documents will be ready); *Melachrino v. Nickoll*, (1920) 1 K.B. 693 (date fixed by reference to the happening of an event); cf. *Steel Brothers Ltd. v. Dayal Khadoo & Co.*, (1923) 47 Bom. 924; A.I.R. 1924 Bom. 247; 87 I.C. 67. See also *Firm Bachhraj Amolakchand v. Firm Khupchand Narsinghdas*, A.I.R. 1949. Nag. 199 cited at pp. 382, 694, ante—damages with reference to the date of delivery.
9. *Melachrino v. Nobo Coomar Roy*, *supra*.
10. *Melanohrino v. Nickoll and Knight*, *supra*.
11. (1879) 4 Can. S.C.R. 349.



by the seller, the plaintiff, a formal request was made on July 28 by the plaintiff, who brought his action on November 11. *Held*, that the action lay for the difference in value in respect of all the undelivered residue, as the defendant was bound to order the hay at reasonable times, and a reasonable time for delivery of the residue was July 28 when the new hay crop was coming into the market.

Again, it has been suggested under the English law that the words "where no time is fixed" apply only to a case where the contract is to deliver goods "on demand" or "as required by the buyers" and do not include a case where the time for performance can be fixed by a jury, as it can be when performance is to be within a reasonable time.<sup>1</sup> The question is still open.

In India, when no time is mentioned, the case must be treated as one in which no time is fixed, as would appear to be clear from illustrations (c) and (d) to section 73 of the Indian Contract Act. The same view has been held in England also,<sup>2</sup> though as mentioned above, the point is still open. In India, in case where the contract is to be performed within a reasonable time, if either party before the expiration of that time and before anything has been done under the contract announces his intention of refusing to proceed with the contract, the day on which he so announces his intention must be taken as the time for assessing the damages, though this rule can scarcely be applied in its entirety to cases where the contract is to be performed by delivering the goods in instalments. If before the expiration of the reasonable time either the buyer applies for delivery and the seller fails to deliver or the seller tenders delivery and the buyer fails to accept, such failure would, in either case, amount to a refusal to perform and the day assessing the damages would be the day on which such refusal has occurred.<sup>3</sup>

The time appointed for delivery may or may not, however, coincide with the date of the buyer's breach of contract. For example, the buyer may, in advance, intimate his intention not to accept the goods, in other words repudiate the contract, and the seller may or may not accept the repudiation as an immediate breach.<sup>4</sup>

The law with respect to prospective breaches of contract and the measure of damages, was thus stated by Cockburn, in *Frost v. Knight* :<sup>5</sup>

"The promisee, if he pleases, may treat the notice of intention as imperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance ; but in that case he keeps the contract alive for the benefit of the other party as well as his own ; he remains subject to all his own obligations and liabilities under it,

1. *Millet v. Van Heek & Co.*, (1921) 2 K.B. 369, pp. 375, 376, 378.

2. *Melachrino v. Nickoll & Knight*, supra, at p. 726, *Bailhache J.* ; see also *Ashmore & Sons v. C.S. Cox & Co.*, (1899) 1 Q.B. 443.

3. See *Pollock and Mulla, Sale of Goods Act*, p. 294, citing *Shriram Vithuram*

*v. Trimbak Amolakchand*, A.I.R. 1927 Bom. 514 : 103 I.C. 645.

4. Per Cur. in *Frost v. Knight*, (1872) L.R. 7 Ex. 111, at 112-113 ; per Lord Esher, M.R. in *Roth v. Taysen*, (1896) 12 T.L.R. 211 (C.A.).

5. (1872) L.R. 7 Ex. 111.



and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it : and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In *Boorman v. Nash*<sup>1</sup>, the plaintiff, in November, 1825, sold goods to the defendant, deliverable in the months of February and March following. The defendant became bankrupt in January. The goods were tendered and not accepted at the dates fixed by the contract, and re-sold at a heavy loss. The loss would have been much smaller if the goods had been sold in January, on the buyer's bankruptcy. *Held*, that the contract was not rescinded by the bankruptcy, that the assignees would have had the right to adopt it, that the seller was not bound to re-sell before the time for delivery, and that the damages were to be calculated according to the market price at the date fixed by the contract for performing the bargain.

In *Phillpotts v. Evans*<sup>2</sup>, there was a sale by merchants at Gloucester of wheat deliverable at Birmingham as soon as vessels could be obtained. The market began to fall and while the wheat was on its way the buyer intimated that he would not accept it. On arrival it was tendered to him and rejected. The time for ascertaining the damages for non-acceptance was held to be the day on which the wheat was tendered.

If the seller accepts the buyer's repudiation as an immediate breach, he must act reasonably by way of minimising the loss caused thereby. Whether or not he acts reasonably is a question of fact.<sup>3</sup>

But the seller is not bound to accept the buyer's repudiation, even when it is obvious that the buyer cannot carry on the contract at the date fixed.<sup>4</sup> Thus in *Tredegar Iron & Coal Co. v. Hawthorn*<sup>5</sup>, where coal was sold only for export, deliverable during February, and the buyer, no shipping being procurable, repudiated the contract in that month, at which time the seller could have re-sold without loss, it was *held* by the Court of Appeal that the seller was not bound to minimise the buyer's loss by accepting the repudiation in February, but might stand by his bargain ; and having re-sold in March at loss of a shilling a ton might recover that deficiency.

Where the time for performance is fixed by the contract but extended and another date substituted for it by the agreement of the parties, the substituted date must be taken as the date for ascertaining the measure of damages.<sup>6</sup> It has been held under

1. 9 B. & C. 145 ; 52 R.R. 607 ; cf. *Cohen v. Cassim Nana*, (1876) 1 Cal. 264.  
2. (1839) 5 M. & W. 475 ; 52 R.R. 802.  
3. Per Mathew J. in *Roth v. Taysen*, L.T. 628 (C.A.) ; 1 Com. Cas. 306 ; 12

T.L.R. 211.  
4. See as to this section 60.  
5. (1902) 18 T.L.R. 716 (C.A.).  
6. See sections 55 and 63 of the Indian Contract Act, 1872.



the Indian law that an agreement to postpone performance for an unspecified time operates as an extension for a reasonable time and consequently the date to be taken must then be a date at which there appears to be failure or refusal to perform.<sup>1</sup> If the time has not been postponed by the agreement, the time fixed by the contract is still the date at which to ascertain the damages.<sup>2</sup>

Where damages are payable in a foreign currency they are such a sum in Indian currency as will, at the rate of exchange prevailing at the date of default with respect to which the damages are to be assessed, but not at the time of judgment or award, produce the sum in foreign currency.<sup>3</sup> Fluctuations in the rate of exchange therefore do not affect the parties. Similarly, if the buyer refuses to accept and the seller retains the goods, the buyer cannot be held responsible for any further loss should the market fall nor entitled to have the damages reduced if it rises.<sup>4</sup>

### Illustrations

The following further illustrations may also be studied with advantage :

(1) There was a sale of 230 bales of manilla hemp, shipment to be made from port or ports in the Philippine Island by sailor or sailors between May 1st and July 21st. The sellers shipped hemp by a steamer in September which would arrive at about the same date as a cargo shipped on a sailor between May and July, and on October 27 declared it against the contract. The buyers refused to accept declaration and returned it, but on November 4th the sellers said that they could make no other. The date for assessing the damages was held to be November 4th.<sup>5</sup>

(2) In *Leigh v. Paterson*<sup>6</sup>, a quantity of tallow was sold to be delivered in all December. On the first October the seller announced that he would not deliver, but the buyer refused to accept his repudiation. The market price rose between the 1st October and 31st December. *Held*, that the day for ascertaining the damages was the 31st December.

(3) In *Jamal v. Moola Dawood Sons & Co.*,<sup>7</sup> there was a sale of shares deliverable on 30th December. They were tendered on that day and rejected. *Held*, that the measure of damages is the difference between the contract value of the shares and their market value on that date. The fact that they were re-sold at an increased value subsequently is irrelevant.

1. Mohammad Habib Ullah v. Bird & Co., A.I.R. 1922 (P.C.) 178 ; (1921) 48 I.A. 175 : 43 All 257 : 63 I.C. 589 ; Kidar Nath Behari Lal v. Shimbhu Nath Nandu Mal, A.I.R. 1927 Lah. 176 : 8 Lah. 198 : 99 I.C. 812 : Coorla Mills v. Vallabhdas, A.I.R. 1925 Bom. 547 : 94 I.C. 575.  
2. Mutthaya Maniyagaram v. Lekku Reddiar, (1912) 37 Mad. 412 : 14 I.C. 255 ; Narsinggirji Manufacturing Co. v. Budansaheb Abdulsahab Kaji, A.I.R. 1924 Bom. 390.  
3. Barry v. Van. den Hurk, (1920) 2 K.B. 709 ; Di Ferdinando v. Simon Smits & Co., (1920) 3 K.B. 409, 414, 415,

C.A.  
4. Jamal v. Moola Dawood Sons & Co., supra. Collateral circumstances will not alter the rule ; Bolisetti Venkatanarayana v. Vakkalayada Lakshmi Punneyya, A.I.R. 1928 Mad. 1232 : 115 I.C. 1342 ; cf. Mehr Chand v. Jugal Kishore Gulab Singh, 85 I.C. 317.  
5. Ashmore & Sons v. C.S. Cox & Co., (1899) 1 Q.B. 436.  
6. (1818) 8 Taunt. 540 : 20 R.R. 552 ; cf. Mackeritch v. Nobo Coomar Roy, (1903) 36 Cal. 477.  
7. (1916) 1 A.C. 175.



(4) In *Brown v. Muller*<sup>1</sup>, 500 tons of iron were sold in August to be delivered in about equal proportion in September, October and November. Later in August the seller gave notice that he did not intend to deliver; the buyer demanded delivery in October of 200 tons "as per contract", and on the 4th December brought an action for non-delivery against the seller. *Held*, that the proper measure of damages was the difference between the market price and the contract price of one-third of 500 tons on the 30th September, 31st October, and 30th November.

(5) In *Bungo Steel Furniture v. Union of India*, A.I.R. 1967 S.C. 378, Government had entered into a contract with the appellant for the manufacture of steel bins. There was wrongful termination of contract by the Government. It was held by Ramaswami J.<sup>2</sup> : Property in the bins not completely manufactured not having passed to Government, S. 55 of the Act has no application. But damages for non-acceptance of goods by wrongful termination of the contract can be claimed under S. 56 of the Act. Measure of damages in respect of finished bins would be the difference between the contract price and the market price of such goods at the time when contract is broken, and in respect of unfinished bins would be the difference between the contract price on the one hand and the cost of labour and material required for manufacture of components parts of unfinished bins on the other. In the absence of market at the place of delivery, the market price of the nearest place or the price prevailing in the controlling market is to be considered.

(6) A, a stock-broker, closed the account of a client B prematurely and without instructions, instead of carrying it over to the next settlement as on the facts and the true construction of their agreement he ought to have done. B informed A that he insisted on the performance of the contract. *Held*, A cannot claim to have the damages assessed with reference to the price of the stock at the date of closing the account, but B is entitled to claim damages assessed according to the price at the date fixed for performance.<sup>3</sup>

(7) Buyer agreed to purchase from seller 200 shares in Heinze Tin, Limited, but he broke the contract and refused to purchase the same in spite of seller's notices last of which was dated 2nd June, 1937, when the market had fallen considerably. The shares, however, were not re-sold until 6th September, 1937, as the seller did not give instructions to their broker to sell them and no reasons were given why they waited so long. *Held*, that in order to succeed the sellers had to show the market price at the date of the breach or at the date of sale effected as soon as reasonably possible after the breach and that the presumption was that the sellers were holding the shares in the hope of a rise, and hence the speculation was of the sellers and not of the buyers.<sup>4</sup>

1. (1872) L.R. 7 Ex. 319; cf. *Cooverjee Bhoja v. Rajendra Nath*, (1909) 36 Cal. 617; 2 I.C. 831; *Bilasiram Thakurdas v. Gubbay*, (1915) 43. Cal. 305; 33 I.C. 23.

2. In minority judgment. The other two Judges constituting the Bench allowed the appeal on another point disagreeing with Ramaswami J. on that point.

3. *Michael v. Hart & Co.*, (1902) 1 K.B. 482, C.A. There was a suggestion that the damage might be fixed according to the highest price reached in the interval.

4. *Mohan Bhasin Share Agency v. Khuda Baksh*, A.I.R. 1939 Lah. 250; 184 I.C. 43.



(8) In the case of a sale of a decree in which the seller is not to have any right to proceed to execute the decree from the time of the transaction and the buyer is given the liberty to take steps to realise the decree at his cost at any moment, it cannot be said that the agreement is subject to an implied condition that the decree should remain capable of execution ; in other words, it cannot be said that the parties regard that the terms are subject to any implied condition that the debtor should remain solvent. If therefore the judgment-debtor becomes insolvent before the payment of the sale price and the formal execution of a deed of assignment in writing, it cannot be said that contract of sale becomes "impossible" and so void under section 56(2) of the Act.<sup>1</sup>

(8) The plaintiff contracted to supply certain number of willow baskets for a period of two months on certain conditions. Even after the expiry of two months the plaintiff went on supplying the baskets though of a different type, on instructions of defendant. No new contract was entered into and no particular quantity of new baskets to be delivered was fixed. On refusal of the defendant to take delivery of all the baskets, the plaintiff sued for recovery of price of goods supplied and for damages. It was *held* that the original contract having expired, the defendant was not bound to accept delivery of baskets in absence of any evidence showing the terms of the new contract.<sup>2</sup>

As already noted, the seller has various remedies both against the goods and the buyers personally, and in many cases where these remedies exist, he will have the option of availing himself of the remedy declared by this section.<sup>3</sup>

#### (4) Mitigation of damages.

It is a recognised principle of law that a party to a contract entitled to any damages must not aggravate the damage by any unreasonable conduct on his part ; he must like a prudent man use ordinary and reasonable diligence to minimise the damage as much as possible ; but no extraordinary duties are imposed on him. "The fundamental basis is thus compensation for pecuniary loss naturally following from the breach ; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps : this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."<sup>4</sup>

1. Vithaldas Vishram v. Jagjiwan Gordhandas, A.I.R. 1939 Bom. 84 : 41 Bom. L.R. 33.

2. Mukand Kaul v. English Furniture Mart Ltd., (1948) 8 J. & K L.R. 57, 61, 62.

3. See Coorla Mills v. Vallabhadas,

A.I.R. 1925 Bom. 547 : 94 I.C. 575 : (1925) 27 Bom. L.R. 1168.

4. Per Lord Haldane L.C. in British Westinghouse Electric etc. Co. v. Underground Electric Ry. Co., (1912) A.C. 673 (689).



Subsequent transactions may be taken into consideration in mitigation of damage, but such transactions must arise out of the consequence of the breach and in the ordinary course of business (p. 722). The mere fact that the benefit of another contract has occurred in favour of the plaintiff owing to the default of the defendant is not enough.<sup>1</sup>

It was observed by the Privy Council in *Jamal v. Moola Dawood Sons & Co.*<sup>2</sup> : "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Stainforth v. Lyall*<sup>3</sup> is an illustration of this. But the fact that by reason of the loss of the contract which this defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the later contract." In *Muhammad Habibullah v. Bird & Co.*,<sup>4</sup> in an action for damage for non-delivery of goods the fact that the buyer made a profit by supplying goods which he had in stock to his sub-purchaser was not taken into consideration. In *Wertheim v. Chicoutimi Pulp Co.*<sup>5</sup>, it was held that in case of late delivery the measure of damage in order to indemnify the purchaser is the difference between the market prices at the respective dates of due and actual delivery, but if the purchaser has re-sold the goods at a price in excess of that prevailing on the date of delivery, he must, in estimating his damage, give credit therefor. The above case was distinguished in *Williams Bros. v. Agius*<sup>6</sup>, which was a case of non-delivery and not delayed delivery, where the sub-contract was not taken into consideration. In *James Finlay & Co. v. N. V. Kwik Hoo Tong*<sup>7</sup>, it has been held that the buyer is not bound to enforce for the purpose of mitigating the damages, contracts with his sub-purchasers (which he might legally do) if to do so, after he knew that his seller had committed a breach of contract (by giving a wrong date of shipment on bill of lading) would seriously injure his commercial reputation. In that case the buyer could have enforced his contracts with his sub-purchasers who were, under their contracts, bound to take the date of shipment as given on the bill of lading as conclusive and in that case there would have been no damage. But as the buyer knew that the date of shipment was wrongly given the adoption of that course would have ruined the credit in the business world.

In *Payzu Ltd. v. Saunders*<sup>8</sup>, the buyer made default in payment of 1st instalment when due, whereupon the seller refused to deliver unless cash payments were made at the time of the order. The buyer refused this offer and the market having risen sued for damage for non-delivery. Held, that seller was wrong in imposing the condition but that the buyer

1. See *Yates v. Whyte* (1838) 7 L.J.C.P. 116; *Jebson v. E. & W. India Dock Co.*, (1875) L.R. 10 C.P. 300; see *Hill v. Showell & Sons*, (1918) 87 L.J.K.B. 1106 where the law is discussed at some length.  
2. (1916) 33 I.A. 6 at p. 10; 43 Cal. 493 at p. 502; 31 I.C. 949.  
3. (1830) 7 Bing. 169.

4. (1921) 43 All. 257 P.C. See also *Domingo v. De Souza*, (1928) 50 All. 695; A.I.R. 1928 All. 481; *Ramgopal v. Dhanji*, 55 I.A. 209.  
5. (1911) A.C. 301.  
6. (1914) A.C. 510, 522.  
7. (1929) I K.B. 400.  
8. (1919) 2 K.B. 581.



should have accepted the goods to mitigate the loss and the buyer was entitled to recover such loss which he would have suffered if he had accepted the goods.

**(5) Contract for purchase of car at fixed retail price—Breach of contract—Damages—Burden of proof.**

In *Charter v. Sullivan*,<sup>1</sup> the plaintiff, a motor car dealer, agreed to sell a Hillman Minx Car to the defendant for £773 17s. The retail price of such cars was fixed by the manufacturers. Subsequently, he received a letter from the defendant refusing to complete the purchase, but seven or ten days later he re-sold the car to another purchaser at the same price. He brought an action for damages for breach of contract against the defendant, claiming as damages the loss of profit of £97 15s which he would have made if he had completed the sale to the defendant in addition to selling a similar car to the second purchaser. At the trial the plaintiff's sale manager gave evidence that he was "certain we would have sold the second purchaser another Hillman Minx if not this one" and "if defendant had taken car we would have ordered one from stock; it would have taken a week to ten days to get one, can sell all Hillman Minx we can get", and his evidence was accepted by the Judge. It was *held*: The plaintiff was entitled to normal damages of 40s. only. Since the measure of damages was that enacted by S. 50(2) of the (English) Sale of Goods Act, 1893<sup>2</sup> viz., the loss directly and naturally resulting from the breach of contract, and the plaintiff had not proved a loss of profit, for, on the evidence, he had sold the same number of Hillman Minx cars and made the same profit as he would have done if the defendant had carried out the contract.

*W.L. Thompson Ltd. v. R. Robinson*<sup>3</sup> was distinguished in that case. "I doubt if there can be an available market for particular goods in any sense relevant to S. 50(3) of the Sale of Goods Act, 1893, unless those goods are available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand at the price at which a purchaser for the goods in question can be found, be it greater or less than or equal to the contract price. The language of S. 50(3) seems to me to postulate that in the cases to which it applies there will, or may be, a difference between the contract price and the market or current price, which cannot be so where the goods can only be sold at a fixed retail price. Accordingly, I am of opinion that whether there was in this case 'an available market' within the meaning of S. 50(3) or not, it is a case in which S. 50(2) should be applied to the exclusion of S. 50(3)."<sup>4</sup>

In the latter case, on March 4, 1954, the defendant agreed in writing with the plaintiffs, who were motor car suppliers, to purchase from them a Standard Vanguard motor car. On March 5, 1954, the defendants intimated to the plaintiffs that they were not prepared to accept delivery of the motor car. The plaintiffs returned the motor car to their suppliers, who did not seek compensation, and the plaintiffs claimed damages for breach of the agreement. The price at which Standard Vanguard motor

1. (1957) 1 All E.R. 809.

2. Corresponding to S. 56 of the Indian Sale of Goods Act, 1930, read with Ss. 73, 74 of the Indian Contract Act,

1872.

3. (1955) 1 All E.R. 154.

4. Per Jenkins L.J. at pp. 813, 814.



car could be sold by suppliers throughout the country was fixed by the manufacturers and the amount of profit which the plaintiffs would have realised on the sale of the motor car was £61 1s. 9d. At the time of the agreement there was not such a demand in the locality of the plaintiffs as would absorb all Standard Vanguard motor cars available there for sale, but it was not shown that there was no available market in the broader sense which regarded the trade and marketing organisation for selling such motor cars throughout the whole country. It was *held*: The plaintiffs were entitled to be compensated for the loss of their bargain to the extent of the profit which they would have realised, *viz* £61 1s. 9d., because the plaintiffs had, by reason of the breach of contract, sold one motor car less than they otherwise would have sold; and even if, in determining whether there was an available market within the meaning of S. 50(3) of the Act, for the car the whole of the trade and marketing organisation must be taken into consideration, yet in the present case it would not be just to apply S. 50(3) and accordingly, that enactment did not afford to the defendants a defence in the plaintiffs' claim.

**57.** Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

Damages for non-delivery.

### Synopsis

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|---|--|
| (1) <i>Analogous law.</i>                                 | (5) <i>Price unpaid</i>                        |
| (2) <i>Buyer's remedies before delivery of the goods.</i> | (6) <i>Goods not obtainable in the market.</i> |
| (3) <i>Measure of damages.</i>                            | (7) <i>Sub-contract of buyer.</i>              |
| (4) <i>Price pre-paid.</i>                                | (8) <i>Delay in delivery.</i>                  |

#### (1) Analogous law

This section is based on section 51(1) of the English Act, (Appendix A). Sub-sections (2) and (3) of that section are not reproduced in the present Act, as sections 73 and 74 of the Indian Contract Act contain general provisions relating to the measure of damages on a breach of contract, which are applicable to contract for the sale of goods in common with other contracts. The Sale of Goods Act does not include in itself any specific rule as to the quantum of damage to be awarded in case of breach of warranty. For that purpose, the provisions of S. 59 of the Act are controlled in matters of quantum of damages by the provisions laid down in Ss. 73 and 74 of the Contract Act.<sup>1</sup>

#### (2) Buyer's remedies before delivery of the goods

The breach of contract for which the buyer may have to take action may arise from the seller's default in delivering the goods or from some defect in the goods tendered or delivered; there may be a breach of the principal contract for the transfer of the property and delivery on possession, or of a condition or warranty either of quality or title.

Where the property has not passed to the buyer, it is obvious that his remedy for the breach of seller's promise to delivery is the same as

1. Kanak Kumari v. Chandan Lal,

A.I.R. 1955 Pat. 215.



that which exists in all other cases of breach of contract. He may recover damages for the breach, but has no special remedy growing out of the relation of seller and buyer.

The buyer has obviously three remedies open to him in the case of wrongful non-delivery of goods, viz., (1) a suit for damages for non-delivery, this remedy being open to him in every case even when the property has passed to him ;<sup>1</sup> (2) a suit for specific performance where the goods contracted to be sold and delivered are specific or ascertained ;<sup>2</sup> (3) when the property in the goods has passed, a suit to detain, trover, or conversion. Of course, in the last case, the buyer must be entitled to the immediate possession of the goods.

In *Clayton v. Le Roy*,<sup>3</sup> the plaintiff's watch, which had been brought some years previously at the defendant's shop was stolen from the plaintiff. Eventually the watch was purchased in a jeweller's shop, by one B, who sent it to the defendant for an opinion as to whether it was a genuine antique watch. The defendant wrote both to the plaintiff and to B, telling them that it was the watch which had been stolen, and inquiring as to their wishes in the matter. No answer was sent by the plaintiff to the defendant's letter, but a few days afterwards, some one on behalf of the plaintiff called at the defendant's shop and, on being shown the watch, demanded that it should be then and there handed over to him. This request was refused. It was *held* (by majority), that upon the facts given in evidence there had been no wrongful refusal on the part of the defendant to return the watch to the plaintiff before the date of the issue of the writ, and that the plaintiff had no cause of action against the defendant either in detain or in trover.

### (3) Measure of damages.

The damages which the buyer may recover in an action under this section are in general the difference between the contract price and the market value of the goods at the time when the contract is broken<sup>4</sup> and are not increased or lessened by subsequent circumstances,<sup>5</sup> and the same principles as govern assessment of damages under the previous section apply under the present section also. The rule as to the market price, perhaps, is not always quite so satisfactory as it is in the case of the buyer's refusal to accept, and may produce hardship in individual cases,<sup>6</sup> but it is the one adopted being considered convenient generally.

Ordinarily the measure of damages upon a breach of contract for sale of goods is the difference between the contract price and the market price on the date of breach. Where there are difficulties in assessing the damages on the ordinary footing, the Court must do its best to award such

1. Section 57 ; *Barnett v. Javeri*, (1916) 2 K.B. 390. See also *Peter Dumenil & Co. Ltd. v. James Ruddin Ltd.*, (1953) 2 All E.R. 294 cited under S. 60 post.

2. Section 58.

3. (1911) 2 K.B. 1031 C.A.

4. *Barrow v. Arnaud*, (1846) 8 Q.B. 604 ; 70 R.R. 568 ; *James Finlay v. Kwik Hoo Tong*, (1929) 1 K.B. 400 ; *Keshavlal v. Diwan Chand*, 47 Bom. 563.

5. *Di Ferdinando v. Simon*, (1920) 3 K.B. 409 ; *Barry v. Van den Hurk*,

(1920) 2 K.B. 709.

6. See *Brady v. Oastler*, (1864) 3 H. & C. 112, 140 R.R. 338 ; *Hajee Ismail & Sons v. Wilson & Co.*, (1918) 41 Mad. 769 : 45 I.C. 942 ; cf. illustration (a) to section 73 of the Indian Contract Act, under which he is entitled to recover the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time when they ought to have been delivered.



damages as will put the seller in the same position in which he would have been if the contract had been performed.<sup>1</sup>

The rule does not apply when there is repudiation of the contract before the time for delivery. The buyer may obtain only a nominal damage if there is no difference between the contract price and the market price on the date of the breach.<sup>2</sup>

The rule as to the market price is also inapplicable when the contract provides that the damages are to be ascertained with reference to a price to be settled by a certain association.<sup>3</sup>

In the Sale of Goods Act there is nothing inconsistent with S. 73 of the Contract Act and hence it must be taken to apply. Section 73 makes it clear that damages for a breach of a contract must be based on the market price ruling at the date of the breach and since the stipulation that delivery should be given as and when the goods arrive in Madras amount to a contract for delivery on the date of their arrival in Madras, breach shall be deemed to have been committed on that date.<sup>4</sup>

When goods are paid for at the time of purchase and the seller fails to deliver them, the purchaser is entitled to recover the purchase money with interest from the date when it was paid till judgment in the suit for damages filed by him. The purchaser would also be entitled to damages for breach of contract on the usual basis—the measure of damages being the difference between the contract rate and the market rate prevailing at the date of the breach and not at the time of the trial.<sup>5</sup>

*For special damages, see notes under section 61 infra.*

### **Contract for sale of goods—Non-delivery—Applicability of S. 73, Contract Act—Measure of damages.**

Where according to a contract of sale of bales of cloth between the defendant and the plaintiffs, the defendant contracts to deliver certain number of bales by certain time and the plaintiffs deposited an amount as advance price but the defendant fails to make the delivery at the stipulated time, the contract is governed by S. 57, Sale of Goods Act, and not by S. 73 of the Contract Act and the plaintiff is entitled to sue the defendant for damages for non-delivery. Measure of damages is the difference between the contract price and the market price at the date of the breach.<sup>6</sup>

**Sections 57, 6 (3)—Contract for sale of coal-ash that might accumulate during period of contract by running contract—contract amounts to agreement to sell—on breach by the Railway Administration contractor can sue for damages under S. 57—claim for conversion does not lie.**

1. Tularam Nathmall v. Bilasroy & Co., (1950) 85 C.L.J. 164.

2. Millet v. Van Heek & Co., (1921) 2 K.B. 369; Valpy v. Oakley, (1851) 16 Q.B. 941; Taylor & Sons v. Bank of Athens, (1922) 91 L.J.K.B. 776, no difference between the value at the time of agreed shipment and actual shipment.

3. See Lancaster v. Turner & Co., (1924) 2 K.B. 222 for contract of London Corn Trade Association. In Re. Bourgeois etc. (1920) 25 Com. Cas. 260, price for ascertainment of

damage to be fixed by arbitration; the buyer's ordinary rights are not taken away.

4. B. Muniswami Chetty & Co. (Firm) v. D. Muniswami Chetty & Co. (Firm), A.I.R. 1944 Mad. 418.

5. Rameshwardas Poddar v. Paper Sales Ltd., A.I.R. 1944 Bom. 21; Elliot v. Hughes, (1863) 4 F. & F. 387 not followed; Startup v. Cortazzi, (1835) 2 Cr. M. & R. 165 approved.

6. Firm H.S. Sunder & Sons v. Ram Chand S. & M. Mills, A.I.R. 1957 Punj 90.



In *Union of India v. Tarachand*, A.I.R. 1976 M.P. 101, 105 it was held :.....the property in the future natural product of existing goods, will pass to the buyer, and when it is identified by coming into existence without any further act of appropriation.....This, of course, is subject to any contract between the parties.

"In the instant case, the parties by contract provided that the property in them would pass to the plaintiff when the goods are picked or unpicked and stacked by the Railway administration. Here, the contract was the standard agreement for sale of coal-ash by running contract, and was a special type contract. Under the terms of the contract, the plaintiff had no right to appropriate all the coal-cash produced at the Nandgaon pump-house unless the same was picked or unpicked and stacked by the Railway administration for delivery, he was only entitled to the residue of such coal-ash, if any. There is nothing to show that any part of the coal-ash contracted for had been stacked for delivery. That being so, the property in the goods had not passed to the plaintiff and, therefore, his claim for conversion did not lie."

#### (4) Price pre-paid.

Payment of the price, without a reservation of a right to damages, is not of itself a waiver of that right.<sup>1</sup> Where the price has been pre-paid, wholly or in part, but the goods not delivered, the buyer's damages for non-delivery should be measured by the difference between the contract price and the price on the date of the breach, though it may be argued that in such a case the buyer has not got the money in his hands and cannot therefore go into the market and buy : and in conformity with this argument it has been ruled at *nisi prius* that the buyer's damages for non-delivery should be measured by the difference between the contract price and the price ruling at the time of the trial.<sup>2</sup> It has, however, been observed that the better view appears to be that even so the date to be taken is the date of breach, and in addition to recovering the difference between the market and contract price on that date, the buyer may also recover the price pre-paid with interest.<sup>3</sup>

#### (5) Price unpaid.

In *State of Madras v. M. A. S. Mehta*,<sup>4</sup> the seller agreed to supply goods regularly to a buyer at fixed price. The buyer was to pay purchase price within 15 days of date of delivery. The buyer was in arrears to a considerable extent. The seller stopped supply of goods and filed suit for recovery of unpaid price. Counter-claim by buyer for damage for breach of contract was found not sustainable for want of formal contract. It was held : A purchaser of goods who commits defaults in his obligation to pay for the goods within 15 days of the delivery thereof cannot be heard to complain that the seller committed breach in withholding supply.

#### (6) Goods not obtainable in the market.

The exact sort of goods the buyer has contracted for may not be obtainable, but if it is reasonable for him to buy in similar goods he may

1. *Clydebank Eng. Co. v. Don Jose Castanda*, (1905) A.C. 6.

2. *Elliot v. Hughes*, (1863) 3 F. & F. 387; *Shepherd v. Johnson*, (1802) 2 East, 211.

3. *Chalmers*, Sale of Goods Act, 16th

Edn., p. 198; *Pollock and Mulla*, Indian Sale of Goods Act, p. 300; *Startup v. Cortazzi*, (1835) 2 Cr. M. & R. 165. As to the buyer's right to recover interest, see section 61.

4. A.I.R. 1964 Mad. 508.



charge the seller with the difference in price.<sup>1</sup> Where no such substitute is available, then, if there has been a contract to resell the goods, the price at which that contract was made will be evidence of their value and the buyer can recover the difference between that price and the price at which he bought them from the defaulting seller. If there has been no such contract the market value may be estimated by adding to the price of the goods at the place where they were purchased, the costs and charges of getting them to their place of destination and the usual importer's profits.<sup>2</sup> In *Borries v. Hutchinson*,<sup>3</sup> where there was delay in delivering caustic soda, an article not kept in stock, in assessing damages, the value of the goods at the time when they ought to have been and at the time when they actually were delivered was taken into consideration. In *Grebert v. Nugent*,<sup>4</sup> the buyer was allowed compensation for the loss of profit sustained by him and also damages he had to pay his sub-purchaser on account of the failure of the seller to supply the goods, the seller having notice of such sub-sale. In *Haji Ismail v. Wilson & Co.*,<sup>5</sup> costs of procuring the goods from the most convenient market (sugar from Java) were allowed. In *Stroms Bruks v. Hutchison*,<sup>6</sup> the measure of damages was with reference to the value of the goods at the time and place at which they ought to have been delivered. In *Macauley v. Horgan*,<sup>7</sup> there being no market at the place of delivery, the market price of the nearest convenient place was taken. In *Sharpe & Co. v. Nosawa & Co.*,<sup>8</sup> in case of non delivery of goods of a particular shipment from Japan, the buyer would act reasonably by purchasing on the spot and the price of such should be regarded in measuring the damage. In *Watts v. Mitsui & Co.*,<sup>9</sup> market price at the destination of the goods was taken.

### (7) Sub-contract of buyer.

It is an established principle of the law of damages that circumstances not arising naturally out of the transaction, but peculiar to the plaintiff, will not be taken into consideration so as to enhance or to diminish the damages payable by the defendant. Such circumstances are *res inter alios acta*. "It is well settled that in an action for non-delivery or non-acceptance...the law does not take into account in estimating the damage anything that is accidental as between the plaintiff and the defendant, as for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods."<sup>10</sup> So where the buyer used other goods to fulfil a sub-contract and thereby made a greater profit

1. *Hinde v. Liddell*, (1875) L.R. 10 Q.B. 265, 269; *Elbinger Actien Gesellschaft v. Armstrong*, (1874) L.R. 9 Q.B. 473, 476; *Monte Vide Gas etc. Co. v. Clan Line Steamer*, (1821) 37 T.L.R. 866.

2. *O' Hanlan v. G.W.Ry.Co.*, (1865) 6 B. & S. 484, 141 R.R. 482; *Cooverjee Bhoja v. Rajendra Nath*, (1909) 36 Cal. 617; 2 I.C. 831; cf. *Jugmohandas v. Nusserwanji*, (1902) 26 Bom. 744; *Patrik v. Russo British Grain Export Co.*, (1927) 2 K.B. 535; see also I.L.R. 26 Bom. 235; *Erie County etc. Co. v. Carroll*, (1911) A.C. 105, 107; failure to supply gas;

the cost of procuring the same could be recovered.

3. (1865) 18 C.B.N.S. 445, 465.

4. (1885) 15 Q.B.D. 85.

5. (1918) 41 Mad. 769.

6. (1905) A.C. 515; (1905) W.N. 135.

7. (1925) 2 Ir. R. 1

8. (1917) 2 K.B. 814.

9. (1917) A.C. 227.

10. Per Lord Esher M.R. in *Rodocanachi v. Milburn*, (1886) 18 Q.B.D. 67, approved in *Williams Bros. v. Agius*, (1914) A.C. 510 (H.L.) See also *Grebert Borgnis v. Nugent*, (1885) 15 Q.B.D. 85, 90.



than if he had received delivery from the seller, the greater profit was not taken into account in an action against the seller.<sup>1</sup>

It was observed in *Finlay & Co. v. Kwik Hoo Tong Handle Meats-chappij* :<sup>2</sup>

“As a general rule sub-contracts entered into by a buyer cannot be used to increase or minimize his damages, as the sub-contracts are incidental matters with which the seller had nothing to do. I find that laid down in *Rodocanachi v. Milburn*<sup>3</sup> which was affirmed in *William Bros. v. Agius*.....This Court in *Slater v. Hoyle & Smith*<sup>4</sup> applied the same principle, that unless the seller contemplates the possibility of a sub-contract under which a claim may be made on the buyer, the sub-contract must be disregarded for the purpose either of increasing or diminishing the damages. This was one of the many instances in English law where the measure of damages did not give the real loss suffered by the party.”

The same rule applies where the seller knows generally that the buyer requires the goods for re-sale.<sup>5</sup> As regards claim for special damages, notes under section 61 of the Act may be consulted. In *Horne v. Midland Ry. Co.*,<sup>6</sup> it was *held* that knowledge of a sub-contract does not necessarily impart knowledge of all its terms. The view that the defendant company was put on enquiry as to the nature of the sub-contract was not accepted by the majority. In *Hall v. Pim*,<sup>7</sup> it was *held* that the material date of ascertaining what was in the contemplation of the parties was the date when the contract was made and not the date when the goods were appropriated to the contract. There the seller knew that the goods might be passed on by way of sub-sale if the buyer did not choose to keep them for himself ; on failure by the seller to deliver the buyer is entitled to recover the loss of profits, though the buyer is under an obligation, on failure by the seller, to buy similar goods from the market to fulfil his contract. In *Patrick v. Russo Br. Grain Co.*,<sup>8</sup> where at the time of seller's default there was no market for the goods, it was *held* that the buyer was entitled to recover the difference between the contract price and the price at which the buyer re-sold them.

In *Divakaruni Sambasivarao and Bros. v. Kurnala Venkatarao Tobacco Seed Oil Firm*,<sup>9</sup> it was *held* : Where the parties knew that the agreement to purchase goods was entered into to supply to a third party under a sub-sale, it is a clear case where under the terms of S. 73 of the Contract Act itself, the party committing the breach would be liable to pay the difference between the contract rate and the sub-rate if the parties knew at the time of the contract that a breach thereof would result in damage. But, where there was no such knowledge, the only measure is the damage which naturally arose in the usual course of things from such breach. If there was a market at the time of the breach, the measure of damages upon a breach of the buyer is the difference between the contract price and the market price on the date of the breach. But when there was

1. *Sheikh Mohammad v. Bird*, (1921) 37 T.L.R. 405 (P.C.) Had the seller supplied the goods, the buyer would have made the profit he claimed and had the other goods as well.

2. (1929) 1 K.B. 400, C.A., at p. 411, Scrutton L.J.

3. *Supra*.

4. (1920) 2 K.B. 11 (breach of warranty).

5. *Thol v. Henderson* (1881) 8 Q.B.D. 457.

6. L.R. 8 C.P. 131.

7. 33 Com. Cas. 324 H.L.

8. (1927) 2 K.B. 535.

9. A.I.R. 1955 Andhra 143 ; 1955 Andhra W.R. 252.



no market at the time of the breach, Courts have found difficulty in assessing the damages. In the ultimate analysis as laid down by S. 73 of the Contract Act, in the absence of specific knowledge mentioned therein, the real value can be ascertained by finding out the damage that naturally arises in the usual course of the things from the breach.

Reference was made in the above case to *Jagmohandas v. Nusserwanji*.<sup>1</sup> In that case, as the defendant failed to deliver coal to the plaintiff on the prescribed date, the suit was filed for damages for breach of contract. On the date of the breach, there was practically no coal in the place of delivery of the description contracted for at the date at which delivery should have been given and consequently no market rate could be proved. At the hearing the plaintiff produced a statement showing the rates at which he had during the contract period settled certain contracts for Powell Duffryn coal which he had with the Bombay Company Limited. It was *held* that under the special circumstances of the case and in the absence of any evidence as to a market rate, the figures given in the statement might properly be received in evidence for the purpose of fixing the actual value of the coal at the dates of breach, thus affording a measure of the damages suffered.

Reference was also made to *Cooverjee Bhoja v. Rajendra Nath*,<sup>2</sup> in which MacLean J. pointed out that as there was no market rate for the commodity in Calcutta at the date of the breaches, the damages for those breaches was the value to the plaintiffs of the portions that ought to have been delivered on those dates at the price procurable in England less the cost of getting them there.

Where there is a chain of sellers and buyers the damages as ascertained between the last buyer and seller would probably, without further litigation, form the measure of damages to be recovered all along the chain.<sup>3</sup>

On the breach of an agreement for sale of shares on the part of the seller, the buyer is entitled either to claim shares or to claim the money which is deposited for the purchase of shares. It is the option of the buyer either to insist on the performance of contract or to refuse.<sup>4</sup>

#### (8) Delay in delivery.

In the case of delay in delivery, also, the *prima facie* rule is that the damage is the difference between the value of article contracted for at the time when it ought to have been and the time when it actually was delivered.<sup>5</sup> In *Wertheim v. Chicoutimi Pump Co.*,<sup>6</sup> where delivery was delayed, the Privy Council were of opinion that the value of goods at the time of actual delivery was the price at which the buyer had re-sold the goods, that being their value to him, and as this price was much higher than the market price at the time of delivery, the buyer's damages were held to be the difference between the resale price and the market price at the time

1. (1902) I L.R. 26 Bom. 744 ; 4 Bcm. L.R. 504.

2. (1909) I L.R. 36 Cal. 617 ; 2 I.C. 831.

3. Hope Prudhommel & Co. v. Hamel, A.I.R. 1925 P.C. 161 ; 88 I.C. 307.

4. Commercial Enterprises v. Ma'an Mohan Singh : Revn. Petn. No. 30/AS/I of 1359F. D/-27-10-1950 ; (Hyderabad) (1950) Indian Digest, p.

728.

5. Elbinger Actien Gesellschaft v. Armstrong, (1874) L.R. 9 Q.B. 473 at p. 477, per Blackburn J. cf. Illustration (g) to section 73.

6. (1911) A.C. 301 ; 80 L.J.P.C. 91 ; applied Taylor v. Bank of Athens, Pinnock v. Same, (1922) 91 L.J.K.B. 776.



appointed for delivery and not the difference between the latter price and the market price at the time of actual delivery. It was observed :

“(If he does not get his goods he) should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or by others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be for the same reason worth to the purchaser what he could then sell for in that market, but if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a point by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position.”

Although this case was distinguished in *Williams Bros. v. Agius*<sup>1</sup> and *Slater v. Hoyle*<sup>2</sup> from cases of non-delivery, yet it is difficult to reconcile it with the principle of *Rodocanachi v. Milburn*<sup>3</sup> according to which the re-sale price should have been regarded as an immaterial factor ; and Court of Appeal in *Slater v. Hoyle* was evidently of opinion *obiter* that the decision was a wrong one.<sup>4</sup>

“It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been, if the contract had been performed,” and the rule as to market price “is intended to secure only an indemnity” to the purchaser. “The market value is taken because it is presumed to be the true value of the goods to the purchaser.”

The rule stated above must, however, be taken as only applying to cases of late delivery. “When there is not delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day and, barring special circumstances the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price (*Greater Western Railway Co. v. Redmayne*)<sup>5</sup> nor can he take benefit of the fact that the buyer has made forward re-sale at under the market price.”<sup>6</sup>

1. (1914) A.C. 510 ; 83 L.J.K.B. 715—Per Lord Dunedin : In a question of the measure of damages in respect of a breach of contract for the sale of goods, there is a distinction between non-delivery and delayed delivery.
2. (1920) 2 K.B. 11 ; 89 L.J.K.B. 401 (C.A.).
3. (1886) 18 Q.B.D. 67. This was also, however, a case of non-delivery for loss of goods and not of delay in

delivery.

4. See Benjamin on Sale, 8th Edn., p. 964.
5. (1865) L.R. 1 C.P. 329.
6. *Williams Bros. v. Ed. T. Agius Ltd.*, (1914) A.C. 510, 522-523 per Lord Dunedin ; cf. *Muhammad Habib Ullah v. Bird & Co.*, (1921) L.R. 48 I.A. 175 ; A.I.R. 1922 (P.C.) 178 ; 63 I.C. 289 ; 43 All. 257.



The time for delivery may have been extended at the seller's request. In that case the extended time or a reasonable time thereafter will be taken as the contract time.<sup>1</sup> In the case of instalment contracts the damages must *prima facie* be calculated with reference to the market price at the time for the delivery of each instalment.<sup>2</sup>

Where the seller delivers the goods later than the contract time and the buyer accepts them, the measure of damages is *prima facie* the difference between the value which the goods would have had at the place of delivery if they had been delivered in due time, and the value which they had at that place when they were delivered.<sup>3</sup>

The rule for the calculation of damages by the market price at the date of delivery does not apply where the parties in their contract may have provided that in case of breach certain agreed damages should be paid by the party in default.<sup>4</sup>

In the case of cross contracts for delivery of exactly similar quantities of cotton bales there is no necessity for either party to either tender the goods or tender the price. The person who has to get the difference can without going through the force of tender, claim the difference which is really in his favour.<sup>5</sup>

#### Miscellaneous cases

**(i) Section 57—Contract Act (1872), S. 56—"Becomes impossible."**

In *M/s H.D.C. Market v. Firm Murlidhar*, A.I.R. 1957 M.B. 53 it was held: In a suit for damages for non-delivery of goods, it is for the seller to prove that booking of the stipulated goods was impossible so as to make it impossible for him to make the delivery of goods in terms of the contract. But this decision was reversed by the Supreme Court on facts on another point in *M/s. Murlidhar v. M/s. Harishchandra*.<sup>6</sup> (See Additional Notes).

**(ii) Contract for sale of goods—Breach—Measure of damages—Right of parties to provide their own measures—Effect of S. 62 of the Act.**

In *Sitaram Bindraban v. Charanjitlal Brijlal*,<sup>7</sup> an Association known as the Cotton Dealers Association of Khamgaon formed by several individuals and firms doing business of forward delivery transactions in cotton by its memorandum provided, among other things, that the parties to a forward delivery transaction will pay and receive clearing money in respect of that transaction. These clearing rates were to be fixed by the appeal committee of the Association. One of the rules framed by the

1. *Ogle v. Earl Vane*, (1868) L.R. 3 Q.B. 272; *Wilson v. London & Glove Cox*, (1897) 14 T.L.R. 15; *Hickman v. Haynes*, (1875) L.R. 10 C.P. 598; *Kidar Nath v. Shimbhu*, (1927) 8 Lah. 198; *Macauley v. Horgan*, (1925) 2 Ir. R. 1; non-delivery when no time was fixed for delivery.  
2. *Brown v. Muller*, (1872) L.R. 7 Exch. 319; *Roper v. Johnson*, (1873) L.R. 8 C.P. 167.  
3. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, pp. 153, 154. See also *Victoria Laundry etc. v. Newman Industries*

Ltd., (1949) 1 All E.R. 997.  
4. *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, (1915) A.C. 79, H.L.  
5. *Karuppaswami Mooppanar v. Chottabhai Janerbhay & Co.*, A.I.R. 1945 Mad. 59. See also *Ramgopal v. Ram Sarup*, A.I.R. 1934 Bom. 91 and *Uttam Chand Saligram v. Jewa Mamooji*, A.I.R. 1920 Cal. 143 : 54 I.C. 285.  
6. A.I.R. 1962 S.C. 366.  
7. A.I.R. 1958 Bom. 291; 60 Bom. L.R. 689.



Association provided also for the measure of damages in case of breach of contract by the parties to the transaction. It was *held*: The rule framed was a term of the contract between the parties and, therefore, the rights of the parties could be adjusted by reference to the term. As this term completely covered the question of the measure of damages it excluded the operation of S. 73 of the Contract Act which applied to contracts for sale of goods, generally.

It was observed in the above case : Ordinarily, the measure of damages upon breach of contract for sale of goods is the difference between the contract price and the market price on the date of breach. It is, however, open to the parties to exclude any of the terms or conditions which the law attaches to the contracts of sale and create for themselves any special rights and obligations that they please, such as, providing their own measure of damages in case of breach of contract, and, indeed, the terms of S. 62 of the Sale of Goods Act recognise the right of parties to vary the ordinary incidence of a contract by express terms of the contract of sale of goods between them.

**(iii) Sections 57 and 58—Scope—Right of buyer to sue for damages for non-delivery or for special performance—Difference—Assessment of damages and compensation—Contract Act, Sections 73, 74.**

In *Bangaru Rama Rao and Bros. v. punnayya and Bros.*,<sup>1</sup> the plaintiff (a registered firm of merchants and commission agents) and the defendant were traders in cloth at places R and P respectively. A suit was instituted for a declaration that the plaintiff was entitled to 22 bales of cloth consigned under two railway receipts and referred to in patti, and another suit was filed for recovery of a certain sum being the amount of damages for breach of contract alleged to have been committed by the defendant, or alternatively, for conversion by the defendant of goods belonging to the plaintiff.

There was control of textile goods by Government, scheme of Textile Commissioner implementing provisions of Essential Supplies (Temporary Powers) Act, 1946, and Cloth Control Order, 1946. Plaintiff quota-holder was linked up with defendant firm ('representative buyer'). The question involved was nature of relationship between, and rights and liabilities of, plaintiff and defendant.

*Vishwanath Sastri J.* (with whom Umamaheswaram J. agreed on reference) *held* : (1) the relationship between the plaintiff and the defendant was contractual and was one of buyer and seller of goods.

(2) The defendant refused to accept the price and transfer the railway receipt or deliver the goods and he was therefore clearly in breach.

(3) Ss. 73 and 74 of the Contract Act contain definite rules for the assessment of damages and compensation to be paid upon a breach of contract and these rules would have to be applied and enforced by courts even in respect of contracts of sale entered into between buyers and sellers of cloth during the period of control. An action for damages in respect of the violation of a contract is as much an action upon the contract as suit for performance and is the only available means of enforcing the contract where through the act of one of the parties specific per-

1. (1958) 2 An. W.R. 671.



formance of the contract has been rendered impossible. Under S. 57 of the Sale of Goods Act, 1930, the plaintiff buyer has a right to sue the defendant-seller for damages for non-delivery. Damages are recoverable as a legal consequence of a breach of contract and not by reason of an implied contract or understanding to pay damages. S. 73 of the Contract Act entitles the plaintiff to compensation for any loss or damages covered by the breach of the contract by the defendant. The plaintiff is entitled to be placed in the same position as he would have been in, if the contract had been performed and the defendant had delivered the 22 bales on their arrival at place R. The measure of damages or compensation is the sum by which the contract price fell short of the price at which the buyer might have obtained goods of a like quality at the time when the goods could have been delivered, that is the date when the goods arrived at place R. The rule as to the market value of the goods on the date of breach is a measure of damages or compensation and it is on this basis that the plaintiff has been awarded damages in the case. The estimate of profits the plaintiff would have made if the goods had been delivered is another method of measuring the loss and awarding compensation damages. The contention of the appellant that the plaintiff was entitled only to the fixed percentage of profit that had been allowed to him at the time when the cloth control was in force cannot be accepted.

**(iv) Auction sale.**

Where there is non-delivery of part of goods purchased to buyer, the buyer can sue the seller for damages for non-delivery if delivery is wrongfully neglected or refused. The buyer need not sue for refund of proportionate price of goods not delivered.<sup>1</sup>

**58.** Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specially, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

**Synopsis**

- (1) *Specific performance.* *equitable rights.*  
 (2) *The Act not concerned with*

This section is based on section 52 of the English Act (Appendix A). As the principles relating to specific relief in India are contained in the Specific Relief Act, 1877, the provisions of this section are expressly made subject to that Act. (See now the Specific Relief Act, 1963).

1. Union of India v. Mouji Lal Shaw, A.I.R. 1960 Cal. 729,



**(1) Specific performance.**

This section applies to all cases where the goods are specific or ascertained, whether the property therein has passed to the buyer or not, but unless the goods are specific or ascertained there can be no decree of specific performance.<sup>1</sup> The section provides a remedy for the buyer, and gives no correlative right to the seller : it is therefore only on the application of the buyer, when suing as plaintiff, that the contract of sale can be enforced.<sup>2</sup>

“Specific” as defined in section 2 (14) of the Act means goods identified and agreed upon at the time a contract of sale is made : while “ascertained” means “identified in accordance with the agreement after the time a contract of sale is made.”<sup>3</sup>

The rationale of specific performance is the inadequacy of the remedy of damages and the practical impossibility of fixing damages. The jurisdiction to grant specific performance is entirely discretionary, and the court is not bound to grant such relief merely because it is lawful to do so : but the discretion of the court is not arbitrary but should be sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.<sup>4</sup> Sections 10 and 11 of the Specific Relief Act, 1877, dealt with the mode of recovering possession of moveable property, and the cases in which the court might have compelled a party specifically, to deliver any particular article of moveable property to the person entitled to its immediate possession. In accordance with the principles underlying sub-sections (b) and (c) of section 11 of the Specific Relief Act, 1877, the seller might have been ordered to deliver specific or ascertained goods to the buyer to whom the property had passed pursuant to the contract for sale, when compensation in money would not afford the buyer adequate relief for the loss of the goods claimed, or when it would be extremely difficult to ascertain the actual damage caused by their loss.<sup>5</sup> In ordinary commercial contracts neither of these conditions is usually fulfilled and, indeed, the statutory presumption is that the breach of contract to transfer moveable property can be adequately relieved by pecuniary compensation. The buyer must show that it is a case where damages are not an adequate remedy.<sup>6</sup> Generally it is only in the case of chattels of a peculiar character having a *peculiar affectionis* or special value to the buyer<sup>7</sup> or which are rare<sup>8</sup> not easily or generally available in the market<sup>9</sup> so that the money compensation if granted cannot put the vendee with respect to such chattel in the same position in which he would have been if he had obtained possession of the chattel, that the court grants such relief.

1. Jones v. Tankerville, (1909) 2 Ch. 440, at p. 445.

In Re Wait, (1927) 1 Ch. 606 ; Thames Sack Co. v. Knowles & Co., (1918) 88 L.J.K.B. 585.

2. In Re Wait, supra. See also Maheshwari & Co. Pvt. Ltd. v. Corporation of Calcutta, A.I.R. 1975 Cal. 165.

3. Ibid.

4. See section 22, Specific Relief Act, (1877) (now section 20 of the Specific Relief Act, 1963) ; see also Cohen v. Roche, (1927) 1 K.B. 169 (definite finding).

5. See illustration of clause (c), section

11 of the Specific Relief Act, 1877. (now section 8 of the Specific Relief Act, 1963).

6. Specific Relief Act, section 11, section 12, Explanation (now section 8 and section 10, Explanation, Specific Relief Act, 1963) ; Whiteley v. Hilt, (1918) 2 K.B. 808 at p. 819, C.A. ; Cohen v. Roche, supra.

7. Claringbould v. Curtis, 21 L.J. Ch. 541.

8. Falcke v. Gray, 4 Drew 458 ; Donnell v. Bennett, 22 Ch. D. 835.

9. Curt v. Rutter, 1 P.W. 570 ; Hawkins v. Maltby, 4 Ch. 100 ; Paire v. Hutchinson, 3 Ch. 388,



Illustration to section 12 of the Specific Relief Act, 1877 provided that 'a contract to sell railway shares of particular description may be specifically enforced, for the shares are limited in number and not always to be had in the market.' But the same principle does not apply to sales of Government securities which are always available in the market.<sup>1</sup> In *Dominion Coal Co. v. Dominion Iron & Steel Co.*,<sup>2</sup> specific performance was refused of a contract to supply coal of a specified quality which might be obtained elsewhere. In *Bharat v. Nisarali*,<sup>3</sup> specific performance was refused of a contract to deliver certain heads of buffaloes, there being nothing remarkable about them.

A suit for specific performance will bar a subsequent suit for damages and *vice versa*.<sup>4</sup>

The mere fact that the buyer may have paid the contract price in advance, and the seller has subsequently gone bankrupt, does not bring the case within the section. The buyer who gives credit to the seller is in no better position than the seller who gives credit to the buyer.<sup>5</sup>

The section provides that the defendant may be compelled to perform the contract specifically, although he may be willing to pay damages for the breach of it.<sup>6</sup> That is to say, the seller cannot purchase the right to commit a breach of the contract of sale on payment of wages. The buyer can claim specific performance and also damages for detention of the goods until delivery.<sup>7</sup>

See the author's "*Law of Specific Relief in India*", seventh Edition, where this subject is fully discussed.

### Illustrations

(1) In *Behnke v. Bede Shipping Co.*,<sup>8</sup> specific performance of a contract for the sale of steamship was ordered. She was of peculiar and practically unique value to the plaintiff. She was cheap being old, but her engines and boilers were practically new and such as to satisfy the German regulations and enable the plaintiff, a German ship-owner, to have her at once put up on the German register.

(2) In *James Jones & Sons Ltd. v. Earl of Tankerville*,<sup>9</sup> there was a sale of the timber on the seller's land, the buyers to cut it and have leave to saw it up on the seller's land. After a certain amount had been cut the seller repudiated the contract and forcibly prevented the buyers from cutting or removing any more. The court gave the buyers relief by way of specific performance and granted an injunction against the seller, restraining him from further interfering with the buyers.

(3) In *Thames Sack & Bag Co. v. Knowles*,<sup>10</sup> there was a contract for the sale of ten bales of hessian bags and the seller merely delivered an invoice giving the marks and number of the bales as "10-30 ex 6762/6806." Held, that the buyer was not entitled to specific performance as the goods were not "ascertained". "Ascertained" means that the indivi-

1. See *Re Schawabacher*, 98 L.T. 127.

2. 1909 A.C. 293.

3. (1916) 20 C.W.N. 1020. See also *Cohen v. Roche*, (1927) 1 K.B. 169; Sale of furniture of special value: specific performance refused.

4. See *Callianji v. Narsi*, 19 Bom. 764, the court awarded damages instead of specifically enforcing the contract,

5. In *re Wait*, *supra*.

6. Cf. section 20, Specific Relief Act, 1877.

7. See *Bullen & Leake's Precedents of Pleading*, 7th Edn., p. 220.

8. (1927) 1 K.B. 649.

9. (1909) 2 Ch. 440.

10. (1919) 88 L.J.K.B. 585.



duality of the goods must in some way be found out, and when it is then the goods have been ascertained.

**(2) The Act not concerned with equitable rights.**

The Act is not concerned with equitable rights, although it may seem that its provisions must be complete and exclusive statements of the legal relations both in law and equity, since it deals with the rights and obligations of the seller and buyer under the contract of sale very carefully. This, however, is not the case.<sup>1</sup>

**\*59.** (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods ; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price ; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

**Synopsis**

- |                                      |   |
|--------------------------------------|---|
| (1) Remedies for breach of warranty. | description.  |
| (2) Suit for damages.                | (9) Breach of warranty of fitness.                      |
| (3) Further damage.                  | (10) Buyer must act reasonably.                         |
| (4) Measure of damages.              | (11) Other conditions.                                  |
| (5) Warranty of title.               | (12) Loss of business or injury to business reputation. |
| (6) Warranty of quality.             | (13) Sub-section (2).                                   |
| (7) Other warranties.                | (14) Miscellaneous cases.                               |
| (8) Goods not answering to the       |   |

**(1) Remedies for breach of warranty.**

A 'warranty' is a stipulation collateral to the main purposes of the contract, the breach of which gives rise to a claim for damages but *not* to a right to *reject* the goods and treat the contract as repudiated.<sup>2</sup> The buyer is not, by reason of a breach of warranty, entitled to reject the goods he may set up against the seller the breach of warranty "in diminution or extinction" of the price.<sup>3</sup> A 'condition' is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.<sup>4</sup> Whether stipulation in a contract of sale is a condition or warranty depends in such case on the construction of the contract.<sup>5</sup> Section 13, *ante*, lays down the circumstances in which a condition may be treated as warranty.

1. See *In re Wait*, *supra*, 635-36.

\*Analogous law.

Sub-sections (1) and (4) of section 53 of the English Sale of Goods Act, 1893.

2. Section 12(3), *ante*.

3. *Ghulam Mohammad v. Granyer*, 42 P.L.R. 172.

4. Section 12(2), *ante*.

5. Section 12(4), *ante*.



In the present section the distinction between “condition” and “warranty” has been maintained. It appears from the definition of warranty that a breach of it gives rise to claim for damages only on the part of the buyer, as he has not the right to reject the goods and treat the contract as repudiated. Similarly, from section 13 it is clear that even in the case of entire contracts, part of them, either voluntarily, or acting in such a way as to preclude himself from exercising his right to reject them, his remedy is to set up a claim for damages as if the breach of the condition was a breach of warranty. The same holds good where the contract is for specific goods the property in which has passed to the buyer. Of course, this rule is subject to any term of the contract, expressed or implied, to treat such a breach as a breach of condition resulting in the repudiation of contract and not merely as a breach of warranty. A buyer may also treat the breach of any condition to be fulfilled by the seller as a breach of warranty only.<sup>1</sup>

Where, however, a stipulation which might ordinarily be treated as a warranty is fraudulently made, it may be a ground for rescinding the contract and returning the goods.<sup>2</sup> This conclusion is also pointed out by the words “by reason *only* of such breach of warranty” in subsection (1).

Where the buyer has accepted the goods his only remedy is to claim damages for breach of the warranty. If there has been a breach of any condition, by acceptance, the buyer treats the breach of the conditions as a breach of warranty.

A warranty, properly so-called, can only exist where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract and a collateral engagement that the specific things so sold possesses certain qualities. Thus, where the net weaving mills and hosiery mills which are the subject-matter of the sale are things ascertained and existing and are capable of being inspected at the contract, the stipulation as to the fitness and as to the liability of the vendor to put the mills in running condition is *prima facie* an independent contract collateral to the principal bargain. It, therefore, only gives rise to an action for damages for the breach of warranty in accordance with the procedure laid down in S. 59 of the Act. (*Kanak Kumari v. Chandan Lal*, A.I.R. 1954 Pat. 215).

The section is declaratory of the common law and enables the buyer to set up the breach of warranty as a plea for reduction or extinction of the price in answer to a suit by the seller.<sup>3</sup> This is a remedy available by way of defence. Where a buyer elects or is compelled to treat a breach of a condition as a breach of warranty, he may counterclaim in that case also for damages in the seller’s action for the price.<sup>4</sup> The buyer may also

1. Section 13(1), ante.

2. *Gompertz v. Denton*, (1882) 1 Cr. and M. 207, 209; *Clarke v. Dickson*, (1858) E.B. and E. 148, 113 R.R. 583; *Holdsworth v. City of Glasgow Bank*, (1880) 5 App. Cas. 317, 323, 328.

3. *Basten v. Butter*, (1806) 7 East 479; *Street v. Blay*, (1831) 2 B. and Ad.

455; *Mondel v. Steel*, (1841) 3 M. and W. 858, 58 R.R. 890; *Poulton v. Lattimore*, (1829) 9 B. and C. 259, 32 R.R. 673 (extinction of price).

4. *Khoyee & Co., v. Gordon Woodroffe & Co.*, A.I.R. 1937 Mad. 40; I.L.R. 1937 Mad. 479; 166 I.C. 313.



sue the seller for damages for breach of warranty. Thus, if the damages exceed the amount of the price, he may either counterclaim for the excess, or bring an independent action in respect of, or he may, in all cases, pay the price and bring a distinct action for any damages sustained by reason of the seller's breach.<sup>1</sup> The right of action is not excluded by a provision in the contract that the buyer shall pay in cash after inspection of the goods on their arrival.<sup>2</sup>

The buyer has an alternative right to set up the breach of warranty for the above purpose; but he is not bound to take this course in a suit for price. He may bring a separate suit in respect of damages suffered without taking any defence in the suit for price.<sup>3</sup> No notice of defence is required.<sup>4</sup> The buyer can set up the breach in respect of the price of the same goods or goods covered by the same contract.<sup>5</sup>

If the buyer wrongfully rejects the goods and repudiates the contract he cannot set up a breach of warranty in reduction of the damages when sued for non-acceptance.<sup>6</sup> It was held by the Madras High Court in *Nannier v. Rayalu Iyer*<sup>7</sup>, that the buyer having repudiated the contract on the ground that the goods were not tendered within time agreed could afterwards plead non-liability on the ground that the goods were not of the contract quality.

In *Ramnarayan v. Subramaniam Chetti*<sup>8</sup>, it was held: Section 59 of the Act speaks for a breach of warranty; where there is a breach of warranty, the buyer will not be justified in refusing to accept delivery. For a breach of the warranty provided for by S. 16 of the Act the remedy of the buyer would be to claim damages after accepting delivery of the goods as provided by S. 59 of the Act. But if on the other hand the goods of a different description are sent, the buyer will be justified in refusing the delivery under S. 37 (3) of the Act.

In *Shah Mohanlal Manilal v. Dhirubhai Bavajibhai*<sup>9</sup>, it was held: Where, as provided *inter alia* by S. 42 of the Act, the buyer does an act in relation to the sold goods which is inconsistent with the ownership of the seller, section 42 must be treated as coming into operation notwithstanding that the reasonable opportunity of examining the goods has not expired. The construction which requires that section 41 should be read as limiting the provisions of section 42 so that the buyer is not, even in the

1. *Davis v. Hedges*, (1871) L.R. 6 Q.B. 687; *Amies v. Jal* (1933) 25 Bom. L.R. 778, where the hirer was allowed damages for breach of warranty and the owner was entitled to damages for breach on the part of the hirer.

2. *Khan v. Duche*, (1905) 10 Com. Cas. 87.

3. *Davis v. Hedges*, (1871) L.R. 6 Q.B. 687, 689.

4. See *Bright v. Rogers*, (1917) 1 K.B. 917.

5. *Bow McLachlan & Co. v. S. Camosun* (1909) A.C. 597.

6. *Braithwaite v. Foreign Hardwood Co.*, (1909) 2 K.B. 543, 552, C.A. As to the seller's liability for fraud to a

third party, see *Langridge v. Levy*, (1837) 2 M. & W. 519.

7. I.L.R. (1926) 49 Mad. 781, following *Braithwaite v. Foreign Hardwood Co.*, supra; which the court considered to be still good law in spite of the decision of the House of Lords in *British & Beningtons v. N.W. Cachar Tea Co.*, (1923) A.C. 48 at p. 70. See, however, *Chalmers, Sale of Goods Act*, 16th Edn., p. 155, f.n. (b); see also *Taylor v. Oakes*, (1922) 38 T.L.R. 349, on appeal, *ibid*, at p. 517; *Steel Brothers v. Dayal*, (1923) 25 Bom. L.R. 1063.

8. 1962 M.P.L.J. (Notes) 110.

9. A.I.R. 1962 Guj. 56.



events specified in section 42 to be deemed to have accepted the goods unless he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract, is incorrect and deserves to be rejected. Section 42 is independent of section 41 and must be given effect to whenever any one of the acts specified in that section is done by the buyer, irrespective of the question whether such act is done during the currency or after the expiration of the reasonable time for examination of the goods.

The right of examination of the goods for the purpose of ascertaining whether they are in conformity with the contract is a right which is conferred on the buyer for the purpose of enabling him to decide whether to accept the goods or to reject them. But it is open to him to waive that right and he may choose to accept the goods without exercising that right. It will thus be seen that no conflict is created between section 41 and section 42 by reading section 42 as independent of section 41 and not limiting the provision of section 42 by section 41.

The act of the buyer in selling and delivering a part of the goods to the sub-purchasers, is an act in relation to the goods which is inconsistent with the ownership of the seller and the buyer is therefore deemed to have accepted the goods by selling and delivering a part of the goods to the sub-purchasers. It is immaterial in such a case whether the act of selling and delivering a part of the goods to the sub-purchasers is done by the buyer before the reasonable opportunity of examining the goods has expired or is done by the buyer after the expiration of the reasonable time for examination of the goods. Hence, in such a case the buyer is not entitled to reject the goods on the ground that the goods are not in conformity with the contract. If it is found that the seller has committed a breach of the condition precedent of the contract by delivering goods which are not of the contract description, the buyer is entitled to treat the breach of the condition as a breach of warranty on the part of the seller and to claim damages from him for the loss suffered by the buyer as a result of the breach committed by the seller.

In *I. T. Commr v. Profulla Kumar*, A.I.R. 1969 Orissa 187, it was observed: "It is clear from Section 59 of the Sale of Goods Act, 1930, that the remedy for such breach of warranty is that the buyer is not by reason only of such breach of warranty entitled to reject the goods but he may set up against the seller the breach of warranty in diminution of extinction of the price.....If the goods do not conform to the description there is no performance of the contract at all. If the goods are not of marketable quality, the thing for which the buyer bargained was not given. In either case the default of the seller goes to the root of the transaction and therefore the occasion would arise for buyer to reject the goods and sue for the price if he paid the price. It is also open to the buyer to accept the goods and sue on the basis of a warranty. Under Section 59 of the Sale of Goods Act the remedy for the buyer where he accepts the goods is only to sue for damages."

In *Bengal Corporation v. Commrs. for the Port of Calcutta*, A.I.R. 1971 Cal. 357, it was held: (i) Section 59 of the Act clearly postulates that even when a buyer has accepted the goods, he is entitled to set up against the seller a breach of warranty in diminution or extinction of the price or to sue the seller for damages for breach of warranty. The only handicap



of such a buyer who has accepted the goods is that he is precluded from treating the breach of a condition as a ground for repudiating the contract. He is compelled to treat the breach of a condition as a breach of warranty and seek his remedies as provided for in Section 59 of the Act. (ii) In a suit by the seller where the buyer sets up a breach of warranty and claims damages in diminution or extinction of the price claimed by the seller by exercising his right under Section 59 of the Act, actual damages have to be proved. The measure of damages again is really not different from the measure adopted in the law of contract. In assessing the damages which the buyer would be entitled to under Section 59 of the Act, two things have to be found out. The first conclusion that the court has to arrive at is what is the value or price of the goods which was contracted to be bought and sold. The court has further to find out as to what is the value or price of the goods in respect of which a breach of warranty is being set up. Having done so, the Court has to deduct the second figure from the first and the difference would be the measure of damage which the buyer is entitled to in diminution or extinction of the price claimed by the seller.

### (2) Suit for damages.

The buyer can always bring an action for damage when there has been a breach of warranty, unless he has expressly or impliedly waived the breach.<sup>1</sup> If the warranty was given fraudulently, then the buyer on coming to know of it can rescind the contract unless rescission is not possible under the circumstances of the case.<sup>2</sup>

### (3) Further damage.

The buyer by setting up the breach of warranty against the price does not lose his right to claim further damages that he may have sustained. In *Mondel v. Steel*<sup>3</sup>, the buyer in an action for price of a ship which was not built in terms of the contract, set up the defence of the breach of warranty (which was the difference in the value of the ship as she was and what it would have been if completed in terms of the contract). The buyer thereafter brought a separate suit for damages caused for not being able to use the vessel and for effecting subsequent necessary repairs. It was held that the suit was maintainable.<sup>4</sup> But the damages resulting from one and the same cause of action must be assessed and recovered once for all.<sup>5</sup>

### (4) Measure of damages.

The provisions of section 53 of the English Act relating to the measure of damages are omitted from the present section also, as sections 73 and 74 of the Indian Contract Act contain general provisions to the measure of damages on a breach of contract which apply to contracts for the sale of goods equally with other contracts. Sub-sections (2) and (3) of section 53 of the English Act laying down the rules, are as follows :

1. See *Poulton v. Lattimore*, (1829) 9 B. & C. 259 ; *Basten v. Butter*, (1806) 7 East 749.  
2. *Clarke v. Dickson*, (1858) E.B. & E. 148 ; *Houldsworth v. City of Glasgow Bank*, (1880) 5 A.C. at p. 323, sale of shares caused by the fraudulent mis-

representation of directors.  
3. (1841) 8 M. & W. 858.  
4. See *Rigge v. Burbridge* (1846) 15 M. & W. 598.  
5. See *Brunsdon v. Humphrey*, (1884) 14 Q.B.D. 141, 147 ; *Conquer v. Boot*; (1928) 2 K.B. 336.



“(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.”

It has been held in *Khaliquzzaman v. A. H. Parakh*,<sup>1</sup> that in respect of a claim for breach of warranty under S. 59 (1) of the Act the measure of damages is not the full consideration that has passed from the defrauded party; it is only the difference between the actual value of the property and its value if the property had been what it was represented to be.

**Breach of warranty as a defence.** In *Kanak Kumari v. Chandan Lal*<sup>2</sup>, it has been held:

In the case arising under the Indian Sale of Goods Act, remedy provided under S. 59 of the Act, is substantially the same as that laid down in S. 53 of the English Act. Consequently the principle laid down in English decisions is applicable to cases arising under the Indian Act. That principle is that the buyer has got an option to split up his claim against the seller in diminution or extinction of the price and the other for special damages for which he can bring a separate action.<sup>3</sup>

Once it is held that the damages available to the buyer can be split up into one covering general damages and the other covering special damages, there is little importance left in the discussion as to what should be the sequence in which the remedies for the two damages should be exercised. The question has to surrender itself to the other principles of law whereby circuity of action has to be avoided as far as possible.

It was held in this case, wherein the claim for further damages was precedent to the breach of warranty set up by the buyer in defence, that the sequence of the action did not stand in the way of buyer's pleading diminution of the price of the goods sold to him as an answer to the counter-claim for the unpaid portion of the price pleaded by the seller in the action for damages brought by the buyer.

In *Mondel v. Steel*<sup>4</sup>, the action was by the buyer for damages for breach of an express warranty of the quality of a ship built under written contract. The defendant pleaded in effect that the buyer had already recovered damages by setting up the breach of warranty in defence when sued for the price of the ship. The reduction was in respect of the difference of the time of the delivery between the ship as she was and what she ought to have been according to the contract; but the damages claimed in the subsequent action were special, and such as could not have been allowed in the former action, being in respect of subsequent necessary repairs, so that the plaintiff was deprived of the use of the vessel. It was held: The rule is, that it is competent for the defendant.....simply to defend himself by showing how much less the subject-matter of the action

1. A.I.R. 1939 Oudh 186 : 180 I.C. 879.

2. A.I.R. 1955 Pat. 215.

3. *Mondel v. Steel*, (1841) 8 M. & W. 858; *Davis v. Hedges*, (1871) 6 Q.B. 687; *Rigge v. Burbridge* (1846) 15 M.

& W. 508 followed.

4. *Church v. Abell*, (1877) 1 Canada S.C.R. 442 followed.

5. (1841) 8 M. & W. 858.



was worth by reason of the breach of contract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.

Commenting on this, Benjamin observes :<sup>1</sup> "Accordingly, a reduction or extinction of the price under the rule in *Mondel v. Steel* is not a set-off (which is based upon statute). But the rule applies only to cross-claims under the same contract. A buyer, therefore, cannot *defend* himself against the seller by a cross-claim arising under a different contract."

In *Davis v. Hedges*,<sup>2</sup> *Mondel v. Steel* was followed and it was held that the buyer was not bound to reduce the price in the seller's action, but had the option to setting up the defective quality as a defence or of maintaining a separate action in respect of it. That case arose out of an action for damages for the non-performance and improper performance of certain work which the plaintiff had employed the defendant to do. The defence set up was that the defendant had sued the plaintiff for the price of the work alleged to have been improperly done and the plaintiff had settled by paying the whole amount then sued for ; and that, as the plaintiff might have given the non-performance and the defective performance complained of in evidence in reduction of damages, the plaintiff was precluded from bringing a cross-action for them.

In *Rigge v. Burbidge*,<sup>3</sup> in an action for the stipulated price of a specific chattel, defendant pleaded payment into court of sum which the plaintiff took out in satisfaction of the cost of action and the defendant brought an action against the plaintiff for damages arising out of the negligence in the construction of the chattel. In that action the seller raised the plea that *Fisher v. Samuda*<sup>4</sup> appears to be an authority for the proposition that where an action has been brought for the value of goods supplied on a stipulated price, and the buyer does not either in bar of the action or in reduction of the damages, object to the quality of the goods, but let the seller recover a verdict for the full price agreed upon, he cannot then maintain a cross-action on the ground of the goods being of not good quality, or unfit for the purpose for which they were ordered. It was *held* that the buyer in the action was not estopped thereby from suing the plaintiff for negligence in the construction of the chattel.

In *Church v. Abell*,<sup>5</sup> C wishing to produce a water wheel which with the existing water power would be sufficient to drive the machinery in his mill, undertook to put in a 'Four Foot' Sampson Turbine Wheel which he warranted would be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time for payment of the agreed price of the article having elapsed, C sued A for breach of the warranty and recovered £ 438 as damages. A subsequently sued C for the price, and C offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C to give any evidence in

1. Benjamin on Sale, 8th Edn., p. 990.

2. (1871) L.R. 6 Q.B. 687.

3. (1846) 15 M. & W. 598.

4. (1808) 1 Camp. 190.

5. (1877) Canada S.C.R. 442.



reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended. The learned Judge proceeding at the trial declared the evidence inadmissible. It was *held* that the sequence of action was immaterial.

**Sections 59, 61—Deposit of purchase money—Breach of contract—Refund of deposit—Interest payable—Arbitrator granting interest—Contract Act, 1872, Ss. 39, 64 and 73—Arbitration Act, 1940, S. 39.**

In *Ram Bahadur Thakur & Co. v. R.B. Shreeram Durgaprasad Private Ltd., Tumsar*,<sup>1</sup> under an agreement the plaintiff contracted to purchase 7,500 tons of manganese ore of particular quality. In terms of the contract, the plaintiff had to deposit 25 per cent. of the purchase price of the ore with the defendant and, as and when the ore was supplied, a proportionate price out of the same was to be appropriated towards the sale price and 90 per cent. of the price was to be completed on the quantity of ore delivered. The rest was to be paid afterwards. The agreement contained an arbitration clause. Some quantity of ore was delivered by the defendant. Dispute arose in respect of 4,000 tons of ore which was tendered by the defendant and the rest, *viz.*, 987 tons which was never tendered at all. After the arbitrator was appointed he made his award in which he held that the defendant had tendered 4,000 tons to the plaintiff who wrongfully refused to accept the delivery. He further held that the defendant failed to deliver the balance of the ore and to that extent committed breach of the contract. He directed the defendant to refund the 25 per cent. of the price deposited for 4,000 tons and also the balance of the ore. He assessed the defendant to damages in respect of the breach of the contract by him and further directed him to pay interest in respect of the advance price paid for 4,000 tons and the balance of 987 tons. It was held: (1) The amount paid was by way of deposit and not as earnest money and hence refund could be granted. (2) If the arbitrator had held that the contract in respect of 987 tons was severable, it could not be said that the arbitrator's conclusion was erroneous, or in any event that he committed an error apparent on the face of the record. (3) The arbitrator was a Court and he had power to award interest on the advance price in respect of only the 987 tons of ore which the defendant failed to deliver.

#### (5) Warranty of title.

When there is breach of warranty of title and the buyer is deprived of the thing bought he can recover the price if paid and can also ask for damages caused thereby. If the buyer is made liable to a third person for dealing with his goods, the seller is bound to indemnify the buyer. In *Rowland v. Divall*<sup>2</sup>, the buyer of a motor car was dispossessed by the true owner after using it for some time. *Held*, he was entitled to recover the full price; the contract was not for the use of the car but for lawful possession of it.

#### (6) Warranty of quality.

The general rule as to the measure of damages for a breach of warranty is the same as the first branch of the rule in the leading case of

1. A.I.R. 1968 Bom. 35.

2. (1923) 2 K.B. 500. See also *Butterworth v. Kingsway Motors Ltd.*,

(1954) 2 All E.R. 694 cited at p. 278 ante—failure of consideration—breach of warranty—damages.



*Hadley v. Baxendale* on which section 73 of the Indian Contract Act is founded. This rule excludes the element of the defendant's knowledge, his liability depending, not upon the state of his knowledge, but upon the facts of the case.<sup>1</sup>

If the contract is discharged by the breach, then the buyer has his remedy as for a breach of contract for non-performance. If the contract is not discharged, then the measure of damages is the estimated loss directly or naturally resulting in the ordinary course of events from such breach, and such loss is *prima facie* the difference between the value of goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty.<sup>2</sup>

In *Dingle v. Hare*,<sup>3</sup> where twenty tons of super-phosphate were sold at five guineas a ton, guaranteed to contain 30 per cent. of phosphate of lime, it was *held* that the jury had properly allowed the purchaser the difference between the value of the article delivered and that of the article as warranted, that is to say, the difference between five and two guineas a ton. And in *Jons v. Just*,<sup>4</sup> the same rule was applied to a sale of manila hemp, and the plaintiff recovered as damages £756, although by reason of a rise in the market the inferior hemp sold for nearly as much as the price given in the original sale.

The contract price, or the special value of the goods to the buyer, is not to be considered in fixing the amount of damages and consequently sub-contract of which the seller had no notice must be disregarded whether for the purpose of increasing or diminishing the damages.<sup>5</sup> Again, though the general rule is that the date at which the difference between the two values is to be fixed is the date of delivery, circumstances may exist which render it necessary to take a later date. Thus in *Loder v. Kekule*, *supra*, the buyer had contracted for "Russian prime Ukraine Y. C." tallow, and had paid in advance for it. The tallow was found on delivery to be of inferior quality, so that the amount of the damages ought to have been fixed with reference to the market price on that day. The buyer, however, did not re-sell the tallow till some time afterwards, when the market price had fallen, but the court being of opinion that the delay was due to the conduct of the seller, and the jury having found that the buyer had re-sold the tallow as soon as he reasonably could, the buyer recovered as damages the difference between the market value of tallow according to the contract at the date of the breach and the price subsequently obtained on the re-sale of the tallow delivered.

1. *Bostock v. Nicholson*, (1904) 1 K.B. 725 at p. 736; *Randall v. Newson*, (1877) 2 Q.B.D. 102 C.A.; *Wilson v. Dunville*, (1879) 6 L.R. Ir. 210; *Davis v. Miller*, (1894) 10 T.L.R. 286; *Holden v. Bostock*, (1902) 50 W.R. 323, C.A.; *Frost v. Aylesbury Dairy Co.*, (1905) 1 K.B. 608, C.A.; *Jackson v. Watson*, (1909) 2 K.B. 193 C.A.; *British Westinghouse Co. v. Underground Electric Co.*, (1912) A.C. 673 H.L.; *Gedding v. Marsh*, (1920) 1 K.B. 663; *Slater v. Hoyle*, (1920) 2 K.B. 11 C.A.; *Taylor v. Bank of*

*Athens*, (1822) 27 Com. Cas. 142; *Pinnock v. Lewis*, (1923) 1 K.B. 690, at p. 697.

2. See *Ashworth v. Wells*, (1898) 78 L.T. 136.

3. (1859) 7 C.B. (N.S.) 145; 29 L.J.C.P. 144, 121 R.R. 424.

4. (1868) L.R. 2 Q.B. 197; 37 L.J.Q.B. 89.

5. *Loder v. Kekule*, (1857) 3 C.B.N.S. 128, 139-140, 111 R.R. 275; *Slater v. Hoyle and Smith*, (1920) 2 K.B. 11 C.A.



In *Ashworth v. Wells*<sup>1</sup>, an orchid was sold warranted as a white orchid for £20 : but when it flowered two years later it turned out to be a common purple orchid of no value. A white orchid was worth at least £50, but before it flowered buyers would not be willing to give more than £20 for it. It was *held* by the Court of Appeal that in these circumstances the date to be considered, was the date at which it flowered, and not the date at which it was delivered, and the damages were £50, not £20.

The value of goods as warranted is their intrinsic value, and not any special value which they may have to the buyer. To apply the latter standard would enable the buyer to recover special damages without having brought to the seller's knowledge the particular circumstances which may be given to the goods their special value. But special circumstance, such as a sub-sale known to the seller, and the absence of a market may give the goods an exceptional value.<sup>2</sup> Thus in *Hamilton v. Magill*<sup>3</sup>, where the plaintiff bought from the defendant No. 1 iron c.i.f. to Philadelphia at £6 5s. a ton, and re-sold it at £6 10s., and the iron delivered was No. 2 iron, and was rejected by the sub-buyer, and then sold by the plaintiffs for £975, it was *held* that the plaintiffs in an action for breach of warranty, could recover the difference between £975 and the sub-sale price, and not only the difference between £975 and the sale price, as the seller had knowledge that the iron was bought to enable the plaintiffs to accept the sub-buyer's offer.

See *Oscar Chess, Ltd. v. Williams*, (1957) 1 All E.R. 325, cited at p. 268 *ante* as to effect of mistake as to quantity of subject-matter when mutual mistake of fact essential to agreement.

### (7) Other warranties.

In the case of other warranties, the general rule governing the measure of damages for the breach is laid down in sub-section (2) of section 53 of the English Act, and is the same as in section 73 of the Indian Contract Act. The rule is that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

In *Mullett v. Mason*,<sup>4</sup> the plaintiff, a farmer, placed with other cattle a cow bought from the defendant, which was fraudulently warranted to be sound although known by the seller to be affected with an infectious disease. He was held entitled to recover as damages the value of such of his own cattle as had died from the disease communicated to them by the infected animal, as the plaintiff had a right to rely upon the representation that the cow was sound, and the direct result of such reliance would be that he would place her with other cows ; and the court refused to reduce the damages to the value of the cow bought. The case *Hill v.*

1. (1898) 78 L.T. 136, C.A.  
 2. See Benjamin on Sale, 8th Edn., p. 998.  
 3. (1833) 12 L.R. Ir. 186 ; cf. Slater v. Hoyle, *supra*, in which a sub-contract of which the seller had no notice was disregarded.  
 4. L.R. 1 C.P. 559 ; 35 L.J.C.P. 299, See,

for a similar decision where the facts were similar, except that the warranty was not fraudulent, *Smith v. Green*, (1875) L.R. 1 C.P. 95 ; L.J.C.P. 28 : It makes no difference whether the warranty is false to the knowledge of seller or not.



*Balls*<sup>1</sup> was distinguished on the ground that in this latter case there had been simply the sale of a horse which happened to be glandered, without any misrepresentation or warranty to induce the buyer to put the horse in the same stable with others.

In *Taylor v. Bank of Athens*<sup>2</sup>, there was a sale of beans to be shipped in August, which were accepted and paid for. It subsequently transpired that the beans were shipped in September. There was no difference in value between beans shipped in August and beans shipped in September. *Held*, that only nominal damages were recoverable.

In *Van den Hurk v. Martens*<sup>3</sup> it was *held* that as goods sold for export would not be opened until contents are actually required for use, the damage is to be assessed according to the prices ruling on the date of rejection by sub-buyers and not on the date of delivery to the buyer.

In *Cullinane v. British "Rema" Manufacturing Co.*,<sup>4</sup> the defendants sold machinery to the plaintiff for £6,578, warranting that it would produce dry clay powder at the rate of six tons an hour. The plant when delivered only produced two tons an hour and was commercially useless. The plaintiff claimed, as damages for breach of warranty (i) the loss of capital being the difference between the cost of the plant and buildings housing it and their break-up value, (ii) interest on the gross capital expenditure, and (iii) loss of profits for three years with certain deduction. At the trial before the Official Referee, the plaintiff was awarded under all the heads. It was *held* on appeal: It was impossible to continue a claim for the loss of capital with a claim for loss of profits; by stating that his claim for loss of profits was limited to three years the plaintiff was not thereby entitled to claim (as he, admittedly, could not claim if he had not placed the limitation on the loss of profits) both for loss of capital and for loss of profits; depreciation had nothing to do with the profits lost as a consequence of a breach of warranty and the effect of so reducing the profits would be that the plaintiff first recovered for loss of capital and then had to bring into account against the profits part of what he had recovered for loss of capital: therefore, the plaintiff was only entitled to recover the sums under (ii) and (iii). The principle laid down was this: A person who has obtained a machine which is mechanically exact in accordance with the order given but which is unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may say when he discovers its incapacity, that it was not what he wanted and that it is quite useless to him, and he may claim to recover the capital cost he has incurred deducting anything he can obtain by disposing of the material that he got. A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. But alternatively, where the warranty in question relates to performance, he may make his claim on the basis of the profit which he has lost because the machine as

1. (1857) 2 H. & N. 292; 27 L.J. Ex. 45; 115 R.R. 547.

2. (1922) 91 L.J.K.B. 776.

3. (1920) 1 K.B. 850. See also *Pinnock Bros. v. Lewis & Peat*, (1927) 1 K.B. 690.

4. (1953) 2 All E.R. 1257 C.A. See also *Leaf v. International Galleries (A Firm)*, (1950) 2 K.B. 16; (1950) 1 All

E.R. 693 cited at p. 622 ante—innocent misrepresentation; and *Mason v. Birmingham*, (1949) 2 All E.R. 134 cited at p. 303 ante—warranty of quiet possession; *Warman v. Southern Counties Car Finance Corporation Ltd. etc.*, (1949) 1 All E.R. 711 cited at p. 276 ante—hire-purchase agreement.



delivered fell short in its performance of that which it was warranted to do. If he chooses to base his claim on that footing, depreciation has nothing whatever to do with it.

*Victoria Laundry (Windsor) v. Newman Industries*<sup>1</sup> was applied in the above case. In that case, in 1946, the plaintiffs, launderers and dyers, wishing to extend their business, and having in view (*inter alia*) the prospect of certain profitable dyeing contracts, required a larger boiler. They therefore on April 26, 1946, concluded a contract with the defendants, an engineering firm, to purchase a boiler, then installed on the defendants' premises, for 2150 l., and delivery was arranged to be taken on June 5. Owing to a mishap while the boiler was being dismantled by the third parties, under contract with the defendants, it rolled over and sustained damage, and delivery to the plaintiffs was delayed until November 8, 1946. The defendants were aware of the nature of the plaintiffs' business, and by letter had been informed that the plaintiffs intended to put the boiler in use in the shortest possible space of time. In an action for breach of contract the plaintiffs claimed to include in their damages their loss of business profits. Their claim was under two headings, *viz.* loss of general laundering business and loss of particularly profitable dyeing contracts for the Ministry of Supply. The trial Judge allowed the plaintiffs a sum for damages under certain minor heads but disallowed the claim for loss of profits on the ground that it was based on special circumstances which had not been drawn to the attention of the defendants and therefore came within the second rule in *Hadley v. Baxendale*, (1854) 9 Exch. 341. The Court of Appeal *held* : The damages under the first heading and 'some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected' fell under the first rule of *Hadley v. Baxendale* and were recoverable, but that the (additional) particular profits to be deprived from the Ministry's dyeing contracts fell under the second rule and, in the absence of seller's actual knowledge, were not reasonable.

In *E. W. Evans v. S. Benjamin*<sup>2</sup>, it was *held* : Surely if one goes in for an Electrolux or Refrigerator, he expects it to perform all the functions, which machines of that character ordinarily perform. If, therefore, an Electrolux does not form ice but does the other things which machines of this character usually do, it is a defective machine and if anybody sells a machine of that kind, there is a breach of condition. The purchaser is entitled in such a case under S. 59 of the Act to treat that breach of a condition as a breach of warranty and then proceed to seek the reliefs provided for in the section. The position therefore is that although it is quite true that there could not be an implied warranty in a case of this description, the purchaser can ask for damages on the basis of a breach of warranty by treating of breach of condition as a breach of the former kind.

The claim in the above case was, however, disallowed as the purchaser had not kept the machine in the condition in which he had purchased, but subsequently interfered with it.

1. (1949) 2 K.B. 528 : (1949) 1 All E.R. 997 ; accuracy of the Head-note in *Hadley v. Baxendale*, (1854) 9 Exch.

341 questioned.  
2. A.J.R. 1951 Cal. 470.



**(8) Goods not answering to the description.**

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.<sup>1</sup> When the buyer is treating a breach of condition in this case as a breach of warranty, the damages for such breach of warranty are different from the damages which result from a mere breach of warranty of quality, and are governed by the general rule laid down in section 53(2) of the English Act corresponding to section 73 of the Indian Contract Act, and not by the mere limited rule laid down in section 53(3) of that Act.

In *Bostock v. Nicholson*<sup>2</sup>, A sold sulphuric acid to B as commercially free from arsenic. B used it for making glucose, which he sold to brewers and the persons who drank the beer made by the brewers were poisoned. A did not know the purpose for which the acid was required. In an action for breach of warranty, *held*, B can recover the price of the acid and the value of the beer spoiled, but not the damages he has had to pay to the brewers or damages for injury to the goodwill of his. In this case the purpose for which the buyer had ordered the goods was not expressly or by implication communicated to the seller. The result might have been different if they had actually sold the acid, instead of glucose made from it to the brewers, or had made it known to the defendants that they required the acid for the purpose of making glucose for sale to brewers, for in the latter case they might have established a breach of warranty within section 16 (1).

In *Wilson v. Dunville*,<sup>3</sup> the plaintiff, a dairy farmer, had bought from the defendants, distillers, a quantity of grains which the defendants warranted to be "distillers' grains," and which were ordinarily used for feeding cattle, though the sale to the plaintiff was not expressly made for that purpose. The grains contained an admixture of lead, and several of the plaintiff's cattle were poisoned and died. The warranty was not fraudulent. It was found by the jury that the grains sold did not reasonably correspond with the description "distillers' grains". The defendants were held liable for the poisoning of the plaintiff's cattle. It was observed :

"For the purpose of rendering a defendant responsible for damages which, in the ordinary course of things, flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties.....If those consequences result solely from the act in question and unusual state of things, they are the ordinary and usual consequences of that act, and the defendant is liable."

In *Randall v. Raper*,<sup>4</sup> the plaintiffs had bought barley from the defendant as chevalier seed barley, and in the usual way of their trade as corn factors they believing it to be chevalier seed barley, re-sold it with a

1. Section 15 ante, p. 305.

2. (1904) 1 K.B. 725, C.A. ; for a case where damages for a loss of goodwill were held recoverable, see *Cointat v. Myham & Son*, (1913) 2 K.B. 220. On appeal, however, a new trial was ordered in order that the question of

custom excluding any implied condition might be left to the jury. See 110 L.T. 749.

3. 6 L.R. Ir. 210 ; (1879) 4 L.R. Ir. 249.

4. (1858) E.B. & E. 84 ; 27 L.J.Q.B. 266 : 113 R.R. 554 ; see also *Wallis v. Pratt*, (1911) A.C. 394,



warranty that it was such. The sub-buyers sowed the seed, and the produce was barley of a different and inferior kind, whereupon they made claim upon the plaintiffs for compensation, which the plaintiffs had agreed to satisfy. *Held*, that the buyer was entitled to recover those damages from the seller, and it was not material whether the seller had notice that the buyer intended to re-sell or not.

In *Hasenbroy Jetha v. New India Corpn. Ltd.*<sup>1</sup> the appellants' firm was a well-reputed firm dealing in second-hand crushing machines. The respondents agreed to purchase a crushing machine of the description mentioned in the contract without a screen. It was found that the machine was not of merchantable quality inasmuch as it produced only 1½ tons per hour. It was *held*: (1) The inspection made by the respondent's representative was of no use inasmuch as the defect was a latent defect, which could not be revealed except by a demonstration with electric power and which was in fact not done or avoided on the assurance given by the appellants' firm. The mere fact that there was an opportunity to inspect or that an inspection was done, or that the machine was worked by hand was of no use, as the latent defect was not revealed by such inspection. (2) Where the entire sale consideration was paid by the purchaser to the seller and the article was delivered by the latter to the former, the title in the article having passed to the purchaser, he is only entitled to recover damages for breach of contract or warranty; the breach does not entitle the purchaser to the refund of the purchase price.

In *Sha Thilokchand Poosaji v. Crystal & Co.*<sup>2</sup>, it has been *held*: Where goods not answering to the description contracted for are delivered to a buyer, he has a right to one of two alternative remedies: (a) reject the goods and obtain a refund of the price if paid in advance and sue for damages for non-delivery. In such an event, the damages he would obtain would be the difference between the contract price and the market price of the goods on the date of the breach if the latter were higher: (b) waive condition and accept the goods and sue for damages for a breach of warranty. When he accepts the goods, he has to pay the contract price less any claim for set-off for the breach of warranty.

Section 59 of the Act does not state the principle on which such damages are to be computed, but this is set out in S. 53 of the English Sale of Goods Act, 1893, as the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty, in other words, *the difference between the value of the goods as delivered and their value if they had answered to the contracted description.*<sup>3</sup>

**Sale by description—Warranty as to merchantability—Breach of—Remedy of buyer—Quantum of damages—Basis—Contract Act, 1872, S. 73.**

Although the right of rejection of a buyer and his right to sue for damages for a breach of warranty are alternative remedies and can never be cumulative, where the buyer makes an offer to reject the goods provided

1. A.I.R. 1955 Mad. 435.

2. A.I.R. 1955 Mad. 481; (1955) 1 Mad. L.J. 494.

3. *Jones v. Just*, (1861) 3 Q.B. 197;

*Champanhac and Co. Ltd. v. Waller & Co. Ltd.*, (1948) 2 All E.R. 724, 727 relied upon.



the seller agreed to take the goods back and pay the price and the seller does not agree and does not accept the rejection leaving the buyer with no other option but to accept the goods and to sue for damages for breach of warranty, the buyer is entitled to damages.

In a case of breach of warranty as to merchantability of goods sold by description, the basis for the quantum of damages can either be the difference between the price of goods of the contracted quality or description on the date of delivery, and the price which the damaged goods would have fetched if sold on that date : or if the above course is not feasible or proper in the circumstances of the case, the difference between the price of goods of contracted quality and description on the date of sale and the price fetched by the damaged goods on the date of the sale.<sup>1</sup>

### (9) Breach of warranty of fitness.

In the case of a breach of warranty that the goods should be fit for a particular purpose, the rule for damages is the same as in the case of a breach of description *i.e.* the damages should be such as naturally flow from the breach and may be recovered in respect of consequential loss sustained through the failure of such purpose provided that such losses are not too remote.

In *Randall v. Newson*<sup>2</sup>, the plaintiff bought of the defendant, a coach builder, a pole for his carriage. The pole broke, and the horses became frightened and were injured to the extent of £130. The price of the new pole was £3. It was *held* by the Court of Appeal that the plaintiff might recover not only the value of the pole, but also damages for the injury to the horses if the jury should find that such injury was the natural consequence of the defect in the pole.

In *Jackson v. Watson*<sup>3</sup>, the plaintiff, whose wife had died from eating tinned salmon supplied by the defendants, was held entitled to recover, as damages for the breach of the warranty that the salmon should be fit for human food, the expenses of medical attendance on the wife, her funeral expenses and a sum to compensate him for the loss of his wife's services.

In *Holden Ltd. v. Bostock Ltd.*<sup>4</sup>, the plaintiff, a brewer, was allowed as damages the market value of the beer which had to be destroyed as the sugar used in its preparation contained poisonous matter and which was supplied by the defendant in breach of a warranty that the sugar did not contain any poisonous matter. In *Smith v. Johnson*<sup>5</sup>, there was breach of warranty in supplying mortar for building operations. The building was condemned by the County Council on the ground that the mortar was bad. The plaintiff was held entitled to recover costs of pulling down, rebuilding and for loss of ground rent. In *Smith v. Green*<sup>6</sup>, a cow was sold in breach of a warranty that it was free from disease, but it had foot and mouth disease and infected other cows belonging to the purchaser and they all died. The seller was held liable for the whole loss. In *Scott v.*

1. Shivalingappa Shankarappa v. Bal-Krishna Chettiar & Son, A.I.R. 1962 Mad. 426.

2. (1877) 2 Q.B.D. 102 : 46 L.J.Q.B. 259 (C.A.); Davis v. Miller, (1891) 10 T.L.R. 285.

3. (1909) 2 K.B. 193 : 78 L.J.K.B. 487

(C.A.). See also Frost v. Aylesbury Dairy Co., (1905) 1 K.B. 608 : 74 L.J. K.B. 386 (C.A.) (typhoid germs in milk).

4. (1902) 18 T.L.R. 317.

5. (1899) 15 T.L.R. 179.

6. (1875) L.R. 1 C.P. 92.



*Foley*<sup>1</sup>, there was breach of warranty as to the fitness of the ship. The charterers were held entitled to recover damages and costs for which they were made liable to a stevedore for breach of the warranty. In *Vogan v. Oulton*<sup>2</sup>, it was held that a hirer of sacks who had to pay damages caused to a labourer owing to sacks giving away could recover the same from the person from whom they were hired.

Where the buyer, having bought goods as fit for a particular purpose re-sells them with the same warranty, and owing to their not being fit for that purpose has to pay damages to his buyer, what is the position regarding payment of damages ?

In *Hammond v. Bussey*,<sup>3</sup> the contract was for the sale of steam coal fit to be used in steamers and the seller knew that the buyer required it for the purpose of re-selling it as such to steamers at Dover but did not know of any particular sub-contract. No sub-contract had in fact been entered into at the time. The coal was not fit for that purpose and the buyer had to pay damages to his sub-buyer in consequence. It was held by the Court of Appeal that the buyer was entitled to recover the costs incurred by him to defend the suit for damages brought by the sub-buyer, as well as the damages from the defendant. The quality of the coal could only be detected by use, and the plaintiffs had only the sub-purchaser's word as to its defects ; they had, moreover, given notice to the defendant of the action. The plaintiffs, therefore, had acted reasonably in defending the action, and it might, in the circumstances of the case, reasonably be supposed to be in the contemplation of the parties at the time of making the contract as a probable consequence of the breach of it.

Subsequent cases have all been based upon *Hammond v. Bussey* and the finding that the sub-sale was to be taken as in the contemplation of the parties exists in all cases where the buyer has been held entitled to recover damages which he has become liable to pay to sub-purchasers. There, however, appears to be no authority in which it is expressly laid down that in such cases, as contrasted with cases in which the seller has failed to deliver, it is essential that a re-sale by the buyer should have been contemplated by the parties, in order to entitle the buyer to recover damages to which he has become liable for the breach of his contract with the sub-buyer. It may be argued that the damages to the buyer flow as naturally from the breach, if he sells the goods believing them to be fit for the particular purpose for which, to the knowledge of the seller, he bought them, as when he makes use of them himself in that behalf. Even when an article, such as a horse, is sold with an express warranty of soundness or the like, and it is re-sold by the buyer with a similar warranty and in consequence of the breach of it, he is sued by the sub-buyer, he may recover the damages and costs from the seller, provided that he has acted reasonably in defending the action ; and it is not suggested that in such a case it must have been within the contemplation of the parties that the buyer should re-sell.<sup>4</sup>

1. (1899) 16 T.L.R. 55.

2. 81 L.T. 435.

3. (1887) 20 Q.B.D. 79 C.A., already quoted.

4. *Lewis v. Peake*, (1816) 7 Taunt. 153, 17 R.R. 475. Indian Contract Act section 73, illustration (m).



It, therefore, seems clear that the buyer in such cases is entitled to recover as part of his damages not only the costs which he has been compelled to pay to the successful plaintiff but also his own costs as between solicitor and client incurred by him in defending the action,<sup>1</sup> and where, as is often the case, there is a string of contracts, the damages payable by the seller may be very heavy.<sup>2</sup>

**(10) Buyer must act reasonably.**

A buyer complaining of a breach of warranty must, as in other cases, act reasonably by way of mitigating the effects of the breach. It means the same thing whether we say that a plaintiff must minimize his damages or we say that he can recover no more than he would have suffered if he had acted reasonably, as any further damages do not reasonably flow from the defendant's breach.<sup>3</sup> Thus, where a plaintiff has no defence, he is not entitled to recover the cost of defending an action; and, similarly, he re-sells at his own risk if by the exercise of a reasonable care he could have ascertained before re-selling that the warranty was broken.<sup>4</sup>

It has been further held under the English law that to enable a buyer, who has re-sold or otherwise dealt with the goods to recover consequential damages for a breach of warranty over and above the ordinary measure of the difference in values, it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he re-sells or deals with them, for otherwise the damages claimed do not "directly and naturally" result from the seller's breach of warranty but are due to the buyer's own negligence.<sup>5</sup> The circumstance that the defect in the goods is not readily discoverable is of course very material.<sup>6</sup>

But a buyer is not bound to take any action which a reasonable and prudent man would not take in the ordinary course of business; yet any action which in fact he does, and reasonably might take connected with the transaction, and which lessens his loss, whether he is bound to take it or not, will be relevant on the question of damages.<sup>7</sup> Thus, in *British Westinghouse Co. v. Underground Railways*<sup>8</sup>, the buyers of electric

1. Following *Agius v. Great Western Colliery Company*, (1899) 1 Q.B. 413, C.A., recovery of costs of defending suits brought by sub-purchaser; *Bennett v. Kreeger*, (1925) 41 T.L.R. 609, purchaser entitled to damages and costs paid to customer and his own costs as between attorney and client. See also *Pollock and Mulla*, Indian Sale of Goods Act, pp. 313 to 315.

2. *Kasler & Cohen v. Slavonski*, (1928) 1 K.B. 78, where the first purchaser was held entitled to damages obtained by the last purchaser in the claim and costs incurred by successive seller in defending; *Dexters Ltd. v. Hill Crest Oil Co.*, (1926) 1 K.B. 348; Chain contracts with different descriptions of the goods. See also *British Oil & Cake Co. v. Burstall*, (1923) 39 T.L.R.

406.

3. *Payzu Ltd. v. Saunders* (1919) 2 K.B. 581, 589, Scrutton L.J.

4. See *Wrightup v. Chamberlain*, (1839) 7 Scott 589, 50 R.R. 855.

5. *Wrightup v. Chamberlain*, supra; per Parke B. in *Walker v. Hatton*, (1842) 10 M. & W. 255; 11 L.J. Ex. 361, 62 R.R. 600; *Hammond v. Bussey*, supra. See *Benjamin on Sale*, 8th Edn., page 1005.

6. *Mowbray v. Merryweather*, (1895) 2 Q.B. 640, where the defect in a chain sold was capable of discovery, yet could only have been discovered by a minute examination.

7. See *Benjamin on Sale*, 8th Edn., p. 1004.

8. (1912) A.C. 673; 81 L.J.K.B. 1132.



machines, which failed in respect of power and economy of coal consumption, ultimately replaced them by Parsons machines of greater capacity and less steam consumption, the substituted machines being so superior to the contract machines that, according to an arbitrator's finding, it would have paid the buyer to instal them even if the contract machines had been, according to contract. In an action for breach of warranty the buyer contended that they were entitled to recover the cost of the installation of the Parsons machines as minimising their loss in the future; the sellers contended that the commercial life of the contract machines had ended: accordingly that no damages for the future after the installation of the Parsons machines (including the cost of the installation) were recoverable. *Held*, by the House of Lords, that the installation of the Parsons machines was not *res inter alios acta*: that the advantage to the buyers by the use of these machines should be brought into account in estimating the damages; and that the sellers were right, and the buyers wrong, in their respective contentions. Apart from the breach of contract, lapse of time had rendered the appellant's machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines.

Similarly, a buyer is not bound to minimise the damages by doing things which, though in strict law he might be entitled to do them, would be seriously detrimental to his business reputation. In *Finlay v. Kwik*<sup>1</sup>, the breach of contract consisted in tendering a bill of lading dated incorrectly. The buyer unaware of this fact at the time of tender, accepted the shipment and entered into sub-contracts for the sale of part of the goods, the sub-contracts containing a clause that the "bill or bills of lading shall be conclusive evidence of the date of shipment." The sub-buyers refused to take delivery on the ground that the shipment had not been made at the contract date. It was *held* that the buyer was not bound to enforce, for the purpose of minimising the damages, the ontracts which he had entered into with the sub-buyers as to do so, after he knew that the shipment date was incorrect, might seriously injure his commercial reputation.

### (11) Other conditions.

In case of breaches of other conditions also which can be treated as breaches of warranty, for instance, warranty of title, the buyer seems to be entitled to recover from the seller the damages and costs to which he may have become liable in an action by the sub-buyer. Such a case may arise where a buyer purchases goods from a person who has no right to sell it and re-sells to a third person, from whom the true owner recovers it or its value. Similarly, if the time of shipment is the essence of the contract and the goods are shipped late in such cases, if the buyer accepts the goods, he is entitled to recover the difference between the value which the goods would have had if they had been shipped in time, and the value which they actually have. If there is no difference, the buyer cannot recover more than nominal damages.<sup>2</sup>

1. (1929) 1 K.B. 400, C.A., 98 L.J.K.B. 251.

2. *Finlay v. Kwik*, *supra*; *Taylor v.*

*Bank of Athens*, (1922) 91 L.J.K.B. 776.



In *Molling v. Dean*,<sup>1</sup> the plaintiffs, colour printers in Germany, supplied to defendant a large number of toy books which, as they knew, the defendant had re-sold at profit to a New York publisher for sale in America. The plaintiffs packed the books specially for carriage to America, and the defendant, without opening the case, sent them on. The American sub-buyer rejected the goods as badly printed, and reshipped them to the defendant in London. *Held*, that as America was the place of inspection, the defendant was entitled to reject the books after their rejection by the sub-buyer and was entitled to recover the expense of sending the books to America, and of their return, and the custom duties at New York, and also loss of profit on the sub-sale.

**(12) Loss of business or injury to business reputation.**

Damages or injury to business reputation caused by the breach are too remote and cannot ordinarily be recovered. In *Watson v. Gray*<sup>2</sup>, damages for general loss of business have been held too remote. In *Bostock & Co. v. Nicholson*<sup>3</sup>, there was sale of sulphuric acid with arsenic which was used in the preparation of beer which caused illness to those who drank and as a result the buyer could not carry on any business. It was *held* that damages to the goodwill of the plaintiff's business could not be recovered. In an American case reported as *Swain v. Schieffelin*<sup>4</sup>, damage for loss of custom was allowed. In that case the manufacturer of ice-cream used as a colouring matter liquid called "carlet red" which to the knowledge of the manufacturer contained arsenic; and many of the buyer's customers became ill.

**(13) Sub-section (2).**

Before 1873 (the year of passing of the Judicature Acts) it was held that when a breach of warranty was pleaded as a defence to an action for the price a diminution or extinction of the price was limited to the difference between the actual value of the goods and their value as warranted and that a cross-action only would lie in respect of special or consequential damages satisfied by the diminution or extinction of the price.<sup>5</sup> But now as defence and counter-claim can be pleaded together, this point is seldom, if ever, of importance. The buyer if sued by the seller is not bound to set up the breach of warranty as a defence in the seller's action, but may bring a cross-action. In the result the buyer may divide his cause of action, or may keep it entire and sue for his whole damage.<sup>6</sup>

**(14) Miscellaneous cases.**

**(i) Sections 59, 61—Error of law on face of award—Contract for purchase of goods—Breach of warranty—Claim for compensation—Measure of damages—Award of incidental expenses and interest by way of damages—Arbitration Act, 1949—Interest Act, 1839, S. I—Contract Act 1872, S. 73.**

The respondent had purchased and taken delivery of a certain number of packets of cigarettes from the Government of India under a

1. (1901) 13 T.L.R. 217; *Proops v. Chaplin & Co.*, (1920) 37 T.L.R. 112, buyer was entitled to recover costs of defending a prosecution for selling whisky of wrong strength at the price.  
2. 16 T.L. 308.  
3. (1904) 1 K.B. 725; see also *Doe v. Bowater*, (1916) W.N. 185.

4. (1892) 134 N.Y. 471.  
5. *Model v. Steel*, (1841) 8 M. & W. 858; *Rigge v. Burbridge*, (1946) 15 M. & W. 598.  
6. See Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 167, f.n. (o) and authorities cited therein.



contract which provided that "All sales will be conducted on the distinct understanding that the goods sold are on a 'said to contain' basis. No responsibility for quality will be accepted whatsoever after the delivery is made at the depot." Out of the packets delivered the respondent sold some of them in the market at a price lower than the purchase price and returned the rest under an arrangement whereby the Government was to take back the goods found with the respondent in their original packing. The contract with regard to undelivered goods was cancelled. The parties referred their disputes to arbitration and the award granted to the respondent three sums of money on the following heads :

(i) loss suffered by the respondent in respect of packets of cigarettes not returned by him computed on the basis of difference between the price and the price received by him on sale, (ii) incidental charges on account of expenses incurred on advertisement, storage, agency commission, etc., (iii) interest on sum refunded to respondent in respect of returned packets. It was held :

(1) As a part of the stock of cigarettes supplied to the respondent was mildewed and unfit for consumption, the respondent was entitled to claim compensation for breach of warranty, the measure of damages being the price paid and the price realised on sale. Hence, there was no error of law apparent on the face of the award in respect of the first head.

(2) The amount awarded under the second head could not be sustained. When the respondent took delivery of the goods, he became owner of the goods by the express intendment of the contract. The expenditure incurred for advertisement, publicity, storage, agency commission and other overhead expenses, since the respondent took delivery was therefore in respect of his own goods and he could not claim these expenses as part of compensation payable for breach of warranty in respect of goods retained by him. For his claim for incidental expenses in respect of goods appropriated by him, the respondent's claim could not be, apart from the damages, awarded. The amount awarded by the umpire to the respondent, on the head of incidental expenses could not, therefore, be awarded as compensation on any view of the case. The amount has been awarded on an erroneous assumption of law, which is on the face of it erroneous.

(3) That the award of interest under the third head would not be sustained. The contract did not provide for payment of interest in respect of amount paid by the respondent if the contract fell through. Nor could interest be awarded under S. 61 of the Sale of Goods Act or under the Interest Act on grounds of equity. In the absence of any usage or contract express or implied or of any provision of law to justify the award of interest, interest cannot be allowed by way of damages caused to the respondent for wrongful detention of their money. In respect of that part of the contract which was abandoned, if any liability to pay interest had arisen, it was for the respondent to claim it in settling the terms on which cancellation of the contract was to be made. In respect of the goods which have not been returned to him he could claim compensation for breach of warranty, but such compensation could not include interest as damages for detention of money. Interest was therefore allowed on a view of the law which appeared on the face of the award to be erroneous.



**(ii) Section 59—Negotiable Instruments Act, 1881, S. 45.**

A placed order with B for fitting new engine to his lorry and for building body. Order was executed and the lorry delivered to A. A executed pro-note for the bill. B sued A for recovery of the amount due thereunder. A pleaded loss due to fitting of old engine. Plea was held amounted to partial failure of consideration and was not sustainable.<sup>1</sup>

**60.** Where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

**Synopsis**

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| (1) <i>Analogous law.</i>  | (7) <i>Grounds for breach of contract.</i>   |
| (2) <i>Repudiation of contract—anticipatory breach.</i>  | (8) <i>Liberty to purchaser to cancel contract if goods not delivered within fixed time and purchase goods at market rate on the account of vendor and recover difference in price—purchaser's right to damages on breach.</i> |
| (3) <i>No obligation to accept the repudiation.</i>  |  |
| (4) <i>Measure of damages.</i>   |  |
| (5) <i>Goods to be delivered by instalments but no time fixed for delivery—measure of damages.</i> |  |
| (6) <i>Treating the contract as subsist-</i>   |  |

**(1) Analogous law.**

This section is new and has no corresponding provision in the English Act. The principle embodied in it is included in sections 39 and 120 of the Indian Contract Act.

The remedies on an anticipatory breach have been recognized for a long time in England as well as in this country,<sup>2</sup> though the expression "anticipatory breach" is not very appropriate. As Lord Wrenbury pointed out in *Bradley v. Newson* :<sup>3</sup>

"There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arise he will not do it, he is repudiating his promise which binds him in the present, but it is no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future."

1. *P. Aiyappa Pillai v. Rajendran*, A.I.R. 1964 Mad. 45.

2. See *Leigh v. Paterson*, (1898) 129 R.R. 483 ; *Frost v. Knight*, (1870) L.R.7,

Exch. 111 ; *Mansukhdas v. Rangayya*, 1 Mad. H.C.R. 162 ; *Steel Bros. v. Dayal Khatao*, I.L.R. 47 Bom 924.

3. (1919) A.C. 16 at p. 53.



## (2) Repudiation of contract—anticipatory breach.

A contract is repudiated when a party shows by his conduct an intention not to be bound by the contract, or when he refuses to perform it.<sup>1</sup> It is not necessary that the party should say in so many words that he will repudiate the contract or intends to do so.<sup>2</sup> If in fact he is repudiating the contract, he is doing so, although he may be contending that he is performing the contract, and may be expressing an intention to perform what is left of the contract.<sup>3</sup>

The general principle is laid down in section 39 of the Indian Contract Act. The present section is a particular case of a much wider principle which gives an immediate right of action in damages to one party to a contract if and when the other party, before time of performance, clearly shows his intention not to be bound by and to repudiate his contract. *Hochster v. De la Tour*<sup>4</sup> was the first case in England in which it was decided that a prospective refusal amounted to an *immediate* breach. The whole law on this subject was re-examined and conclusively settled in *Frost v. Knight*<sup>5</sup> in which Cockburn C.J. observed :

“The promisee, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance ; but in case he keeps the contract alive for the benefit of the other party as well as his own, he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.”

In *Johnstone v. Milling*,<sup>6</sup> the Court of Appeal expressed a strong opinion to the effect that the doctrine of *Hochster v. De la Tour* does not extend to cases where the party suing would have no right to throw up the *whole* contract upon a breach by the other party at the date appointed for performance. Just as in the case of a contract which contains many terms, actual failure to perform one does not necessarily give the other party a right to treat it as repudiated, but only a right to sue for damages, so an anticipatory refusal to perform one term of a contract does not

1. *Freeth v. Burr*, (1874) L.R. 9 C.P. 208 ; *Mersey Steel Co. v. Naylor*, (1884) 9 App. Cas. 434 ; *Sultan v. Schiller*, (1879) 4 Cal. 252, 255 ; see also *Rash Behari v. Nrittya Gopal*, (1906) 33 Cal. 477, at p. 481.  
2. See per Sir George Jessel in *Mersey Steel Co v Naylor*, *supra*.  
3. *Millar's Karri & Co. v. Weddel & Co.*, (1909) 14 Com. Cas. 25 at pp. 30,

31.  
4. (1853) 2 E. & B. 678, 95 R.R. 747.  
5. L.R. 5 Ex. 322 ; (1872) L.R. 7 Exch. 111, 41 L.J. Ex. 78.  
6. (1886) 16 Q.B.D. 460, 50 L.J.Q.B. 162 (C.A.) ; *Mansukhdas v. Rangayya*, (1863) 1 Mad. H.C. 162, *Hochster v. De la Tour*, (1853) 2 E. & B. 678 ; *Synge v. Synge*, (1894) 1 Q.B. 466.



necessarily entitle the other party to rescind. To enable the party not in fault to repudiate the contract, the anticipatory breach by the other party must be one "going to the whole consideration."<sup>1</sup> In other words, the right of repudiation for an anticipatory breach by the promisor can stand on no higher ground than a breach at the time of performance, and the term in question must be one which goes to the root of the contract, that is, one which, if broken, renders the performance of the rest of the contract substantially different from what the party, not in fault, contracted for.<sup>2</sup> Where the contract is in writing, the question whether the term is such as to go to the root of the contract is one for the court.<sup>3</sup>

The other party must make his election, and either treat the contract as rescinded for all purposes, or keep it alive for all purposes. He cannot, therefore, bring an action for damages for an anticipatory refusal to perform one term of the contract, and at the same time treat the contract as in existence in other respects.<sup>4</sup>

In *Nagisetty v. Venkatasubbayya*<sup>5</sup> also it has been similarly held that where there is a repudiation by the promisor by the anticipatory refusal to perform the contracts before the time for performance has arrived, two courses are open to the promisee, namely, either to treat the contracts as subsisting or to treat them rescinded, and if he elects to treat the repudiation as inoperative and treat the contracts as still in force, in such case the promisee keeps the contracts alive for the benefit of the other party as well as his own : in other words, he keeps the contracts alive for all purposes. But if the promisee fails to fulfil a condition precedent which is binding on him, the promisor will be discharged.

In *Haroon Tar Mohammad & Co. v. Bengal Distilleries Co. Ltd.*,<sup>6</sup> it has been held : Under the English law, if one party to a contract states his intention not to perform the contract, even though the time for performance has not yet arrived, the other party may treat the contract as discharged and sue for damages without being under any obligation to perform his own part, but he will not be allowed to do so unless he accepts such repudiation. Where the repudiation is not accepted, the party rejecting the repudiation, has no cause of action for maintaining a suit for damages before the expiry of the time of performance. The Indian Law contained in S. 39 of the Contract Act and S. 60 of the Sale of Goods Act, is not different in their effect from the English Common Law.

When the contract is repudiated before the time of performance arrives, the other party accepting the repudiation is under an obligation to take all reasonable steps to mitigate the damage for non-performance. "In assessing the damage for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means, of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been diminished."<sup>7</sup> Where the purchaser repudiates before delivery when the market is steadily falling the seller is under an obligation

1. *Michael v. Hart & Co.*, (1902) 1 K.B. 489, at p. 490 ; 71 L.J.K B. 265 (C.A.)

2. See *Johnstone v. Milling*, supra.

3. *George D. Emery Co. v. Wells*, (1906) A.C. 515 P.C.

4. *Johnstone v. Milling*, supra.

5. A.I.R. 1935 Mad. 345 : 157 I.C. 640.

6. (1948) I.L.R. 2 Cal. 11.

7. Per Cockburn C.J. in *Frost v. Knight*, (1872) L.R. 7 Ex. at p. 112. See also *Roper v. Johnson*, (1873) L.R. 8 C.P. 167.



to re-sell within a reasonable time to minimise the damage. When the goods are intended by the buyer for a particular sub-contract, the buyer is under an obligation to minimise the loss by purchasing similar goods in open market to fulfil the contract.<sup>1</sup>

When delivery is withheld at the request of buyer the buyer will have to pay the additional loss caused thereby.<sup>2</sup> In *British Automatic Co. v. Haynes*<sup>3</sup>, there was refusal to accept two machines hired at a weekly rent for 3 years. Four weeks' rent was allowed as damages as the period was considered sufficient to let out the machine on hire again and it was immaterial that the owner had more than two machines in stock.

If the party not in default accepts the other repudiation and rescinds, he is, so far as anything remains to be done by him at the date of the rescission, discharged from all performance or offer to perform it; and he may therefore recover damages on the basis that he was ready and willing to perform his contract and cannot be sued by the party in default for non-performance.<sup>4</sup> Of course, the repudiation which so absolves a party from performance of conditions precedent, must have been made before the due date for the performance of the contract by him.<sup>5</sup>

In *Cort v. Ambergate Rly. Co.*,<sup>6</sup> there was sale of goods to be manufactured and delivered. The buyer accepted part and gave notice to the seller not to manufacture any more. The seller without manufacturing or tendering the rest was held to be entitled to sue for breach of contract and was entitled to be placed in the same position as if the whole contract was performed. In *Mackertich v. Nobo Coomar*,<sup>7</sup> the purchaser did not rescind the contract on the seller's repudiation. Held, damage is to be assessed on the basis of the difference between the contract price and the market price on the last date of delivery.

In *Peter Dumenil & Co. Ltd. v. James Ruddin Ltd.*,<sup>8</sup> A agreed to sell to B 140 cases of Australian skinned rabbits of a particular brand kept with C, A's agent. The price was fixed and paid. A delivery order addressed to C was also given to B. Subsequently, when B demanded delivery of 25 cases from C, he was informed by C through mistake that he had no case of that particular brand with him. B without making any further enquiry from the seller A brought a suit for return of the price paid or in the alternative for damages for breach of contract. It was held:

1. *Roth v. Taysen*, (1896) 1 Com. Cas. 306. See also *Nickoll v. Ashton*, (1900) 2 Q.B. 298, 305; *Melachrinou v. Nickoll*, (1920) 1 K.B. 693.
2. *Ogle v. Earl Vane*, (1841) 1 L.R. 2 Q.B. 275, 284; *Hickman v. Haynes*, (1775) L.R. 10 C.P. 598; *Bank of Morvi v. Baerlein Bros.*, (1924) 48 Bom. 374; *Krishna Jute Mills v. Innes*, (1911) 21 Mad. L.J. 182; *Mutthaya v. Lekku*, (1921) 37 Mad. 412.
3. (1921) 1 K.B. 377.
4. *Cort v. Ambergate Rly. Co.*, (1851) 17 Q.B. 127, 85 R.R. 369; *Chunna Mal Ram Nath v. Mool Chand*, A.I.R. 1928 P.C. 99; 9 Lah. 510; 108 I.C. 678 (disapproving *Abaji Sitaram v. Trimbak Municipality*, (1903) 28

- Bom. 66); *Jhandoo Mal Jagan Nath v. Phul Chand Fateh Chand*, A.I.R. 1925 Lah. 217; 5 Lah. 497; 85 I.C. 118. See also notes under section 38(2).
5. *Steel Brothers Ltd. v. Dayal Khatao & Co.*, (1923) 47 Bom. 924; A.I.R. 1924 Bom. 247; 87 I.C. 97.
6. (1851) 17 Q.B. 127.
7. (1908) 30 Cal. 477. See also *Cooverji v. Rajendra*, (1909) 36 Cal. 617.
8. (1953) 2 All E.R. 294. See also *W.L. Thompson Ltd. v. R. Robinson*, (1955) 1 All E.R. 154 cited at p. 735 ante. In India the measure of damages is to be considered according to the general provisions contained in S. 73 of the Contract Act, 1872.



There was a breach of contract only with regard to the 25 cases which ought to have been delivered on demand and B was entitled to recover the damages in respect of the breach. There being no request for delivery of any more cases, the failure to deliver the 25 cases coupled with C's statement was not sufficient to evince an intention on A's part not to be bound by the contract. In the circumstances there was no anticipatory breach on A's part so as to entitle B to treat the contract as rescinded and to claim the return of price paid.

It is to be noted that S. 60 of the Indian Sale of Goods Act, 1930, which deals with what is known as anticipatory breach does not contain a provision that damages should be assessed on the basis of the market price on the date of repudiation. The measure of damages is to be considered according to the general provision contained in S. 73 of the Contract Act, 1872.

**Goods sent by railway—Repudiation of contract before delivery—Seller keeping open contract—Date of breach.**

In *Majety Balakrishna Rao v. M/s. Mooke Devassy*<sup>1</sup>, the buyer ordered one wagon kumpellu (black gingelly). The seller immediately applied for a wagon. After the wagon was allotted, the goods were loaded and sent to the buyer at Cochin. The goods were received at Cochin on 26th October, 1950. But even before the goods reached Cochin the buyer intimated on 16-10-1950 that the seller need not send the goods. On 28-10-1950, the seller wrote to the buyer to accept the delivery. To this letter, the buyer sent on 31-10-1950 a wire containing certain proposals. As the seller was not agreeable to the new terms proposed in the wire, he requested his agent of Cochin to clear the goods and sell them.

It was *held* : (1) It was open to the seller either to accept the intimation given by the buyer on 16-10-1950 or to keep open the contract till the date of performance.

(2) The breach of the contract had taken place only after the goods reached Cochin and the buyer refused to take delivery and sent the wire on or after 31st October 1950. The date of the prior letter dated 16-10-1950 under which the buyer intimated that he would not accept the goods should not be taken as the date of breach inasmuch as the seller had not accepted the rescission of the contract by the buyer.

(3) The time for ascertaining the damages for non-acceptance was the date when the goods were finally refused to be taken delivery of by the buyer.

(4) The terms of S. 60 applied inasmuch as the buyer repudiated the contract before the date of delivery, *i.e.* the wagon of goods reached Cochin.

(5) Assuming that the terms of S. 60 did not apply and that the contract was to be regarded as one to be performed within a reasonable time, the principle that the damages were to be fixed in reference to the

1. A.I.R. 1959 Andhra Pradesh 30. See also *Ram Saran Das Raja Ram v. Lala*

*Ram Chander*, A.I.R. 1968 Delhi 233 cited under S. 54 at p. 696 *ante*.



time for performance of the contract subject to questions of mitigation, should be applied.

**Distinction between repudiation and rescission—Acceptance of repudiation by institution of suit.**

It is essential that when repudiation takes place the contract is alive. A contract will be kept alive by agreement of parties. If the original stipulated time for performance has expired, parties can by agreement extend it up to a later date. Repudiation by a party takes place during the subsistence of the contract. The other party will then accept the repudiation and rescind the contract. The rescission is the result of repudiation and acceptance of repudiation. Unless both co-exist, there cannot be rescission, nor can there be a cause of action for repudiation of the contract.

There can in some cases be acceptance of repudiation by the institution of suit.<sup>1</sup>

**(3) No obligation to accept the repudiation.**

The express words of the section make it clear that where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach. Under the English law there appears to have been some confusion on the point.<sup>2</sup>

**(4) Measure of damages.**

Where a contract is for delivery of goods on a certain day and the defendant repudiates the contract before that date, damages must be assessed on the basis of the market rate prevailing on the due date of delivery and not on the basis of the rate prevailing on the date of the repudiation.<sup>3</sup> Thus the measure of damages is not affected by the date of the defaulting party's repudiation, and is fixed as in other cases already discussed,<sup>4</sup> by the difference between the contract price of the goods and the market price on the day,<sup>5</sup> or, if delivery was to be made by instalments on the several days,<sup>6</sup> when they ought to have been accepted, as the case may be.

In the case of a breach of a contract of sale of goods, the measure of damages is the difference between the contract rate and the market rate

1. *India Red Lead Factories Co. v. Purshottamdas Narsingdas*, A.I.R. 1960 Cal. 327.

2. See *Nickoll & Knight v. Ashton Eldridge & Co.*, (1900) 2 Q.B. at p. 305 and *Tredegar Iron & Coal Co. v. Hawthorn Bros. & Co.*, (1902) 18 T.L.R. 716 C.A.; *Michael v. Hart & Co.*, (1902) 1 K.B. 482 C.A. See also notes under section 66.

3. *Maung Po Kyaw v. Saw Tago*, A.I.R. 1933 Rang. 25; 150 I.C. 760.

4. See notes under section 56 and the provisions of sub-section (3) of sections 50 and 51 of the English Act referred to therein,

5. *Boorman v. Nash*, (1829) 9 B. & C. 145, 32 R.R. 607; *Phillpotts v. Evans*, (1839) 5 M. & W. 475, 52 R.R. 802; *Melachrino v. Nickoll & Knight*, (1920) 1 K. B. 693; *Mackertich v. Nobo Coomar*, (1930) 30 Cal. 477; *Mahendra Chandra v. Aswini Kumar*, (1921) 8 Cal. 427; 60 I.C. 337; *Bilasingam v. Gubbay*, (1915) 43 Cal. 305; 33 I.C. 23; *Krishna Jute Mills v. Irnes*, (1911) 21 Mad. L.J. 182; 9 I.C. 104; *Cooverji v. Rajendra*, (1909) 36 Cal. 617; 2 I.C. 831.

6. *Leigh v. Paterson*, (1818) 8 Taunt. 540; 20 R.R. 552.



at the expiry of the period agreed upon as the time for delivery in the contract.<sup>1</sup>

In *Roper v. Johnson*,<sup>2</sup> it has been held that even if the defendant absolutely repudiates his contract, at any period previous to the final date specified in the contract, yet in considering the question of damages, they will be estimated with reference to the times at which the contract ought to have been performed. But in *Ram Gopal v. Dhanji Jadhavji*,<sup>3</sup> a case of an anticipatory breach of a contract to gin cotton, Viscount Sumner said :

“The contract was repudiated almost as soon as it was made, and, the intended operation being thus baulked, the plaintiff was entitled to measure his damages *they then stood* and could not be required by the defendants to buy the cotton, which they had announced in advance they would not gin for him.”

This was, however, an anticipatory breach of contract of work and labour and not of sale of goods.

“The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages<sup>4</sup> and the damages must be estimated by the difference between the contract price and market price at the day or days appointed by performance and not at the time of breach.” It is, however, a ground for mitigation of damages if the defendant can show (and the onus of establishing this is upon him) that the plaintiff might have diminished his loss by going into the market on, or after, the day of rescission and making a forward contract at the then market price,<sup>5</sup> or by taking other reasonable opportunities to minimize the damage.<sup>6</sup>

In *Sheo Narain Gopi Ram v. New Sevan Sugar & Gut Refining Co. Ltd.*,<sup>7</sup> plaintiff 1, the New Sevan Sugar & Gur Refining Co. Ltd., through their agents, Messrs. Bird & Co., and the defendants' firm styled 'Sheo Narayan Gopi Ram' entered into a contract on 22nd June, 1935. Under this contract, the defendants purchased 900 bags of sugar. Under the terms of the contract, the defendants agreed to take delivery of the goods purchased by them in three instalments in the months of July, August and September, 1933. There was a breach and therefore the plaintiffs instituted a suit to recover damages. The trial court came to the conclusion that the defendants had committed a breach of the contract and that they were liable to pay damages to the plaintiffs. The learned Judge, however, was of the opinion that the plaintiffs did not exercise their right of re-sale within a reasonable time. In his opinion, the prices were going down and the plaintiffs should have sold the goods much more quickly than they did. For this reason he came to the conclusion that they were not entitled to the full amount of damages claimed by them.

1. *Jivraj Khemji v. Chalkaran*, A.I.R. 1944 Nag. 279.

2. (1873) L.R. 8 C.P. 167 ; *Brown v. Muller*, (1872) L.R. 7 Ex. 319.

3. A.I.R. 1928 P.C. 200 : 55 I.A. 299.

4. *Roper v. Johnson*, supra ; *Mahendra Chandra Nandi v. Aswini Kumar Acharya*, supra ; *Bilasiram v. Gub-bay*, supra.

5. *Roper v. Johnson*, supra ; *Krishna Jute Mills Co., v. Innes*, (1911) 21 Mad. L.J. 182 ; *Melachrin v. Nicholl*, supra ; *Millet v. Van Heek & Co.*, (1921) 2 K.B. 369, C.A.

6. *Payzu, Ltd. v. Saunders*, (1919) 2 K.B. 581 C.A.

7. A.I.R. 1938 All. 272.



On appeal by the plaintiffs, the District Judge agreed with the view taken by the trial court that a breach had been committed by the defendants. He was further of opinion that the plaintiffs were entitled to a decree for the full amount of damages claimed by them. He therefore decreed the suit of the plaintiffs in full. On further appeal it was *held* by the High Court :

(1) The finding of the District Judge that it was the defendants who committed a breach of contract, is a pure question of fact which cannot be disturbed in second appeal.

(2) The defendants committed a breach when they did not instruct the plaintiffs to send them 300 bags on 31st July. They were again in breach when they took no steps to give instructions in respect of the second instalment in the month of August.

(3) Although under section 60 the seller is bound on a breach of contract by the buyer to treat the contract of sale as cancelled and to exercise his right of re-sale within a reasonable time of the breach, yet, where it appears that the delay on the part of the seller was mainly due to the unreasonable and unfair attitude adopted by the buyer with a view to gain time, the seller cannot be said to have acted with undue delay in not exercising his right of re-sale immediately.

**Section 60—Contract of sale at future date—Repudiation of—Remedies open to promisor—Damages—Measure of—Damages to be ascertained by difference between contract price and current price of goods at time or times of performance.**

In *Indra Agencies v. L.D. Seymour and Co. (India) Ltd.*,<sup>1</sup> it was *held*: The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it is that the promisee has the option either of accepting the promisor's refusal to perform as an immediate breach of contract or of refusing to accept the repudiation ; in the latter case the promisee treats the contract as an existing one, not only for his own benefit, but also for that of the promisor. Though *prima facie* the measure of damages in such cases has to be calculated with reference to the market price when the contract ought to have been performed, once the seller accepts the buyer's repudiation, he cannot allow the damages to be aggravated on a falling market ; the seller in such a case has to re-sell the goods at once, and the damages for repudiation are to be calculated accordingly. When there is an available market for the goods in question the measure of damages for non delivery is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered.

In the instant case the plaintiffs who had received the notice of repudiation on 19th of July, 1951, could not have deferred the re-sale beyond the date when the 1st delivery under the contract was due, even on the option which they should be taken to have exercised under S. 60 of the Sale of Goods Act. The plaintiffs were, therefore, entitled to damages

1. A.I.R. 1966 Punj. 105.



calculated at the difference in the contract price and the price of goods prevailing on the day of repudiation.

**Section 60—Damages for repudiation of contract of sale—Interest on, as damages.**

In *Indra Agencies v. L.D. Seymour and Co. (India) Ltd.*<sup>1</sup>, the Court allowed interest for period prior to the suit on decretal amount to the plaintiffs who had sued the defendants for damages for breach of contract of sale, on the ground that the defendants had falsely accused the plaintiffs of misrepresentation. It was *held*: It was well settled that interest as damages could not be awarded; such interest was only to be allowed by a Court of Equity in the case of money obtained or retained by fraud. If the defendants had taken a false plea of misrepresentation that would not provide a ground for a Court of Equity to award such interest. The interest for two months prior to the suit awarded by the learned Judge was, therefore, unjustifiable and must be taken off from the decretal amount.

**S. 60—Damages under—Interest pendente lite on**—Interest is always within the discretion of the Court. But where there is no satisfactory reason for denying it, pendente lite interest should not be denied. Normal rate of such interest is 6 per cent. when no rate is specified otherwise.<sup>2</sup>

**(5) Goods to be delivered by instalments but no time fixed for delivery—Measure of damages.**

What is the measure of damages when a contract is one for delivery by instalments and there is no time fixed for the delivery, and one party refuses to proceed with the contract? It has already been observed that in India a contract to be performed within a reasonable time must be treated as a contract which does not fix the time for performance. As a result of it, when there is a refusal to proceed with it, the date of such refusal must be treated as the date on which the contract is broken, and therefore as the date on which the damages are to be assessed.<sup>3</sup> This rule, however, does not seem applicable strictly to cases where there is an anticipatory refusal to perform a contract to deliver by instalments within a reasonable time. In *Miller v. Van Heek & Co.*,<sup>4</sup> the contract was for the sale of cotton to be delivered by instalments after removal of an embargo by Government, the date for which was uncertain. Before removal of the embargo, the sellers repudiated and the buyer accepted the repudiation before the removal of the embargo. The buyer claimed that the damages should be fixed by reference to the market price at the date of rescission, but this contention was not accepted by the court and it was observed:

“It is admitted that, if a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and before the time has arrived for performance the contract is repudiated, and the repudiation is accepted, the damages have to

1. A.I.R. 1966 Punj. 105.

2. *Indra Agencies v. L.D. Seymour and Co. (India) Ltd.*, A.I.R. 1966 Punj.

105.

3. See section 56 and notes thereunder.

4. (1921) 2 K.B. 369 C.A.



be measured in reference to the dates on which the contract ought to have been performed. This is beyond controversy.....But it is said that, if no time has been expressed in the contract and the contract would be construed by law as one for delivery by reasonable instalments over a reasonable time even though the time might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled to fix his damages in reference to the market price at the time when the repudiation takes place. That, it seems to me, would introduce an anomaly entirely without any kind of principle to justify it. I am satisfied that the code never intended to make that distinction, as to vary what was the rule of law at the time when it was passed.....namely, that the damages are to be fixed in reference to the time for performance of the contract subject to question of mitigation.”

It appears that where the contract is for sale of goods to be delivered by instalments *as required*, or on like terms, the date of rescission must be taken to be the date at which to assess the damages. There seems to be no direct authority on the point but the proposition may be deduced from the analogy of such cases as relate to anticipatory breach of contract for work and labour and contracts other than contracts of sale, as noticed in *Ramgopal v. Dhanji Jadhavji Bhatia*.<sup>1</sup>

#### (6) Treating the contract as subsisting—Effects.

The section allows the party not in default to elect to treat the contract subsisting even when the second party to it repudiates it before the date of delivery. In that case, as noticed in *Frost v. Knight*, already quoted, he keeps the contract alive for all purposes. Consequently, if when this time of performance arrives, he himself is unable to perform or does not perform his contract, the position will be the same as it would have been if there had been no anticipatory repudiation by other party and the latter will be discharged and may himself sue for damages.<sup>2</sup> If, therefore, the seller for instance, after refusing to accept the buyer's anticipatory repudiation, when the time for performance arrives, tenders goods which are not of the contract description, the buyer may lawfully reject the goods and the seller will be without remedy.<sup>2</sup> The buyer may also accept the goods tendered and treat the breach of condition as a breach of warranty and recover damages accordingly. The same will be the position if under a c.i.f. contract the seller tenders documents which the buyer is not bound to accept.

The case of *Braithwaite v. Foreign Hardwood and Co.*<sup>3</sup> requires special notice. In that case there was a contract for rosewood deliverable by instalments during the year, and to be paid for by cash against bill of lading. Before arrival of the first instalment the buyers repudiated the contract. On its arrival the bill of lading was tendered, and the buyers repeated their refusal and the seller re-sold. The second instalment was similarly tendered and refused and re-sold. The buyers subsequently dis-

1. A.I.R. 1928 P.C. 200 cited above.

2. Cf. *Crookewit v. Fletcher* (1857) 1 H. & N. 893, 108 R.R. 882; *Phul Chand Fateh Chand v. Jugal Kishore Gulab Singh*, A.I.R. 1925 Lah. 693; *Burn & Co. v. Morvi State*, A.I.R. 1925 P.C.

188; see Pollock and Mulla, *Sale of Goods Act*, p. 323.

3. (1905) 2 K.B. 543, C.A.; cf. *Rustomji v. Haji Hussain*, (1920) 22 Bom. L.R. 1165; 59 I.C. 515; *Steel Bros. v. Dayal*, (1923) 47 Bom. 924



covered that the first instalment was somewhat inferior to contract quality. In an action for non-acceptance the buyers contended that the seller had elected to keep to the contract, and not to accept the buyer's repudiation; accordingly he had to show he was ready and willing to deliver goods according to contract, which he could not do with regard to the first instalment, so that damages could be claimed only for non-acceptance of the second instalment. The Court of Appeal *held* that assuming the seller had elected to keep contract alive, he was excused from performing conditions precedent which the buyers waived, and that the buyers' subsequent knowledge did not help them; accordingly the damages should be assessed on the basis that the first instalment was according to contract and the seller could recover the difference in value with regard to both instalments.

This case has been stated by Lord Sumner to be "not quite easy to understand,"<sup>1</sup> and in effect it was said that, even after the seller had, as it was called, kept the contract alive and proposed to tender the cargo, he had been told a second time, in terms of first refusal, "you need not tender any cargo to us at all; *a fortiori* you need not tender a cargo which is in conformity with the contract. You have a cargo of some sort, which we refuse to take; and you may prove your damages for that if we fail to prove you wrong."

Greer J. in *Taylor v. Oakes*<sup>2</sup> expressed the opinion, which was approved in the Court of Appeal, that the decision merely meant that a buyer cannot justify his refusal of an offer to deliver goods under the contract by proving that, if he had not refused, the goods when delivered would not have been according to the contract. "It does not decide that if wrong goods or wrong documents of title are actually presented for acceptance to the buyer and refused by him for an untenable reason, he, the buyer, is liable in damages for his justifiable refusal because he gave a wrong reason for it."

Sir Meckenzie Chalmers has also questioned the correctness of this decision<sup>3</sup> and has observed: "The *Braithwaite case* is not to be taken as impugning the general rule that a buyer who gives a wrong reason for refusing to perform his contract and afterwards discovers a sound reason, may then rely on the sound reason."

*Braithwaite's case*, however, has never been overruled, but whatever be the explanation of it or of its effect, it did not lay down the proposition that when there has been a repudiation by one party on a given ground and an acceptance of that repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligation and particularly cannot require the latter to prove his readiness and willingness to perform any of his obligations under the contract thus repudiated, and if it does lay down that proposition, it is wrong.<sup>4</sup>

#### (7) Grounds for breach of contract.

It is a well-established rule of law that a party to a contract may justify his failure to perform it on any ground which existed at the time of

1. *British & Beningtons Ltd. v. N.W. Cachar Tea Co.*, H.L. (E.) (1923) A.C. 48 at p. 70.

2. (1922) 38 T.L.R. 348, at p. 351.

3. See Chalmers, *Sale of Goods Act*,

1893, 16th Edn., p. 155, f.n. (b).

4. Per Lord Sumner, *British & Beningtons, Ltd. v. N.W. Cachar Tea Co.*, (1923) A.C. 48 at p. 70. See also notes on, § 517 *ante*,



his refusal to perform, whether he knew of that ground or not at the time, or whether he gave that as his reason for his refusal or not, and it makes no difference if he gave some other and invalid reason.<sup>1</sup>

*Braithwaite's* case does not apply at all to cases where a contract is repudiated not by anticipatory refusal to perform it before the time for performance arrives, but by failing to perform it when the time for performance has arrived.

It is also a well-known rule that justification is a conclusion of law which necessarily results from a given state of facts,<sup>2</sup> and therefore if any particular act is on the facts justified, whether it be complained of as a breach of contract or as a tort, it does not matter, whether the right or the wrong reason or no reason at all was given for it at the time when it was done. A contrary view seems to have been expressed in *Nannier v. Rayalu Iyer*<sup>3</sup> though the case as reported is not very clear to be properly understood. There appears according to the report to have been a tender and a refusal of the goods in October and November, and in January the sellers wrote a letter threatening to sell if the buyers would not accept the goods in reply to which the buyers wrote that they would not accept on the ground that delivery had not been made in time. The court appears to have thought that the contract was kept open by the seller until the 16th January, but a contract which has once been broken cannot be kept open and an offer by the seller to tender the goods again, if the buyer will accept them, is in law proposal that the late acceptance should be treated as an accord and satisfaction of the breach and if such proposal is not accepted, the only remedy for the seller is to sue for the original breach.<sup>4</sup> If therefore there was an actual tender and refusal to accept the goods in November, that refusal was breach of contract; but if the goods tendered were not of the contract description, the buyer was entitled to rely upon that fact, even if he gave as the ground for rejecting them that they were tendered late. This case, therefore, cannot be taken to lay down that a buyer, who rejects goods on the ground that they were delivered late, cannot afterwards show that the goods were not according to contract and escape liability on that ground.<sup>5</sup>

**(8) Liberty to purchaser to cancel contract if goods not delivered within fixed time and purchase goods at market rate on the account of vendor and recover difference in price—Purchaser's right to damages on breach.**

A contract for the sale of cotton pods contained a term *inter alia* if the vendor failed to deliver the goods within a fixed time, given liberty to the purchaser, (1) to "cancel the transaction and get back the money paid

1. See *Taylor v. Oakes*, supra; *Levy v. Green*, (1859) 1 E. & E. 969; 117 R.R. 552; *Hession v. Jones*, (1914) 2 K.B. 421, at pp. 424-5; *Alexander v. Webber*, (1922) 1 K.B. 652; *Parthasarathy Chetty & Co. v. T.N. Gajapathi Naidu & Co.*, A.I.R. 1925 Mad. 1258. (In this case the court suggested that there might be a difference if the seller had claimed as damages the difference and the market price instead of the difference between contract price and the price realized on a

resale of the goods, which he had carried out under the express terms of the contract but it is submitted with great respect, that there appears to be no distinction between the two cases.)

2. See *Sutton v. Johnston*, (1786) 1 T.R. at p. 507; 1 R.R. 257.

3. A.I.R. 1926 Mad. 778.

4. Cf. *Muthaya Maniagan v. Lekku* (1912) 37 Mad. 412; 14 I.C. 255.

5. See *Pollock and Mulla, Sale of Goods Act*, p. 325.



along with interest at 6 per cent. per annum, and (2) to purchase cotton pods at the market rate on the account of vendor and the difference of rate at which he purchased from the vendor." On the failure of the vendor to supply the goods the purchaser claimed damages. It was *held* that the purchaser was entitled to the difference between the contract rate and market rate, and that it was not necessary that the damages should be assessed on the basis of actual purchases made by the vendees under the terms of the contract.<sup>1</sup>

**\*61.** (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of price—

(a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable ;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—from the date on which payment was made.

### Synopsis

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|---|---|
| (1) <i>Interest by way of damages—History of legislation.</i>     | (6) <i>Lien for storage charges.</i>  |
| (2) <i>Seller's right to recover interest—section 61 (2) (a).</i> | (7) <i>Rate of exchange.</i>  |
| (3) <i>Buyer's right to recover interest section 61 (2) (b).</i>  | (8) <i>F.O.R. contract—breach of—goods re-sold—right of seller to recover demurrage charges and commission paid to brokers—Recovery of railway freight by seller on breach.</i> |
| (4) <i>Special damages—sub-section (1).</i>                       |   |
| (5) <i>Failure of consideration.</i>                              |   |

### (1) Interest by way of damages—History of legislation.

The Interest Act, 1839 (Act XXXII of 1839) based on Lord Tenterden's Act<sup>2</sup> provides for the payment of interest by way of damages in certain cases. That Act provides for the payment of interest at the current rate in the following cases :

(1) On all debts or sums certain payable at a certain time, under a written instrument, from the due date mentioned in the instrument.

1. *Pahlumal Motiram v. Valjimal Hamraj*, 225 I.C. 145.

\*Analogous law

Section 54 of the English Sale of Goods Act, 1893, corresponding to Sec. 61 (1) of the Indian Act, and

section 49 (3) of the English Act, corresponding to section 61 (2) (a) of the Indian Act. Section 61 (2) (b) (c) of the Indian Act is new.

2. 3 & 4 William IV, Ch. 42.



(2) On all debts or sums certain payable at a certain time from the time that demand in writing is made, with a claim for interest from the date of demand.

With regard to breaches of contract for payment of money, the rule in English law before the Law Reforms (Miscellaneous Provisions) Act, 1934, was that interest cannot be allowed at common law by way of damages for the wrongful detention of a debt.<sup>1</sup> Lord Tenterden's Act, however, has by section 28 provided for the award of interest in particular cases. This was bodily adopted, as already observed in the Interest Act of 1839. In *Juggmohan Ghose v. Kaisree Chand*,<sup>2</sup> a case before the Privy Council prior to the passing of the Indian Contract Act, it was laid down in consonance with the rule of English Common law that, in the absence of a mercantile usage, interest cannot be imported into a contract which contained no stipulation to that effect.

With the passing of the Indian Contract Act, there arose a considerable divergence of judicial opinion as to whether in view of illustration (n) to section 73, interest can be awarded as damages where it is not reasonable under the Interest Act. The view of the Calcutta High Court was that it could be.<sup>3</sup> Later cases of other courts endorsed the view on the ground that in the fact of the wrongful detention of money itself there is proof of the extent of plaintiff's damages, and that the advantage that the plaintiff would have had if the money had not been detained, is stated in terms of money, interest at the current rate for the period of detention.<sup>4</sup> This view was not founded on illustration (n) to section 73. But in *Kamalammal v. Perru Meera Levvai*,<sup>5</sup> the Madras High Court held that interest cannot be recoverable under section 73, illustration (n), where it was not recoverable under the Interest Act. According to this view, therefore, interest cannot be claimed for unlawful detention of money unless there is an express or implied agreement or uses or compliance with the Interest Act. This view was reaffirmed by a later Full Bench in *Kandappa v. Muthuswami*.<sup>6</sup> That was a suit to recover money advanced towards a contract for supply of goods and the Full Bench held that the party who had made the advance was not entitled to interest from the date of advance as the contract did not provide for it, and no demand had been made before suit. The Bombay and Patna High Courts had taken the same view.<sup>7</sup> The Lahore High Court followed the Madras view in one case<sup>8</sup> but other cases of the same court were inclined to take broader view on

1. *London Chatham & Dover Ry. v. S.E.R. Co.*, (1893) A.C. 429, 437.

2. (1862) 9 M.L.A. 857.

3. *Khetra Mohan v. Aswani Kumar*, (1917) 22 C.W.N. 488 : 45 I.C. 667 ; see *Navanitdas v. Mancharsa*, A.I.R. 1934 Nag. 78.

4. *G.I.P. Ry. v. Jugal Kishore*, A.I.R. 1930 All. 132 ; *Kishan Lal v. Bapu*, A.I.R. 1926 Nag. 363 ; *Ajodhya Prasad v. Shiv Prasad*, A.I.R. 1927 Nag. 18 ; *Abdulla v. Alla Diya*, A.I.R. 1927 Lah. 333 ; *Ram Nath v. Hira Lal*, A.I.R. 1926 Cal. 755 ; *Muthuswamy v. Veeraswamy*, A.I.R. 1936 Mad. 486.

5. (1897) 20 Mad. 481 ; *Anrudh Kumar*

*v. Lakshmi Chand*, A.I.R. 1928 All. 500. Ill. (n) is not exhaustive ; *Saiyid Ismail v. Saiyid Mehdi*, A.I.R. 1924 All. 881.

6. A.I.R. 1927 Mad. 99 : see also *Raja Ram Dass v. Gajapathi Krishna Chandra*, A.I.R. 1933 Mad. 729 ; *Nanchappa v. Vatsari*, A.I.R. 1930 Mad. 727 ; *Arjuna v. Mohan Lal*, A.I.R. 1937 Nag. 345.

7. *Alice M. Campbell v. Williams Chard Co.*, A.I.R. 1924 Bom. 131 ; *J.H. Pattinson v. Bindhya Devi*, A.I.R. 1933 Pat. 196.

8. *Kirpal Singh v. Jiwan Mal*, A.I.R. 1927 Lah. 247.



the basis of compensation for wrongful detention.<sup>1</sup> The Allahabad High Court held in *Abdul Jalil v. Mohammad Abdul Salam*<sup>2</sup> that apart from the Interest Act and section 73, illustration (n), interest may be awarded on general grounds of equity, but decisions were conflicting.<sup>3</sup> The Judicial Committee of the Privy Council has now conclusively decided in *B. N. Ry. Co. v. Ruttanji Ramji*<sup>4</sup> that section 73 is only declaratory of Common Law as to damages and that illustration (n) does not modify the language of the section or confer on a creditor a right to recover interest upon a debt due to him when he is not entitled to such interest under any provision of law. This means that in the absence of an express or implied contract to pay interest or a usage of trade, interest can be claimed only under the Interest Act.

The present section of the Indian Sale of Goods Act, 1930, makes an express provision for the award of interest in case of breach of contract for sale of goods.

In *Rangalal v. U.R.P.C.P. & P. Society*, A. I. R. 1975 Orissa 137, it was held on facts of the case, that though the trial court may have been justified in refusing interest prior to the suit, it should have granted interest from the date of suit till realisation under section 34, Code of Civil Procedure.

## (2) Seller's right to recover interest—section 61 (2) (a).

In the absence of the contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price, to the seller in the suit by him for the amount of the price from the date of the tender of the goods or from the date on which the price was payable. It is thus clear that the seller can only recover interest when he is in a position to recover the price. When he can only sue for damages for breach of contract, he is not entitled to interest under the provisions of this sub-section.

The date from which interest is payable must be ascertained from the terms of the contract. In a case of a sale of special goods, where nothing is said about credit or delivery, the price will be payable on the date of making of the contract, and interest will be recoverable from that date. Where the price is to be paid on a specified day, irrespective of whether the goods are delivered or not, that day will be the date from which interest will be recoverable and so on.

Where delivery is to be made at the option of the seller during a stated period, such as the last fortnight in a specified month, or during a specified month, and payment of the price is only due on delivery, the date of delivery or of the tender of goods, will be the date from which interest can be claimed. As instance of it, if there be a contract for the sale of specific goods and the property passes to the buyer and the goods are to be delivered, say in March, the price being payable on delivery, and the seller tenders delivery on the 5th of March, and the buyer wrong-

1. *Piare Mohan v. Gopal Lal*, A.I.R. 1932 Lah. 552; *Gujranwala Municipal Committee v. Charanji Lal*, A.I.R. 1935 Lah. 685; *Sham Singh v. Nanak*, 136 I.C. 719; *M.C., Gujranwala v. Prabhu Dial*, A.I.R. 1933 Lah. 556.

2. A.I.R. 1932 All. 505. See also A.I.R.

1928 All. 500.

3. *Lalman v. Chintamni*, (1918) 41 All. 254; *Jwala Prasad v. Hoti Lal*, (1924) 46 All. 635; *Saiyid Ismail Hassan v. Saiyid Mehdi*, A.I.R. 1924 All. 881.

4. A.I.R. 1938 P.C. 67; I.L.R. (1938) 2 Cal. 72.



fully refuses to accept it, the date from which interest will be recoverable will be the 15th March.<sup>1</sup>

Where there are mutual giving and taking of goods and money between the parties, but there is no date fixed for the payment of the price of the goods or for the return of the moneys advanced to each other, nor is there any notice of demand served on the opposite party to make payment of the outstandings and in default claiming interest, the plaintiff cannot claim any interest from the defendants under the Interest Act, 1839. Similarly, interest cannot be claimed by way of damages under S. 73 of the Contract Act when there is no contract for payment of money on a specified date. The same is the position with the provisions of S. 61 of the Sale of Goods Act, 1930, and the plaintiff cannot also claim interest thereunder.<sup>2</sup>

In *Hukumchand v. Bhagwandas*<sup>3</sup>, it was held: In a suit for recovery of the price of the goods purchased from the joint family shop of the plaintiffs by the defendant, interest can be allowed under S. 61 (2) (a) of the Sale of Goods Act, 1930.

Where interest could also be allowed under S. 61 of the Indian Sale of Goods Act but the courts below did not purport to exercise their power under that law, the contention that interest having been allowed it must be presumed that the courts below allowed interest under S. 61 of the Act cannot be upheld. The interest allowed on the basis of market custom or usage was, therefore, disallowed.<sup>4</sup>

In *State of Madras v. M. A. S. Mehta*<sup>5</sup>, it was held: Where there is a contract providing for payment of price by the buyer within fifteen days of the delivery of goods, and the buyer fails to abide by the terms of the contract, the seller is entitled to six per cent. interest chargeable after expiry of 15 days from date of transaction.

The Supreme Court has held in *Kurapati Venkata Mallayya v. T. Ramaswami & Co.*<sup>6</sup>, that under S. 61 of the Sale of Goods Act, the seller is entitled to interest at 6 per cent. per annum from the date of the transaction to the date of the suit. But in the Madras case a modification was made charging interest only after the expiry of fifteen days from the date of the transaction in view of the terms of the contract.

In *Venkata Subbarao v. Subrahmanyam*<sup>7</sup>, it was held: When there is stipulation in the bills prepared in connection with purchases of cloth by the defendant from the plaintiff, as to payment of interest, the buyer is bound by the clause unless he shows that he had no knowledge of the clause.

In *Bibhuti Bhusan Bose v. National Coal Trading Co.*<sup>8</sup>, it has been held: Where the supplies had been effected to the defendant upto 26th June, 1954, but the defendant had delayed payment for nearly three years and the plaintiff was obliged to institute a suit for its recovery, it was well within the discretion of the Court to award interest to the plaintiff at a reasonable rate on the amount of price under S. 61 (2) of the Act.

1. See Pollock & Mulla, Sale of Goods Act, page 334.

2. Kalyan Sahai v. Firm Lachhminarain Shambhulal, case No. 78 of 1949, D/27-10-1950 (Rajasthan) 1951 Indian Digest, P.W. 476.

3. 1961 M.P.L.J. (Notes) 149.

4. Tansukh v. Ram Pershad Khetawat, A.I.R. 1954 Ajmer 42.

5. A.I.R. 1964 Mad. 508.

6. A.I.R. 1964 S.C. 818.

7. (1964) 2 Andh. W.R. 229.

8. A.I.R. 1966 Pat. 346.



The fact that in his notice of demand the plaintiff had not put forward any claim for interest did not call for an interference with the award of interest by the lower court in view of the fact that the demand was for a balance of goods supplied long since outstanding.

In *Maharana Bhupal Electric Supply Co. Ltd. v. The State of Rajasthan*, A.I.R. 1973 Raj. 132 it was held: **Electricity is not goods covered by the Sale of Goods Act.** The reason is that the Sale of Goods Act applies to goods as defined in section 2(7) of the said Act. The principal ingredient is that it is movable property. The Supreme Court in *Avtarsingh v. State of Punjab*, A.I.R. 1965 S.C. 666 has observed that 'Electricity is not movable property'. The claim of interest under the sale of Goods Act is therefore not tenable.

In *M/S. M.K.M. Moosa Bhai Anil Kota v. Rajasthan Textiles Mills*, A.I.R. 1974 Raj. 194, the supply had been effected up to 18th September, 1962, and in normal case the price of the goods ought to have been paid by the defendant within a reasonable time of the deliveries but the payment had been delayed for nearly a year and the plaintiff was obliged to institute a suit for the recovery of the price. It was contended on behalf of the plaintiff that even in the absence of the contract the plaintiff was entitled to reasonable interest under S. 61(2) of the Sale of Goods Act, 1930. It was held: In such circumstances, the lower courts should have exercised discretion in favour of the plaintiff and awarded interest on the amount of the price of the goods under S. 61(2) of the Act. (Interest at the rate of six per cent per annum, which was considered to be reasonable was allowed).

**Creditor firm selling dry fruits for a number of years—Proceedings under the Displaced Persons (Debt Adjustment) Act, 1951 to recover amount—Interest which may be allowed—Section 61 (2) of the Sale of Goods Act, 1930.**

The petitioners were carrying on their business at Peshawar under the name of Murly Mal Balmokand before the partition of the country. They filed an application under S. 13, Debt Adjustment Act, against the appellant firm Ram Lal Harnam Das carrying on business in Calcutta, for the recovery of Rs. 14,000. The application was made on the allegation that the Calcutta firm used to purchase goods from the Peshawar firm and there was a running account between them in which Rs. 14,000 were due to the petitioners. The Calcutta firm contested the claim and raised a preliminary objection *inter alia* that the displaced firm could not claim the amount as it was not a registered firm and S. 69, Partnership Act, was a bar to the claim. On the merits it was denied that the Calcutta firm had ever any dealings with the Peshawar firm or that there was any kind of account between the parties or that any amount was due from it in that account. The tribunal awarded decree for Rs. 5,364/7/9. It was held on appeal:

(1) The words "or other proceeding" in S. 69(3) of the Partnership Act, 1932, relate to the proceedings of the nature of set-off and nothing else. And as S. 69(3) does not relate to other proceedings as distinct from a suit, the proceedings taken under the Displaced Persons (Debts Adjustment) Act, 1951 are not barred.

(2) No trade usage existed under which the creditor firm could claim interest nor was there any agreement to pay interest.

(3) Section 61(2), Sale of Goods Act, 1930, applied to the case, under which section interest at the fair rate of 6 per cent. per annum should be



allowed on the last debit entry in the account books produced by the creditor firm, particularly when the debtor firm had not produced its books and its explanation of its loss was not convincing. Thus the creditor firm was entitled to interest from the date of the last debit entry in its account books till the application was made under S. 13. Displaced Persons (Debts Adjustment) Act before the Tribunal.<sup>1</sup>

### (3) Buyer's right to recover interest—Section 61 (2) (b).

Sub-section (2) (b) introduces an altogether new provision for payment of interest to the buyer on the price, in a suit brought by him for refund of the price, in consequence of a breach of the contract on the seller's part. The interest in this case is to run from the date on which the payment was made. In this case also the buyer can only recover interest when he is entitled to recover the purchase price, that is to say, when he can sue for the price prepaid as money had and received, by reason of total failure of consideration. He cannot recover interest when his only remedy is to sue for damages; for instance, for a breach of warranty, even though those damages may be sufficient to extinguish the price.

It is also essential for the application of this clause that there should be a breach of contract on the part of the seller. It will not therefore apply, for instance, where a case arises under sections 7 and 8 or where the contract is dependent upon some condition inserted for the benefit of the seller, and is not performed owing to the non-fulfilment of that condition. A contract may also be frustrated by circumstances over which the seller has no control, so that in law he would not be liable to action, giving the same result. If contract is rescinded by mutual consent, it must depend upon the terms of the rescinded agreement whether the buyer may recover interest. Under English law, interest is recoverable where money is obtained by fraud, and it would seem therefore that if the buyer rescinds the contract on the ground that it was induced by fraud, he can recover interest under this section, but it is more doubtful whether he can recover it if he succeeds in setting aside the contract on the ground that in such cases the parties are to be restored as far as possible to their original position.<sup>1</sup>

If a buyer could not obtain delivery of the goods sold owing to the resistance of the creditor of the seller who has attached them he is entitled to recover the purchase money paid with interest thereon under S. 61 of the Act.<sup>2</sup>

In a suit for return of the sale price paid under a contract of sale of goods on the basis of a breach and total failure of consideration and for damages for breach of contract by reason of non-delivery of the goods sold, the plaintiff is entitled to a return of the price paid by him with interest thereon from the date on which it was paid till date of judgment as compensation for having been kept out of his money and also damages for breach, the measure of damages being the difference between the contract price, and the market price of the goods on the date of breach. The material date is the date of the breach and not the date of trial of the suit.<sup>3</sup>

1. R.L. Harnam Dass v. Bal Krishen, A.I.R. 1957 Punj. 159.

2. See Pollock & Mulla, Sale of Goods Act, page 335 citing in re Metropolitan Coal Consumers' Association (1892) 3 Ch. 1, 17 C.A.

3. Damodar v. Allabux, A.I.R. 1943 Nag. 332 : 1943 N.L.J. 508 : I.L.R. (1943) Nag. 762.

4. Rameshwardas Poddar v. Paper Sales Ltd., 1944 Bom. 21 ; 35 Bom. L.R. 906.



In *Standard Printing Machinery Co. v. Vidayagam and Company*,<sup>1</sup> it was held: The mere fact that in a suit for the price of goods sold and interest, the buyer plaintiff alleges a contract for the payment of interest, which he is unable to prove, does not mean that he is disentitled to relief under S. 61(2) of the Act. A clause in a tradesman's bill charging interest at a certain rate does not by itself constitute a contract between the parties to pay interest at that rate, within the meaning of S. 61(2).

**Section 61(2)(b)—Limitation Act, 1908, Art. 85 (corresponding to Art. 1 of the Limitation Act, 1963).**

Price of goods supplied by defendant to plaintiff agreed to set off against advances by plaintiff—Supply stopped—Suit for recovery of balance due from defendant—Goods supplied by way of repayment of advances and not by way of independent obligation—Art. 51 and not Art. 85 of the Limitation Act, 1908, applies—Starting point for limitation—Right to interest prior to suit.<sup>2</sup> (See now Art. 13 of the Limitation Act, 1963).

#### (4) Special damages—sub-section (1).

Damages are either general or special. "Special damage, when contrasted with general damage means the particular damage beyond the general damage which results from the particular circumstances of the case."<sup>3</sup> Section 73 of the Indian Contract Act deals with both classes of damages. The words "compensation for any loss or any damage which naturally arose from the usual course of things from such breach" refer to general damages. The expression "or which the parties knew when they made the contract to be likely to result from the breach of it", refers to special damages. The case of *Hydraulic Engineering Co. v. McHaffie*,<sup>4</sup> is an illustration. In this case, the defendant knew of plaintiff's contract with the third party for supply of important piece of machinery and yet failed to supply it with the result that the plaintiff had to commit a breach of contract. The defendant was held liable for the plaintiff's loss of profit as well as his charges for making other parts of the machine. "Where the breach has occasioned a special loss, which was actually in contemplation of the parties at the time of entering into the contract, that special loss, happening subsequently to the breach, must be taken into account."<sup>5</sup> In *Kasler v. Slavouski*,<sup>6</sup> there was a chain of buyers and sellers in a string contract and in action for breach of warranty, the first buyer was held entitled to recover from the first seller the damages which the last buyer in the chain had recovered from his vendor, and the cost of all the actions between the intermediate vendors.<sup>7</sup>

Speaking about the English Sale of Goods Act, 1893, Sir Mackenzie Chalmers observes:<sup>8</sup>

"The Act deals only with general damages, and merely saves the law relating to special damages. Many of the cases fail to

1. (1959) 1 Mad. L.J. 167.

2. *Rohtas Industries Ltd. v. Sukhmony Moitra*, A.I.R. 1964 Pat. 35. See also *Ram Bahadur Thakur & Co. v. Shreeram*, A.I.R. 1968 Bom. 35 cited at p. 756 ante—Breach of contract; refund of deposit; interest.

3. *Ratcliffe v. Evans*, (1892) 2 Q.B. 524 at p. 528 per Bower L.J.

4. (1878) 4 Q.B.D. 670; (cf.) *Patrick v. Russo-British Grains Exports Co.*, (1927) 2 K.B. 535.

5. *Hydraulic Engineering Co. v. McHaffie* supra, per Cotton L.J., p. 677.

6. (1928) 1 K.B. 78; *Hall v. Pim*, (1928) 139 L.T. 50; (cf.) *Williams v. Agius*, (1914) A.C. 510.

7. For a full discussion of the law as to special damages, see *Indian General Navigation Railway Co. v. Eastern Assam Co.*, (1920) 47 Cal. 1027; A.I.R. 1921 Cal. 315.

8. Chalmers, *Sale of Goods Act*, 16th Edn., pp. 210, 211.



distinguish special from general damages, the reason being that both are governed by the same guiding rule. Given a particular contract, the measure of damages is the loss which naturally results from the breach of a contract of the kind in question. Given a contract made under special circumstances to the knowledge of both parties e.g., a contract to fulfil a sub-contract, the measure of special damage is the loss which naturally results from the breach of a contract made under those particular circumstances. The underlying principle on which special damages are allowed appears to be this : when a contract is entered into by parties with knowledge that there are special circumstances attaching to it, which, in the ordinary course of things, would produce special loss if the contract were broken, the law implies a liability to pay 'special' damages for such special loss."

In *Hammond v. Bussey*<sup>1</sup>, a case where the action was brought for breach of warranty, Fry L.J. suggests four tests for determining whether the damages claimed are recoverable : (1) What are the damages which actually resulted from the breach of contract ? (2) Was the contract made under any special circumstances and if so, what were these circumstances ? (3) What, at the time of making the contract, was the common knowledge of both parties ? (4) What may the court reasonably suppose to have been in the contemplation of the parties as a probable result of the breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach ?

This section preserves the right of a party to a contract of sale to recover special damages in any case where by law special damages may be recoverable.

In the cases noted below, recovery of special damages was considered and decided :

(i) In *Smeed v. Foord*,<sup>2</sup> the defendant had contracted with the plaintiff farmer, to furnish, within three weeks after July 24, a steam threshing engine, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat, so that it could be sent at once to market. He did not deliver the engine until September 11, but from time to time repeatedly assured the plaintiff that it was coming shortly. The plaintiff was therefore obliged to carry the wheat home and stack it and while stacked, it was damaged by rain and had to be dried in a kiln. There was a further loss by reason of a fall in prices on re-sale. *Held*, that the defendant was responsible for the plaintiff's loss by the deterioration of the wheat and his expenses of carting and kiln-drying, but not for the fall in the market price, as this loss could not have been reasonably anticipated by the parties as the probable result of delay in delivery.

Conversely, the seller could not have claimed that a rise in the market price could be taken into account to mitigate damages.

(ii) In *Borries v. Hutchinson*,<sup>3</sup> the plaintiff had bought from defendant seventy-five tons of caustic soda, deliverable in three equal parts in June, July and August. The buyer at the time made a like contract for re-sale at a profit to H, a St. Petersburg merchant. The latter in his turn made a

1. (1887) 20 Q.B.D. 79 at p. 100, C.A.  
 2. 1 E. & E. 602, (1859) 28 L.J.Q.B. 178.  
 See also *Kishinchand Chellaram v. Vishandas Amarnath*, A.I.R. 1949 Bom. 344 cited at p. 640 ante—Sale

by seller after passing of property in goods to buyer.  
 3. (1865) 18 C.B. (N.S.) 445 ; 34 L.J. C.P. 189 ; 114 R.R. 563.



sub-sale at a profit to another merchant in St. Petersburg. The seller, at the time of the contract, knew that the soda was bought for sale on the continent, and was to be shipped from Hull, but there was no evidence that he then knew that it was to be shipped to Russia. Some of the soda was delivered late, and the plaintiff was compelled to pay increased freight and insurance, owing to the approach of winter, on dispatching it to Russia. The rest was not delivered and the plaintiffs had to pay a sum of money to the merchant in Russia to compensate him for damages which he had to pay to a buyer from him. There was no market where the plaintiff could purchase caustic soda.

*Held*, that the buyer was entitled to recover as damages : (1) his lost profits on the sale, and (2) all his additional expenses for freight and insurance, but (3) not the damages paid to H, his vendee, for the latter's loss on the sub-sale, those being too remote, as the seller did not at the time of making the contract, know of the sub-sale to the second merchant in St. Petersburg. *Held*, also *per* Willes, J. that, even had he known, he could not be taken to have contracted to be responsible for such remote consequences.

This is a case in which, in the absence of an available market, the price obtained on the re-sale can be taken as the value of the goods. The increased freight, however, was special damage.

(iii) The defendant had agreed to supply the plaintiffs with certain sets of wheels and axles during the months of February to April, 1872. This contract was subsidiary to one which the plaintiffs had made to supply a Russian Railway Company with wagons by two deliveries in May of the same year, under the penalties for delay. The defendant had notice of the sub-contract, but not of the date of delivery, or of the *amount* of the penalties. By reason of the defendant's delay in delivery of the goods which were not obtainable in the market, the plaintiff had to pay £ 100 to the Russian Company as penalties. *Held*, that the plaintiffs were not entitled, as a matter of law, to recover the amount of the penalties as such, but that the jury might reasonably assess the damages at that amount.<sup>1</sup>

(iv) In *Hydraulic Engineering Co. v. McHaffie*,<sup>2</sup> the plaintiffs, being under a contract with Justice for supply of a particular machine by the end of August, 1878, contracted with the defendants to make a part of the machine as soon as possible. The defendants were expressly informed of the plaintiffs' contract with Justice and that the machine was wanted by Justice at the end of August, but did not complete their part of it until the end of September. Justice then refused to accept the machine, which was unsaleable in the plaintiffs' hand. Under these circumstances the plaintiffs were held entitled to recover damages for : (1) loss of profit on their contract with Justice ; (2) expenditure uselessly incurred in making other parts of the machine ; and (3) cost of painting it to preserve it but not of warehousing it.

(v) The plaintiff bought from the defendants certain sheep-skins for the purpose, as the defendants knew, of re-selling them to a buyer in France at a profit to the plaintiff of 5 francs a skin. The defendants failed to deliver the skins, and the plaintiff was condemned to pay damages by the French courts for breaking his contracts with the French buyer. The skins could not be obtained in the market. The plaintiff was held entitled

1. *Elbinger Acton v. Armstrong* (1874) L.R. 9 Q.B. 473 ; 43 L.J. Q.B. 211.      2. (1878) 4 Q.B.D. 670 C.A.



to recover not only the loss of profit but the damages which he had paid in addition.<sup>1</sup>

(vi) In *Agius v. Great Western Colliery Co.*,<sup>2</sup> the plaintiff, a coal merchant, contracted with ship-owners for the supply of coal to their ships at a certain port, and entered into contracts with the defendants for the supply of coal to him for shipment in those steamers. The defendants failed to deliver within the contract time, and consequently a steamer was delayed. The plaintiff when sued for damages put at £ 150 defended the action and paid £ 20 into court, which was found to be sufficient. *Held*, that the plaintiff was entitled to recover from the defendants the £ 20 paid into court and his costs reasonably incurred over and above the amount which he had received as costs between party and party in that action.

(vii) In *Hall v. Pim*,<sup>3</sup> there was a sale with a re-sale and a succession of sub-sales of a cargo of Australian wheat of a certain quantity and description for future shipment in November. Subsequently, a particular ship was nominated in the following January as the ship which was carrying the cargo, but though the sellers had the documents in March they deliberately refused to deliver them to the buyers. The contract was made subject to the condition of the London Trade Association. It was held by the House of Lords that the sale was the sale of a cargo of an individual ship, and not merely the sale of corn in bulk, and by the terms of the contract it was contemplated that the buyer might re-sell the cargo and in such a case the seller agreed to put the buyer in a position to fulfil his contract. The buyer was therefore entitled to recover as damages the loss of profit on his sub-contract and also to be indemnified against any damages which he might have to pay to sub-purchaser.

Analysis of the cases referred to above will show that where the goods are bought, to the knowledge of the seller at the time of making the contract for resale and no market exists for the goods, the buyer may recover as special damages the difference between the contract price and the sub-sale price *i.e.*, profits as such of the sub-sale; for as the buyer cannot supply himself elsewhere, the loss of profit naturally results from the seller's breach of contract under the special circumstances. But even where the sub-contract is not known to the seller the price at which the buyer, in the absence of market price, re-sells the goods to a sub-buyer is relevant to the measure of damages, as being some evidence of the value of the goods at the date appointed for delivery, and if the jury regard this evidence as satisfactory, they may award the buyer the difference between the contract price and the sub-sale price as general damages.<sup>4</sup>

The case of *Hall v. Pim* is an exception, but it was decided on the particular terms of the contract which contemplated a series of string contracts with the sub-purchasers. It is to be observed that as the buyer had committed himself to sell that particular cargo, it would not have been a performance of his contract if he had tendered other corn to his sub-purchasers. Where, however, the contract is for the sale of unascertained goods and there is a market, the difference between the market price

1. *Grebert Borgnis v. J. & W. Nugent*, (1885) 15 Q.B.D. 85, C.A.

2. (1889) 1 Q.B. 413, C.A.

3. (1928) 139 L.T. 50, H.L. 33 Com.

Cas. 324.

4. See Benjamin on Sale, 8th Edn., p. 972.



and the contract price is the measure of damages, even if the seller knew that the buyer wanted the goods for the purposes of re-sale.<sup>1</sup>

### (5) Failure of consideration.

"It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that had failed."<sup>2</sup> The general rule applicable to all contracts is equally applicable to sale of goods. Where the consideration for payment of the price has wholly failed, or where there has been a total failure of a severable part of the consideration, the price is paid, or a proportionate part thereof respectively, can be received by the buyer as money had and received to his use by the seller.<sup>3</sup> Thus in *Piare Lal v Mina Lal*<sup>4</sup>, it was held that a buyer who had made payment for goods to be delivered at a later date was entitled to recover the sum paid when the seller failed to effect delivery. Such failure of consideration may also be pleaded as defence to an action for the price.<sup>5</sup> But if the failure of consideration is in any way traceable to the buyer's own fault, he cannot recover.<sup>6</sup>

When the seller fails to deliver the goods or tenders goods which the buyer lawfully rejects; and even if the buyer has had the use of the goods and was deprived of them by their true owner, he may recover the price for the breach of the condition as to title.<sup>7</sup> Normally, however, where the buyer has had the goods he cannot recover the price as money had and received, and must bring an action for damages, *unless indeed he can rescind the contract*. Similarly, money given for a forged bill or note or railway scrip, bonds which are valueless as not being properly stamped, or specific goods which were not in existence at the time of the contract or have ceased to exist before the risk has passed to the buyer can be recovered. It is to be observed, however, that when, under the contract of sale, the risk has been transferred to the buyer and the goods perish, he has to bear the loss and cannot recover the price and generally if performance of the contract is frustrated, money paid and payable while the contract was still in force cannot be recovered; the loss lies where it falls.<sup>8</sup>

1. See *Williams v. Reynolds* (1865) 6 B. & S. 495; 141 R.R. 488; *Grebert Borgnis v. Nugent*, (1885) 15 Q.B.D. 85 C.A. at p. 89. For a summary of the rules as to damages for non-delivery, see *Benjamin on Sale*, 8th Edn., pp. 973, 976.  
2. *Royal Bank of Canada v. The King*, (1913) A.C. 283, 296 P.C.  
3. *Chanter v. Leese*, (1839) 5 M. & W. 698, 701, Ex. Ch., 51 R.R. 584, 600, 601; *Biggerstaff v. Rowatt's Wharf Ltd.*, (1896) 2 Ch. 93 C.A. at pp. 100, 101, 103; *Devaux v. Conolly*, (1849) 4 C.B. 640; 79 R.R. 659; *Rowland v. Divall*, (1923) 2 K.B. 500

4. (1928) 50 All. 82; see also *Mathura Mohan v. Ram Kumar*, (1916) 43 Cal. 790; 35 I.C. 305.  
5. *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93.  
6. *Boston Deep Sea Fishing Co. v. Ansell*, (1888) 39 Ch. D. 339; *Hall v. Burnell*, (1911) 2 Ch. 551.  
7. *Rowland v. Divall* (1923) 2 K.B. 500.  
8. See *Pollock & Mulla, Sale of Goods Act*, page 332; *Chandler v. Webster*, (1904) 1 K.B. 493 C.A.  
9. *Biggerstaff v. Rowatt's Wharf*, *supra*; *Cox v. Prentice*, (1815) 105 E.R. 641; 10 R.R. 228.



In cases where the consideration has failed only in part, the money cannot be recovered unless the consideration is severable.<sup>9</sup> A distinction must be made between "a failure of part of an entire consideration and a partial failure of the consideration." Benjamin has observed (p. 417) :

"A failure of part of an entire consideration is a failure of the whole consideration, and the rule of law is in such cases that 'where a sum of money has been paid for an entire consideration and there is only a partial failure of consideration, neither the whole nor any part of such sum can be recovered. On the other hand, if the consideration be originally severable, a failure of part is a total failure of that part, but of that part only and the buyer's rights are unaffected by the acceptance of the other parts of the consideration.'"

In *Johnson v. Johnson*<sup>1</sup>, where a house and parcel of land which had been separately valued, were sold for the aggregate of the value, and the plaintiff who was evicted from the house owing to defect of title, and, sued for the return of the purchase money of the house without giving up the land, it was *held* that the bargain was in effect two contracts and that the plaintiff could recover.

Where the contract is entire and the seller fails to perform part of it, the buyer may treat such failure and as a total failure to perform the contract, and recover the price<sup>2</sup> but if he accepts the partial performance, then, there is only a partial failure of consideration and neither the money nor any part of it can be recovered as money had and received.<sup>3</sup>

A contract, though originally entire, may be rescinded partially, and the money paid for the part unperformed could be recovered, where the contract is capable of severance, and the conduct of the parties shows assent to such severance.<sup>4</sup>

#### (6) Lien for storage charges.

In the case of sale of goods though the vendor has no lien for storage charges it is open to parties to make it a term of the original contract that owner should pay for the upkeep of the chattel while it is detained as a lien for non-payment of the price.<sup>5</sup>

#### (7) Rate of exchange.

Generally speaking, when a claim is to be converted into the currency of the country, the rate of exchange of the date of breach is taken.<sup>6</sup>

1. (1802) 127 E.R. 89, 6 R.R. 736.

2. *Giles v. Edwards*, (1797) 7 T.R. 181, 4 R.R. 414.

3. *Harnor v. Groves*, (1855) 15 C.P. 667, 100 R.R. 535.

4. *Devaux v. Conolly*, (1849) 137 E.R. 658; 79 R.R. 659. See also notes under section 37.

5. *Hazarimall v. Champalal*, A.I.R. 1943 Nag. 141; 207 I.C. 145; I.L.R. (1943) Nag. 272.

6. *Lebeaupin v. Crispin*, (1920) 2 Q.B. 714; non-delivery of goods sold, rate of exchange on the date of the breach taken. See also *Re Hodgson & Co.*, (1920) W.N. 198.



**(8) F.O.R. contract—Breach of goods re-sold—Right of seller to recover demurrage charges and commission paid to brokers—Recovery of railway freight by seller on breach.**

In *Majety Balkrishan Rao v. M/s Mooke Devassy*,<sup>1</sup> it was held: In a suit for damages brought by the seller for the non-performance of an F.O.R. contract the demurrage charges paid by him cannot be allowed inasmuch as he is bound to clear the goods when the buyer refuses to take delivery. Similarly, in regard to the commission and brokerage paid by the seller at the time of re-sale, he cannot claim those charges when it is found that he was not entitled to exercise the right of re-sale under S. 54 (2) of the Act.

Where the buyer contracts for purchase of goods and the contract is F.O.R. he is bound to pay the railway freight at the time of taking delivery of goods sent to him by railway. The mere fact that the seller has not claimed this sum under the specific head of 'special damages' does not preclude him from claiming that amount.

1. A.I.R. 1959 Andh. Pra. 30,



## CHAPTER VII

### MISCELLANEOUS

**\*62.** Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Exclusion of implied terms and conditions.

#### Synopsis

- |  |                               |
|--|-------------------------------|
| (1) <i>Exclusion of implied terms and conditions.</i>                      | (4) <i>Course of dealing.</i> |
| (2) <i>Nature and extent of the rule.</i>                                  | (5) <i>Usage.</i>             |
| (3) <i>Exclusion of terms implied by the Act must be in clear, and un-</i> | (6) <i>Ceaseure of usage.</i> |

#### (1) **Exclusion of implied terms and conditions.**

This section is merely an application of the general maxims *expressum facit cessare tacitum* and *modus et conventio vincunt legem*. A sale is consensual contract and the parties may alter at will the obligations which the law implies from the general nature of the contract.<sup>1</sup> As observed by Lord Blackburn, discussing the correlative obligations of payment and delivery: "There is no rule of law to prevent the parties from making any bargain they please."<sup>2</sup> Of course, if the agreement is forbidden by law, opposed to public policy, or immoral, it is void and of no legal effect. What is meant by saying that the parties can make any bargain they please is that they can impose any condition they like and thereby exclude the application of any terms or conditions which the law attaches to such contracts generally. The Act does not compel the parties to make their contracts according to the rules of law which it contains, and they may make what terms they please provided that the contract is not illegal. Thus they may exclude any of the terms or conditions which the law usually attaches to contract of sale, and create for themselves any special rights and obligations that they please, including, if they are so minded, provisions whereby the seller may derive an advantage from his own default.<sup>3</sup>

It is thus clear that the provisions of the Act are not absolute rules of law, but presumptions which could be negatived or rebutted by the express or implied terms of the particular contract.

\*Analogous law.

Sec. 55 of the English Sale of Goods Act, (1893)—Appendix A.

1. See Chalmers, *Sale of Goods Act*, 16th Edn., p. 8.
2. *Calcutta Co. v. De Mattos*, (1863) 32 L.J.Q.B. 322, at p. 328.

3. *Lancaster v. Turner*, (1924) 2 K.B. 222 C.A. See also *In re Bourgeois and Wilson Holgate & Co.*, (1920) 25 Com. Cas. 260; *Sitaram Bhaurao Deshmukh v. Sayyad Sirajul Khan*, 42 I.C. 32 (55) : 41 Bom. 636.



## (2) Nature and extent of the rule.

While applying this rule in estimating the effect of an express stipulation, in the words of Willes J., it must be borne in mind that "the doctrine that an express provision excludes implication does not affect cases in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer. This principle is confirmed by section 16, clause (4) *supra* which provides that "an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith." French Law goes even further and provides that where a stipulation in a contract of sale is ambiguous, it is to be construed in favour of the buyer.<sup>1</sup> This rule was recognised in Roman Law when it laid down: "*In contrahenda venditione ambiguum pactum contra venditorem interpretandum est.*"<sup>2</sup> In England the same result has been arrived at occasionally by giving effect to the maxim,—"*Verba Chartarum fortius accipiuntur contra proferentem.*"<sup>3</sup>

The provisions of this section are also subject to the ordinary rules governing the admissibility of oral evidence in relation to written contracts,<sup>4</sup> which in India are contained in section 92 of the Indian Evidence Act, 1872. To exclude a term implied by law, the express agreement must be inconsistent with it.<sup>5</sup> For instance, lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of express contract they have made.<sup>6</sup>

The question of what terms are to be implied in a contract is a question of law. "The courts, and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included. It must be such a necessary term that both parties must have intended that should be a term of the contract and have only not expressed it because its necessity was so obvious that it was taken for granted."<sup>7</sup>

The express agreement, to have the effect of excluding the term implied by law, must be one inconsistent with it.<sup>8</sup> Thus, where an express warranty is perfectly consis-

1. See French Civil Code, Art. 1602.  
2. Chalmers, 16th Edn., p. 10.  
3. The words of a deed are construed more strongly against the grantor. See *Roe v. Tranmarr*, 2 Wils. 76: Per Blackburn J. in *Fowkes v. Manchester Life Assn.*, 32 L.J.Q.B. 153 (159).  
4. *Re Walkers, Winsor etc.*, (1904) 2 K.B. 152.  
5. Section 16, clause (4) *supra*; *Bigge v. Parkinson*, (1862) 7 H. & N. 955.  
6. *Re Leith's Estate*, (1866) L.R. 1 P.C. 296 (305). See also *United States Steel Products Co. v. G.W. Railway*, (1916) A.C. 189 (195) H.L.  
7. *In re Comptoir-Commercial Anevrsois v. Power Son & Co.*, (1920) 1 K.B.

868, 899-900, C.A.; *Tournier v. National Provincial & Union Bank of England*, (1924) 1 K.B. 461, C.A.; *Official Assignee of Madras v. Frank Johnson Sons & Co.* (1931) 54 Mad. 409; A.I.R. 1931 Mad. 65: 128 I.C. 849.  
8. Section 16 (4) ante: *Bigger v. Parkinson*, (1862) 7 H. & N. 955; 126 R.R. 783; *Johnson v. Raylton*, (1881) 7 Q.B.D. 438, C.A.; *Mody v. Gregson*, (1837) L.R. 4 Exch. 49 Ex. Ch.; *Drummond v. Van Ingen*, (1887) 12 App. Cas. 284; *Hanutmal Bhutoria v. Dominion of India*, A.I.R. 1961 Cal. 54—such stipulations should not be illegal.



tent with a warranty implied by law, the latter will not be displaced.<sup>1</sup> The principle of this section was applied in an Allahabad ruling in which parties had agreed that seller might re-sell against the buyer in breach, even, though the goods might not have been appropriated towards the contract.<sup>2</sup>

The agreement by which it is sought to vary or negative the incidents arising by implication of law from the contract of sale must be express and not be only implied from the circumstances of the case except in the case where instead of an express agreement reliance is placed on the course of dealings between the parties, in which case agreement to such effect may be inferred from such dealings. So, where the parties have come to an express agreement, none can be implied,<sup>3</sup> and where the parties have expressed in words of acts the condition of warranty by which they mean to be bound, any other condition or warranty inconsistent therewith is excluded thereby.<sup>4</sup> So also an express warranty is never extended by implication of law.<sup>5</sup> But these limitations, as has already been pointed out, do not apply where the express provision appears to have been superadded for the benefit of the buyer.<sup>6</sup>

In *K.C.N. Gowda and Bros. v. Molakram Tekchand and Sons*<sup>7</sup>, it was held: The right or liability which can, under S. 62, be varied or negatived by express agreement or by the course of dealing is the right or obligation which arises by implication of law. But the obligation to perform a contract which the time mentioned in the contract is an obligation which arises under the terms of the contract itself and not by virtue of any implication of law. In other words, if the contract itself mentions the time within which it had to be performed, the parties are under a liability to perform contract within that time because the contract mentions it and not because of any implication of law. Further, so far as the course of dealing on which reliance is placed must be the course of past dealings between the parties and not the dealings in connection with the very contract which is the subject-matter of the dispute. In other words, in each case the question is as to the implication to be drawn from the past as applied to a new transaction.

#### **(8) Exclusion of terms implied by the Act must be in clear and unambiguous language.**

The party who wishes to exclude or escape from terms and conditions by which he would normally be bound must do so in clear and unambiguous language. He cannot rely on an ambiguous document. The Act definitely draws distinction between conditions and warranties. Sometimes the parties use the word "warranty" or "guarantee" in their contracts, when in all probability they mean what the Act calls a condition, with the result that they find that they have not excluded an implied condition, by which therefore they are still bound.<sup>8</sup> In particular the

1. *Bigge v. Parkinson*, supra; cf. *Elderslie S.S. Co. v. Borthwick*, (1905) A.C. 93; *Gordon Alison v. Wallsend S. & Eng. Co.*, (1926) 43 T.L.R. 104.

2. *Sheo Narain v. N.S.S. & G. Co.*, A.I.R. 1938 All. 272; 175 I.C. 552.

3. *Catter v. Powell*, 6 T.R. 320.

4. *Parkinson v. Lee*, 2 East 314.

5. *Dickson v. Zizjnia*, 20 L.J. C.P. 72.

6. *Mody v. Gregson*, (1868) L.R. 4 Exch. 49 (53); *Drummond v. Van Ingen*, (1887) 12 App. Cas. 284 (294).

7. A.I.R. 1958 Mys. 10.

8. See, for instance, *Wallis v. Pratt*, (1911) A.C. 394; *Baldry v. Marshall*, (1925) 1 K.B. 290, C.A.; *Barker (Junior) v. Agius Ltd.*, (1927) 43 T.L.R. 751.



efforts to exclude by agreement the buyer's right to reject are constantly falling owing to a failure to appreciate the full result of the implied condition that the goods must answer the description or be of the contract quantity.<sup>1</sup>

#### (4) Course of dealing.

In *Pocahontas Fuel Co. v. Ambatielos*<sup>2</sup>, McCardie J. discussing the expression observed :

"That phrase means, I conceive, that past business between the parties raised an implication as to the term to be implied in a fresh contract, where no express provision is made on the point at issue.....I think that a course of dealing may arise with equal force whether from a written or parol bargain, or from the repeated occurrence of similar methods as between the parties. In each case the question is as to the implication to be drawn from the past as applied to a new transaction."

As in the case of express agreement, the course of dealing must point clearly to an unambiguous agreement to create obligations or right which do not normally attach to a contract of sale, or to negative or vary those which normally attach. It is also doubtful whether parties can, by course of dealing, practically contract themselves out of the essential requirements of the statute, for instance, dispense with the necessity of tendering the proper document under a c.i.f. contract.<sup>3</sup>

In *Haridas Ranchordas v. Mercantile Bank*<sup>4</sup>, it was held that the course of dealing between the Bank and its customer (to whom overdrafts had been allowed) showed that there was an agreement to pay compound interest. In *Venkatachalam v. Ponnuswami*<sup>5</sup>, in a suit by a commission agent for value of goods consigned, where the defendants pleaded negligence of the plaintiff in not getting the goods insured, the court held from the course of dealings between the parties which showed that the goods were always sent without being insured, that incidence of the risk lay with the defendants. Similarly, in *Alagappa v. Roopchand*<sup>6</sup>, the court declined to apply section 91 of the Contract Act (relating to proper delivery to the carrier) to the circumstances of the case, as the

I. See Pollock & Mulla, Sale of Goods Act, p. 337 ; Green v. Arcos, (1931) 47 T.L.R. 333, C.A. ; Meyer Ltd. v. Osakeyhtio Carelia Timber Co., (1930) 36 Com. Cas. 17, 142 L.T. 480 : "I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart...Commercial men carry on an enormous mass of business under the system of string contracts under which A, who has made a contract with B, goes to arbitration with Z, of whom he never before heard and with whom he has in the eyes of the law no contractual relations. Their view of damages as a sufficient remedy for breach of contract entirely differs from the law's remedy of rejection. The commercial man does not think

there can be no contract to make a contract, when every day he finds a policy 'premium to be agreed' treated by the law as contract." Scrutton L.J. W.N. Hillas & Co., v. Arcos Ltd., (1931) 36 Com. Cas. 353, 368.

2. (1922) 27 Com. Cas. 148, 152, 153.

3. Malmberg v. H.J. Evans & Co., (1924) 41 T.L.R. 38, 40, C.A., per Atkin L.J., 30 Com. Cas. 107 ; cf. Steel Brothers Ltd. v. Dayal Khatao & Co., (1923) 47 Bom. 94 ; A.I.R. 1924 Bom. 247 ; 87 I.C. 67.

4. A.I.R. 1920 P.C. 61 ; 44 Bom. 474 ; 55 I.C. 552.

5. A.I.R. 1925 Mad. 46 ; 82 I.C. 536.

6. A.I.R. 1929 Mad. 635 ; (cf.) Holmes Wilson v. Bata Kristo, A.I.R. (1927) Cal. 668 ; (1927) 54 Cal. 549



long course of dealing between the parties decidedly pointed to the exclusion of section 91 (of the Contract Act) with regard to dealing between the parties.

It has been observed that evidence of previous course of dealings between the parties is only admissible to explain the meaning of the terms used in a contract and not to impose on a party an obligation as to which the contract is silent.<sup>1</sup> Where it is necessary to imply some terms and no rule of law applies, a usual practice or course of business which the parties<sup>2</sup> may be presumed to have known and with reference to which, it is reasonable to suppose, they contracted, becomes material to show their intention though it is not a definite or uniform practice.<sup>2</sup> So delivery of less or more than the contract quantity or the passing of the risk when the contract is silent may be good subject to be governed by course of dealing between the parties.<sup>3</sup>

### (5) Usages.

In commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. This is done upon the principle of presumption that in such transactions and in such contracts the parties do not mean to express in writing the whole of the contract by which they intend to be bound, but they contract with reference to those known usages.<sup>4</sup> If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply, on a part of one who contracts or employs another to contract from him upon a matter to which such custom or usage has reference, a promise for the benefit of the other party in conformity with such usage or custom, provided there be no express stipulation between them which is inconsistent with such usage.<sup>5</sup> When, however, such invariable usage is proved it is to be considered as the basis of the contract between the parties, and their respective rights and liabilities are held to be precisely the same as if without any usage they had entered into a special agreement to the like effect.<sup>6</sup> This is in conformity with the maxim, "*in contractibus tacite insun eaque sunt moris et consuetudinis.*" This tacit variation of the terms from those which would otherwise be implied by law, has the same effect as if it was express.<sup>7</sup> This rule is, however, subject to the following two qualifying exceptions,<sup>8</sup> namely, (1) as regards a person who does not know and assent to a usage a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character; and (2) if and so far as a contract of sale is in writing,<sup>9</sup> evidence of any usage inconsistent with the writing is inadmissible.<sup>10</sup>

1. Ghella Bhai v. Nandubhai, 20 Bom. 238.

2. Remfry, p. 502, citing Lewis v. G.W. Ry., 3 Q.B.D. 196; The Curfew, (1891) p. 131 but see the Nifa, (1892) p. 411; Walker v. Johnson, 10 W. & M. 161; Watts v. Grant, 26 Sc. L.R. 660; Dickson v. Lano, 2 F. & F. 188.

3. See Remfry, pp. 264, 220; Dunlop v. Lambert, 6 C. & F. 600 H.L.

4. Per Lord Wensleydale, in Hutton v. Warren, 1 M. & W. 466 (475).

5. Per Lord Attenborough in Raitt v. Mitchell, 4 Camp. 146 (149), followed in Volkart Brothers v. Vettivelu Nan-

dans, 11 Mad. 459 (461).

6. Ibid.

7. Per Blackburn J. in Mollett v. Robinson, L.R. 7 C.P. 84 (103); cf. Produce Brokers Co. v. Olympia Oil and Cake Co., (1916) A.C. 314 (331) S.C. (1917) 1 K.B. 320 (330).

8. Chalmers 13th Edn., pp. 167-168. See also 16th Edn., p. 14.

9. Mollett v. Robinson, L.R. 5 C.P. p. 646 and Robinson v. Mollett, (1875) L.R. 7 H.L. 802.

10. Miller, Gibb & Co. v. Smith and Tyrer, (1917) 2 K.B. 141 C.A.; Re Sutro & Co. (1917) 2 K.B. 348 C.A.



Usages are imported into contracts as implied terms, not because they have any intrinsic authority, but because the parties are deemed to have contracted with reference to them.<sup>1</sup> A business custom, therefore, as opposed to a land or family custom need not possess the attribute of antiquity,<sup>2</sup> and, whilst the length of time during which a usage has existed is of some importance in determining whether it has become established,<sup>3</sup> it may be of recent origin.<sup>4</sup> It may be in the course of growth.<sup>5</sup>

To make out a trade usage it needs only be shown (i) that it is certain and part of the agreement between the parties by necessary implication, (ii) that it is reasonable and not inconsistent with law,<sup>6</sup> (iii) that it was so universally acquiesced in that everybody in the trade knew it or could have ascertained it, if he had taken the pains to enquire.<sup>7</sup> It is not necessary to prove that the party who is sought to be bound by it was actually aware of it. *"The usage must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."*<sup>8</sup> For a decision to be based upon a usage of trade, there must be sufficient evidence to show that the usage was so universal as to become part of the contract between the parties by operation of law.<sup>9</sup> Where there is reliance on custom there is necessarily a variation from the written contract but the variation should not be in contradiction of or repugnant to it.<sup>10</sup> Evidence of a custom not inconsistent with the contract can be admitted but a mercantile custom obliging the purchaser in contravention of the written contract, for instance, to accept goods not of the stipulated kind, can be of no avail in a suit for the recovery of goods under the contract.<sup>11</sup>

A usage must be general and it is not sufficient that it should be recognised as applying to a majority of cases.<sup>12</sup> The party setting it up must prove it, if it be disputed.<sup>13</sup> The usage to be binding, must be known or taken to be known to both parties.<sup>14</sup> The most cogent evidence of usage is not that which is afforded by the expression of opinion as to its existence, but the enumeration of instances in which the alleged usage has been acted upon and the proof afforded by judicial or revenue record or private accounts and receipts that the usage had been enforced.<sup>15</sup> The

1. See Pollock & Mulla, Sale of Goods Act, p. 338.

2. Jamna Das v. Chetandas, A.I.R. 1928 Bom. 487 : 112 I.C. 610, following Plaid v. Allcock (1866) 176 E.R. 913, 142 R.R. 747; Bechuanaland Exploration Co. v. London Trading Bank, (1898) 2 Q.B. 658; Moulton v. Halliday, (1898) 1 Q.B. 125.

2. Edelstein v. Schular & Co., (1902) 2 K.B. 144.

4. Bechuanaland Exploration Co. v. London Trading Bank, supra.

5. Moulton v. Halliday, supra.

6. Mercantile Bank v. Rochaldas, A.I.R. 1926 Sind 225.

7. Russian Steam Navigation Trading Co. v. Silva, (1863) 143 E.R. 242; 134 R.R. 676; Robinson v. Mollett, L.R. 7 H.L. 802, cited in Paul Beier v. Chotalal, 30 Bom. 1 (15).

8. Jagmohan v. Manik Chand, (1859) 7

M.I.A. 263. See also Chandanmull v. National Bank, A.I.R. 1924 Cal. 552; 51 Cal. 43; 79 I.C. 57; Wittenbaker v. J.C. Ganlortaun, (1917) 44 Cal. 917; 43 I.C. 11.

9. Mackenzie Lyall & Co. v. Chamroo & Co., 16 Cal. 702.

10. Ruttonsi Rowji v. Bombay United Spg. Mfg. Co., 41 Bom. 518.

11. Ibid.

12. Holderness v. Collinson, (1827) 7 B. & C. 212, 31 R.R. 174.

13. Balaram Paramsukhdas v. Gudiyatam Govinda Chetty, A.I.R. 1925 Mad. 1232; 91 I.C. 257.

14. Robinson v. Mollett, (1875) 7 H.L. 802.

15. Lachman Rai v. Akbar Khan, 1 All. 440; Gurdayal v. Jhandu, 10 All. 585; Paul Beier v. Chotalal, 10 Bom. 1 (15); Rahimatbai v. Hirabai, 3 Bom. 34; Gopal v. Hammant, 3 Bom. 273 (297).



series of acts by which an usage is to be established must be uniform and constant.<sup>1</sup> Litigation is a test of the existence of a custom but not its sole proof.<sup>2</sup> There is a difference between custom and what is customarily done.<sup>3</sup> An usage implies a rule which must be followed under compulsion,<sup>4</sup> and to which the benefited can claim adherence by the other party as of right,<sup>5</sup> and not only as a business practice,<sup>6</sup> though a business practice also if long continued may raise a presumption of its being compulsory.<sup>7</sup> It is not sufficient to prove that certain leading merchants of a place consider it desirable.<sup>8</sup>

In *Smith v. Ludah*,<sup>9</sup> Farren J. in discussing the admissibility of evidence (as to an usage in the Bombay piece-goods trade) under section 92, proviso (5), Indian Evidence Act, cited a passage from *Hutton v. Warren*<sup>10</sup> :

“It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent .....And this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound but to contract with reference to those known usages.”

This evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument relating to the contract.<sup>11</sup>

For the application of the rule stated above the usage must be binding on both the parties. If the usage is such that it is binding on one party only, as belonging to a particular class or community or locality to which the usage applies, and does not bind the other party to the contract because of his belonging to a class or community or locality different from that to which the usage applies, the rule contained in this section will not vary or negative any right, duty or liability arising under the contract by implication of law. For instance, there may be a usage which may be confined to mutual dealings of the merchant of a particular locality or market. Such usage is not binding on a merchant who does not belong to that locality or market and as such does not vary or negative the legal incidents of a contract of sale which a merchant belonging to such locality or market may enter into with one who does not so belong.<sup>12</sup> Where other conditions noted above as to validity and application are satisfied the fact that the area to which it extends is small,<sup>13</sup> or that the

1. *Superunddhwaja v. Garurddhwaja*, 15 All. 147.
2. *Syud Mohammad Afzal v. Kanhyalal*, 5 W.R. 42.
3. *In re N.W. Rubber Co.*, (1908) 2 K.B. 919; *Ropner v. Sloate*, 10 Com. Cas. 73.
4. *Attwood v. Sellar*, 7 Q.B.D. 286.
5. *Ibid.*
6. *Ibid.*
7. *Sivendson v. Wallace*, 10 App. Cas. 404.
8. *The Steamship Co. v. Price*, 8 Com.

- Cas. 292.
9. (1892) 17 Bom. 129.
10. (1836) 150 E.R. 517, 1 M. & W. 466.
11. *Leopold Walford v. Affreteurs Reunis S.A.* (1918) 2 K.B. 498, C.A.; *Holmes Wilson & Co. Ltd. v. Bata Kristo*, A.I.R. 1927 Cal. 668; (1927) 54 Cal. 549.
12. *Daun v. City Brewery*, L.R. 8 Ex. 161.
13. *Norden Steamship Co. v. Dempsey*, 1 C.P.D. 654; *The Sheilla* (1909) p. 31.



class of persons to which it applies is limited,<sup>1</sup> or that it is only the usage of a particular trade,<sup>2</sup> or market<sup>3</sup> or business,<sup>4</sup> or if such trade,<sup>5</sup> or business,<sup>6</sup> in a particular town or of a trade between two parts as to all commodities or as to one only,<sup>7</sup> is immaterial.

#### (6) Ceasure of usage.

A mercantile usage like any other usage may die out by the coming into existence of another inconsistent usage,<sup>8</sup> but the mere fact that it is frequently excluded by inconsistent contracts does not show that it has become extinct.<sup>9</sup>

**\*63.** Where in this Act any reference is made to a *Reasonable time* reasonable time, the question what is a *a question of fact.* reasonable time is a question of fact.

This section relates to the import of the term "reasonable time" and is based on section 56 of the English Sale of Goods Act, 1893 (Appendix A). The same provision exists in the *Explanation* to section 46 of the Indian Contract Act, 1872. Before the passing of the English Sale of Goods Act the question of what is a reasonable time was regarded as a question of law and decided with reference to certain artificial rules. The English Act altered the law on the point and made it a question of fact.<sup>10</sup>

References to reasonable time are made in sections 24, 36 (2), 42, 44 and 54 (2). Section 36 (4) makes the same provision as to what is a reasonable hour.

Auction sales. **\*\*64.** In the case of a sale by auction—

(1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale ;

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner ; and, until such announcement is made, any bidder may retract his bid ;

(3) a right to bid may be reserved expressly by or on behalf of the seller and where such right is expressly so

1. Temple v. Runnalls, 18 T.L.R. 822.

2. Syers v. Jonas, 2 Ex. 117 ; Swancott v. Westgarth, 4 East 75.

3. Pollock v. Stables, 17 L.J.Q.B. 352.

4. Cotton v. Sonnes, 18 T.L.R. 456.

5. Mollett v. Robinson, L.R. 7 H.L. 802.

6. Fleet v. Murton, 41 L.J.Q.B. 49.

7. Taylor v. Briggs, 2 C. & P. 525 ; Gould v. Oliver, 7 L.J. C.P. 68.

8. Moul v. Halliday, (1898) 1 Q.B. 125.

9. Ropner v. Sloate, 92 L.T. 328.

\*Analogous law.

Section 56 of the English Sale of

Goods Act, (1893)—Appendix A ; Section 46—Explanation, of the Indian Contract Act, 1872.

10. See Ramudu Iyer v. Ramayyar, A.I.R. 1926 Mad. 221 ; 78 I.C. 1051 ; Empire Engineering Co. v. Municipal Board, Bareilly, A.I.R. 1929 All. 801 ; 119 I.C. 853.

\*\*Analogous law.

Section 53 of the English Sale of Goods Act, 1893—Appendix A. Sections 122 and 123 of the Indian Contract Act, 1872—Appendix B.



reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction ;

(4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person ; and any sale contravening this rule may be treated as fraudulent by the buyer ;

(5) the sale may be notified to be subject to a reserved or upset price ;

(6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

### Synopsis

- |  |   |
|--|---|
| (1) <i>Auction sales.</i>                                | <i>a bid by or on behalf of the seller.</i>                               |
| (2) <i>Sub-section (1)—each lot a separate contract.</i> | (7) <i>Sub-section (4)—remedy of the buyer if seller bids improperly.</i> |
| (3) <i>Sub-section—(2)—auction sale when complete.</i>   | (8) <i>"Knock-outs".</i>  |
| (4) <i>Authority of auctioneer.</i>                      | (9) <i>Sub-section (5).</i>   |
| (5) <i>Rights and liabilities of the auctioneer.</i>     | (10) <i>Sub-section (6).</i>  |
| (6) <i>Sub-section (3)—right to recover</i>              | (11) <i>Notification of auction sale.</i>                                 |
|  | (12) <i>Damping the sale.</i>   |
|  | (13) <i>Transfer of the property.</i>                                     |

The section follows section 58 of the English Act though the arrangement of the different provisions has been altered. Sub-section (5) re-enacts the provisions of section 123 of the Indian Contract Act, 1872.

This section only deals with the right and liabilities of the parties to the contract of sale. It has nothing to do with the rights and liabilities of the auctioneer either in relation to his principal or to the buyer.

Sale by an auction is a sale as contemplated by the Sale of Goods Act, 1930.<sup>1</sup>

#### (1) Auction sales.

Sales by auction are according to Benjamin of three kinds :<sup>2</sup>

1. Sale without reserve where the employment of a buffer renders the sale voidable.

2. Sale with a condition that the highest bidder shall be the purchaser, nothing being said about reserve.

3. Sale with a right expressly reserved to bid by or on behalf of the seller.

1. *C.S. Bureau v. I.T. Commissioner*, A.I.R. 1973 S.C. 376, cited at p. 162 *ante*.

2. *Benjamin on Sale*, 8th Edn., pp. 461, 462. As to essentials of an auction,

see *Raja Bhupendra Narain v. Maharaj Bahadur*, A.I.R. 1933 Cal. 54. See also *Halsbury's Laws of England*, 3rd Edn., Vol. 34, p. 232 for the meaning of 'sale by auction'.



A sale subject to a reserve price and the reservation of a right to bid are distinct matters.<sup>1</sup>

**(2) Sub-section (1)—each lot a separate contract.**

The rule in this sub-section is similar to the provision in section 122 of the Indian Contract Act which is now repealed, though perhaps more guarded.<sup>1</sup> It provides that each lot shall be deemed to be sold under a separate contract. This is, however, only a *prima facie* rule, and therefore subject to a contrary intention.

But the nature of the contract or its subject-matter or circumstances known to both seller and buyer may show that two or more sales at auction were intended by both to be interdependent.<sup>2</sup>

A condition that the goods shall not be removed until payment does not prevent the buyer to whom a lot has been knocked down from reselling the goods forthwith.<sup>3</sup>

The mere fact that a man purchases several lots does not convert his purchases into a single contract.<sup>4</sup>

**(3) Sub-section (2)—auction sale when complete.**

The bid constitutes the offer in a contract of sale by auction. The acceptance of the bid by the auctioneer, when communicated by him by the fall of the hammer or in any other customary manner, completes the sale. Being only an offer, a bid may be retracted at any time before it is accepted.<sup>1</sup> The old English Common Law rule was the same,<sup>5</sup> and it was followed in British India before the Act.<sup>6</sup>

As the offer may be retracted before acceptance, so conversely, it has been held that if a sale be advertised but lots are afterwards withdrawn, an intending bidder has no right of action.<sup>7</sup> Where, however, it turns out that the representation that the auctioneer was authorised to sell, was false and made fraudulently, intending purchasers incurring expenses on the faith of such representation can sue the auctioneer in tort for the recovery of such expenses and for damages for the loss of time.<sup>8</sup> It is common to insert in condition of sale a proviso that biddings shall not be retracted, but it seems that such condition is inoperative in law, for a one-sided declaration cannot alter the bidder's rights under the general law, nor is there any consideration for his assenting to it even if he could be supposed to assent by attending the sale with notice of the conditions.<sup>9</sup>

1. *Emmerson v. Heelis*, (1809) 2 Taunt. 38, 11 R.R. 520 ; *Roots v. Lord Dormer*, (1832) 5 B. & Ad. 77, 38 R.R. 231. For an instance of the presumption being rebutted, see *Franklyn v. Lamond*, (1847) 4 C.B. 637, 72 R.R. 671.
2. (Cf.) *Holiday v. Lockwood*, (1917) 2 Ch. 47 ; *Dykes v. Blake*, (1838) 132 E.R. 866 ; 44 R.R. 761.
3. *Scott v. England*, (1844) 2 D. & L. 520, 69 R.R. 868.
4. *McManus v. Forte-cue*, (1907) 2 K.B. 1, C.A. ; *Payne v. Cave*, (1789) 3 T.R.

- 148, 1 R.R. 679 ; Indian Contract Act, section 5 ; *Champa Lal v. Jai Gopal*, A.I.R. 1922 Mad. 486.
5. *Payne v. Cave*, *supra* ; *Warlow v. Harrison*, (1858) 28 L.J.Q.B. 18, at p. 21, 117 R.R. 219, 223.
6. *Agra Bank v. Hamlin*, (1890) 14 Mad. 235.
7. *Harris v. Nickerson*, (1873) L.R. 8 Q.B. 286.
8. *Richardson v. Silvester*, L.R. 9 Q.B. 34.
9. See *Freer v. Rimner*, (1844) 14 Sim. 391 ; 65 R.R. 617.



Where a bid is accepted subject to the owner's sanction, the bid can still be withdrawn. Thus, when the bid of an agent at auction sale was accepted by the auctioneer *kutchapucca* (subject to sanction of the owner of the goods) and the agent agreed thereto, it was *held* that this did not preclude the principals of the agent from exercising their right to retracting the bid before it was accepted by the auctioneers.<sup>1</sup>

Where a bid is accepted by the auctioneer subject to the approval of his vendor, the contract becomes binding as soon as the vendor signifies his assent, and the mere fact that the actual bidder was only a benamidar for another person does not vitiate the sale.<sup>2</sup>

When the sale is announced to be subject to the reserve price, every bid and the acceptance by the auctioneer are subject to the reserve price having been reached.<sup>3</sup>

Even if there is a condition that the goods shall be taken away and paid for within a given time, and upon failure of the buyer to comply with that condition they shall be re-sold, the buyer may still be sued for the price, and cannot claim that the goods must be re-sold and the difference between the contract price and the re-sale price alone be charged against him.<sup>4</sup>

#### (4) Authority of auctioneer.

An auctioneer who sells goods which he has no right to sell may or may not be guilty of conversion, according to the circumstances.<sup>5</sup> As a rule, he would be liable to the true owner for conversion, or to the owner's assignee for value, even though he had no notice of the assignment.<sup>6</sup>

An auctioneer has implied authority to sign a contract on behalf of both buyer and seller,<sup>7</sup> an authority which does not, however, extend to his clerk.<sup>8</sup>

The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction.<sup>9</sup>

Authority to sell by auction does not imply any authority to sell by private contract, in the event of the public sale proving abortive, even though the auctioneer be offered a price in excess of the reserve.<sup>10</sup> An auctioneer has no implied authority to give a warranty on behalf of the seller<sup>11</sup>; nor has he implied authority to rescind a contract of sale made by him.<sup>12</sup> Similarly, he has no implied authority to deliver goods sold

1. Mackenzie v. Chamroo, (1889) 16 Cal. 702.

2. Chitibahu v. Garmalla, 29 I.C. 12.

3. McManus v. Fortescue, *supra*.

4. Robinson, Fisher & Harding v. Behar, (1927) 1 K.B. 513; cf. section 54 and notes thereunder.

5. Consolidated Co. v. Curtis & Son, (1892) 1 Q.B. 495, 498; Barker v. Furlong (1891) 2 Ch. 172.

6. Consolidated Co. v. Curtis, *supra*.

7. Emmerson v. Heelis, (1809) 2 Taunt. 38; 11 R.R. 520; White v. Proctor, (1811) 4 Taunt. 209; 13 R.R. 580. But

see Bartlett v. Purnell, (1836) 4 A. & B. 792; 48 R.R. 484.

8. Bell v. Balls, (1897) 1 Ch. 663; cf. Sims v. Landary, (1894) 1 Ch. 318.

9. Mews v. Carr, (1856) 1 H. & N. 484, 108 R.R. 683.

10. Daniel v. Adams, (1764) Ambl. 495; Marsh v. Jelf, (1862) 3 F. & F. 234, 130 R.R. 830.

11. Payne v. Leconfield, (1882) 51 L.J.Q.B. 642.

12. Nelson v. Aldridge, (1818) 2 Stark. 435, 20 R.R. 709.



except on payment of the price, or to allow the buyer to set off a debt due to him from the seller.<sup>1</sup>

An auctioneer has no implied authority to take a bill of exchange in payment of the deposit, or the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him,<sup>2</sup> but he may take a cheque in payment of the deposit according to the usual custom.<sup>3</sup>

#### (5) Rights and liabilities of auctioneer.

An auctioneer is a particular agent employed to sell property of the vendor. He acts in a two-fold capacity. Till the fall of the hammer, he is an agent for the seller but when the sale is complete, he becomes an agent of the buyer and has thus an authority to sign a contract on behalf of both the vendor and the purchaser.<sup>4</sup> The auctioneer may sell the goods and sue for the price in his own name and the position is not altered by the fact that the sale takes place on the owner's premises or his name is disclosed at the time of the sale,<sup>5</sup> and can maintain an action for wrongful interference with them or damages to them. He has a lien upon the goods as well as on the proceeds of the sale for his charges and advances and he, therefore, does not lose the right to sue for the price by allowing the buyer to remove the goods before payment.<sup>6</sup> The buyer therefore cannot set off against him any debt, due to the buyer from the owner, except in so far as the amount sought to be set off exceeds the auctioneer's interest. This usually represents the auctioneer's charges and expenses but by special agreement between the owner and the auctioneer it may be increased to cover other debts due from the owner to the auctioneer and also an obligation incurred by the auctioneer to pay other creditors of the owner in pursuance of an agreement to which the owner, auctioneer and those creditors are parties.<sup>7</sup> For same reason, the buyer cannot plead payment to the owner in answer to an action for the price by the auctioneer.<sup>8</sup> Even an express agreement between the owner and the buyer that the latter may set off the price of the goods bought against a debt due to him from the owner will not affect the auctioneer's position unless he has notice of and assents to it,<sup>9</sup> though if and in so far as the auctioneer's interest is satisfied, such an agreement may be pleaded as a defence to an action by the auctioneer.<sup>10</sup> Of course, the auctioneer may, by assenting, either expressly or impliedly, to such an agreement, waive his own rights.<sup>11</sup>

It may be observed that an auctioneer may like any other agent, by not disclosing the fact that he is an agent, render himself liable to be treated as a principal by the buyer, and in such a case his position will

1. *Brown v. Staton*, (1816) 2 Chit. 353, 22 R.R. 570.

2. *Williams v. Evans*, (1866) L.R. 1 Q.B. 352.

3. *Farrer v. Lacey*, (1885) 31 Ch. Div. 42.

4. *Emmerson v. Heelis*, supra; *White v. Proctor*, supra.

5. *Williams v. Millington*, (1788) 1 Hy. Bl. 81, 2 R.R. 24; *Manley & Sons Ltd. v. Berkett*, (1912) 2 K.B. 329, 333; cf. *Freeman v. Farrow*, (1886) 2 T.L.R. 547, where the auctioneer was held entitled to sue for the price of goods sold on his premises though the

owner himself effected the sale.

6. See *Kharas v. Bawanji*, A.I.R. 1926 Sind 6 : 92 I.A. 394; *Webb v. Smith*, (1885) 30 Ch. D. 192.

7. *Manley & Sons Ltd. v. Berkett*, supra; *Holmes v. Tutton*, (1855) 5 E. & B. 65, 103 R.R. 367.

8. *Manley & Sons v. Berkett*, supra.

9. *Robinson v. Rutter*, (1855) 4 E. & B. 954, 99 R.R. 849.

10. *Manley & Sons Ltd. v. Berkett*, supra.

11. *Grice v. Kendrik*, (1870) L.R. 2 Q.B. 340.

12. See *Pollock & Mulla, Sale of Goods Act*, page 346.



be that of a seller of the goods. Such cases, however, are rare and usually it is known that he is an agent, though his principal may not be disclosed.

It is not open to an auctioneer to delegate his authority, though he may employ others where the work is of a merely mechanical character and is done under his direction.<sup>1</sup> On the sale of specific goods, where he discloses the fact of agency, though he does not disclose the name of his principal,<sup>2</sup> he gives no implied warranty of the vendor's right to sell.

The auctioneer is entitled to indemnity from his employer for the consequences of acting on his authority and he can claim reimbursement in respect of damages recovered against him by the true owner of goods.<sup>3</sup>

There is thus created a sort of contract between the auctioneer and the buyer, though it does not amount to a contract of sale in the full sense of the term, but a contract made with the auctioneer on his own account with the buyer. The auctioneer no doubt warrants his authority to sell on behalf of his principal<sup>4</sup> and also, that he knows of no defect in his principal's title,<sup>5</sup> and probably, even apart from express agreement, he undertakes to give the purchaser possession of the goods on payment of the price into his hands and that such possession shall not be disturbed by his principal or himself.<sup>6</sup>

In *Rainbow v. Hawkins*,<sup>7</sup> it was held that an auctioneer has ostensible authority to sell without reserve, and if, after the acceptance to a bid, the seller sets up a restriction of the auctioneer's authority not disclosed to the buyer, the latter's remedy is against the seller on the contract of sale, and not against the auctioneer. This decision has been criticised in the later case of *McManus v. Fortescue*<sup>8</sup> which laid down that an auctioneer is a special agent, and has no ostensible authority to sell without reserve.

An auctioneer may therefore be liable to the buyer if he fails to deliver or put the buyer in possession of the goods<sup>9</sup> but if he does so, he has completed his contract : and it would seem that he does not warrant his principal's title to the goods.<sup>10</sup>

If, however, before the price is paid, the true owner of the goods claims them from the buyer, the auctioneer cannot recover the price, even if the buyer has taken the goods away under an express promise to pay for them,<sup>11</sup> and presumably if the price, or any part of it, has been paid to the auctioneer and the money still remains in his hands the buyer may recover it from him in an action for money had and received.<sup>12</sup>

1. *Coles v. Tercothick*, (1805) 7 E.R. 167 ; 32 R.R. 592.

2. *Benton v. Campbell Parker & Co.*, (1925) 2 K.B. 410.

3. *Adams v. Jarvis*, (1827) 130 E.R. 693 ; 29 R.R. 503 ; *Halbrow v. International Horse Agency*, (1903) 1 K.B. 270.

4. *Anderson v. Croall & Sons Ltd.*, (1904) 6 F. 153 (Court of Session) in which case the auctioneer purported to sell goods which the owner had not authorised him to sell ; *Benton v. Campbell Parker & Co.*, (1925) 2 K.B. 410, 415.

5. *Benton v. Campbell Parker & Co.*,

supra.

6. *Ibid.*, p. 416.

7. (1904) 2 K.B. 322.

8. (1907) 2 K.B. 1 C.A.

9. *Franklyn v. Lamond*, (1847) 4 C.B. 637 ; *Woolfe v. Home*, (1877) 2 Q.B.D. 355 ; *Rainbow v. Hawkins*, supra.

10. *Wood v. Baxter*, (1883) 49 L.T. 45 ; *Salter v. Woollams*, (1841) 2 Man. & G. 650, 58 R.R. 513 ; *Payre v. Elsdon*, (1900) 17 T.L.R. 161 ; *Benton v. Campbell Parker & Co.*, supra.

11. *Dickenson v. Naul*, (1893) 4 B. & Ad. 638, 72 R.R. 671.

12. *Pollock & Mulla, Sale of Goods Act*, p. 348.



If the buyer avoids a sale by reason of any contravention of the provisions of sub-sections (3) and (4), he may resist an action for the price by the auctioneer; and also recover the deposit from him, if the auctioneer has been a party to the fraud, with interest.<sup>1</sup>

If the auctioneer does not disclose his principal and the sale is not announced as being subject to reserve price, does he warrant that he has authority to sell without reserve? It seems possible though the point is not free from doubt.<sup>2</sup>

As already stated, if an auctioneer sells goods which in fact belong to third person without that person's authority he may be guilty of conversion, and is so guilty if he delivers the goods with intent to pass the property in them to the buyer.<sup>3</sup> But when he merely negotiates a sale and earns a commission, he is not guilty of conversion.<sup>4</sup>

An auctioneer will be entitled to an indemnity from the person who employed him to sell the goods under the provisions of section 223 of the Indian Contract Act.

In *Couchman v. Hill*,<sup>5</sup> the plaintiff bought at an auction sale a heifer belonging to the defendant and described in the sale catalogue as a "red and white stripe heifer, unserved". The catalogue contained the following words: "All lots must be taken subject to all faults for errors of description (if any), and no compensation will be paid for the same." By No. 3 of the conditions of sale: "The lots are sold with all faults, imperfections, and errors of description, the auctioneers not being responsible for the contract description, genuineness, or authenticity of, or any fault or defect in, any lot, and giving no warranty whatever." Before the sale and when the heifers were in the ring the plaintiff asked the defendant and the auctioneer: "Can you confirm heifers unserved?" and received from both the answer: "Yes". Between 7 and 8 weeks after the purchase the heifer suffered a miscarriage and three weeks later died as a result of the strain of carrying a calf at too young an age for breeding. In an action by the plaintiff for damages for breach of warranty,

it was *held*: (i) The stipulation in the catalogue and the conditions of sale protected the defendant as well as the auctioneer of mis-statements and misdescriptions in the catalogue;

(ii) the conversation between the parties before the sale amounted to a warranty by the defendant which over-rode the stultifying condition in the printed terms, and the contract was made on that basis when the lot was knocked down to him;

(iii) on the question whether the description, "unserved" constituted a warranty or condition, every item in a description which constitutes a substantial ingredient in the "identity" of the thing sold is a condition

1. *Thornett v. Haines* (1846), 15 M. & W. 367; 71 R.R. 715; *Heatley v. Newton*, (1881) 19 Ch. Div. 326 C.A.  
2. See *Warlow v. Harrison*, (1859) 1 E. & E. 295, 309. But see the comments on this case in *Wainprice v. Westley*, (1865) 6 B. & S. 420, 141 R.R. 452;

see also *Pollock and Mulla, Sale of Goods Act*, page 348.

3. *Consolidated Co. v. Curtis*, *supra*.

4. *National Mercantile Bank v. Rymill*, (1881) 44 L.T. 767, C.A.; *Cochrane v. Rymill*, (1879) 49 L.T. 744, 746, C.A.

5. (1947) 1 All E.R. 103 (C.A.),



which can be waived by the purchaser who thereon becomes entitled to treat it as warranty and recover damages for its breach, and in the present case there was an unqualified condition which, on its breach, the plaintiff was entitled to treat as a warranty and recover the damages claimed.

*Per curiam:* The printed condition that the vendor will take no responsibility for errors of description of things or animals offered for sale on inspection is reasonable for visible defects, but for qualities or attributes which are invisible it is not reasonable.

In *Re Capon: Trustee in Bankruptcy v. Knight*,<sup>1</sup> auctioneers had provided funds for purchase of pigs by a farmer who before removing them required a note acknowledging receipt of pigs and stating that pigs were the auctioneer's property and could be removed and sold by them. On the bankruptcy of the farmer the auctioneers seized and sold the pigs and claimed to return the sale proceeds against the trustees in bankruptcy. The auctioneers claimed that the farmer was their agent in the purchase of the pigs and the agreement was to give them a security. It was *held* that the farmer was not an agent of the auctioneers and the property in the pigs passed to him and trustee in bankruptcy was entitled to the sale proceeds of the pigs. [*Re Capon: Trustee in Bankruptcy v. Knight*, (1940) 1 Ch. 442 : (1940) 2 All E.R. 135 (C.A.)]

**(6) Sub-section (3)—Right to reserve a bid by or on behalf of the seller.**

This sub-section states that in the case of sale by auction, a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or *any one person* on his behalf may, subject to the provisions contained in the section, bid at the auction. The sub-section corresponds to section 58 (4) of the English Act. The words "one person" would imply that the seller cannot employ more than one agent to bid for him. Thus, where both the auctioneer and puffer bid on behalf of the seller the sale was held to be voidable,<sup>2</sup> but neither the seller nor his agent is restricted to one bid.<sup>3</sup> "All the cases, both at law and in equity, agree in this, that if more persons than one are employed to bid, that amounts to fraud, as only one is necessary to protect the property, and the employment of more can only be to enhance the price, and therefore renders the sale void."<sup>4</sup>

The seller is not responsible if others who are interested in the sale, make fictitious bids without his privity.<sup>5</sup>

The mere reservation of a price does not justify the seller in employing a bidder.<sup>6</sup> It would appear that the reservation of a right to bid entitles the seller to withdraw the goods from the auction because the reserve price has not been reached in fact though there is no notification in the condition of sale of there being a reserve price.<sup>7</sup>

1. (1940) 1 Ch. 442 : (1940) 2 All E.R. 135 C.A.

2. *Mortimer v. Bell*, (1865) L.R. 1 Ch. App. 10 : 148 R.R. 26.

3. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 232, f.n. (c).

4. *Thornett v. Haines*, (1846) 15 M. &

W. 367, at p. 372.

5. *Union Bank v. Munster*, (1887) 37 Ch. D. 41 (Mortgagor making fictitious bids without the privity of the mortgagee, who was the seller).

6. *Gilliat v. Gilliat*, (1869) L.R. 9 Eq. 60.

7. *Fenwick v. Macdonald*, *supra*,



**(7) Sub-section (4)—remedy of the buyer if seller bids improperly.**

Where the sale is not notified to be subject to a right to bid on behalf of the seller it is not lawful for the seller to bid himself or to employ any person to bid at such sale ; or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated at the option of the buyer as fraudulent.<sup>1</sup>

This sub-section corresponds to sub-section (3) of section 58 of the English Act. Formerly in England it seems to have been the rule in equity that, when a sale by auction was not expressly stated to be without reserve, the seller might employ one person to bid, so as to prevent the property going at an undervalue. The Sales of Land by Auction Act, 1867 (30 & 31 Vict. C. 48), commonly called the Puffer's Act, was passed to abolish this rule, as applicable to the sale of land, and the same rule has been made applicable to sale of goods.

It may be noted that a sale contravening the rule laid down in the sub-section is not void, but being a fraud on the buyer, the buyer is entitled to avoid it under section 19 of the Indian Contract Act. The buyer can alternately sue the seller for the tort.

**(8) "Knock-outs."**

It has been held that a combination of bidders, not to bid against each other, commonly known as a knock-out, is not illegal.<sup>2</sup> The mere act of dissuading purchasers is not a fraudulent act,<sup>3</sup> but if the purchaser manages to get the thing himself by fraudulently dissuading others from bidding, the vendor may avoid the sale.<sup>4</sup> The seller can protect himself against a "knock-out" by fixing a reserve price.<sup>5</sup>

In England the position has been modified by the Auctions (Bidding Agreements) Act, 1927 (17 & 18 Geo. C. 12). See also the Auctions (Bidding Agreements) Act, 1969 (1969, C. 56).

**(9) Sub-section (5).**

This sub-section corresponds to the first clause of section 58 (4) of the English Act. The term "upset price" is the Scottish equivalent of "reserved price." The reservation of price must be express.

**(10) Sub-section (6).**

It was the rule at common law that if the seller bid, or employed others to bid for him, without reserving the right to bid, the buyer could avoid the sale.<sup>6</sup> The present sub-section embodies the common law rule and is in substance the same as section 123 of the Indian Contract Act. There is no separate provision corresponding to sub-section (6) in the

1. Per Lord Mansfield in *Bexwell v. Christiecrop*, 15 M. & W. 367.  
2. *Rawlings v. General Trading Co.*, (1921) 1 K.B. 635, C.A.; *Jyoti v. Jhowmull*, (1909) 36 Cal. 134; 1 I.C. 784; *Hari v. Naro*, (1893) 18 Bom. 342; *Doorga Singh v. Sheo Prasad Singh*, (1889) 16 Cal. 194; *Mohomed Meera Rawuthur v. Savvasi Vijaya Gopalar*, (1899) 27 I.A. 17; cf. *Ma E. Mya v. V. Pe Lay*, (1925) 3 Rang, 281;

90 I.C. 958; A.I.R. 1926 Rang. 65.  
3. *Doorga v. Sheo Prasad*, (1889) 16 Cal. 194.  
4. *Fuller v. Abrahams*, (1821) 129 E.R. 1226; 23 R.R. 626.  
5. *Rawlings v. General Trading Co.*, supra.  
6. *Thornett v. Haines*, (1846) 15 M. & W. 367, 71 R.R. 714 (recovery of deposit); *Green v. Baverstock*, (1863) 14 C.B.N.S. 204, 135 R.R. 657.



English Act but the wording of section 58 (3) of the Act is wide enough to cover the case of pretended bidding on behalf of the seller.

### (11) Notification of auction sale.

All the conditions of the auction should be notified before the bids commence and all such conditions are deemed to have been sufficiently communicated to bidders if they are exhibited legibly in the auction room.<sup>1</sup> Where the sale is to be held subject to the seller's right to bid or employ a person to bid on his behalf or when the seller reserves the right of confirmation or approval of the final bid, the fact must be notified before the sale commences.<sup>2</sup> Unless such notification is made it is illegal for the seller or any one on his behalf to make a bid,<sup>3</sup> or for the auctioneer knowingly to take such bid, and as against a purchaser the sale, if so held, will be treated as fraudulent and invalid.<sup>4</sup> Where the seller reserves a right to bid, or any one person, and no more, may bid at the auction,<sup>5</sup> and the conditions announced in the notification as governing right must be strictly complied with.<sup>6</sup> So where a seller reserved a right to bid once only, but bid three times when the actual bids were taken the sale was set aside as invalid on that ground.<sup>7</sup> Fictitious bids by a third person without the knowledge or privity of the seller or the auctioneer, however, do not invalidate the sale, nor do they affect the seller's right to seek specific performance.<sup>8</sup> But if two or more persons take part in a mock auction by means of sham bidder and bidding to induce persons to buy at excessive prices they are guilty of a criminal conspiracy.<sup>9</sup>

### (12) Damping the sale.

As in the case of the seller or auctioneer, improper or fraudulent acts which go to raise the price, invalidate the sale as fraudulent, so, in the case of purchasers, improper or fraudulent acts, which are likely to prevent the property put up for the sale from realising its fair value, and to 'damp' the sale as the process is technically called, invalidate any purchase by persons guilty or privy to such acts, and will justify the auctioneer in withdrawing the property.<sup>10</sup> 'Damping', however, should be carefully distinguished from 'knock-out' *i.e.*, an agreement not to bid against each other, is quite legal. The former consists in the illicit or overt acts of dissuading the would be purchasers from bidding or from raising the price as by pointing out defects or by doing some other act which prevents persons from forming a proper estimate of the price of the goods or by scaring away by some other device, while the latter is an agreement between two or more persons not to bid against each other in an auction.<sup>11</sup> While the former is illegal entitling the auctioneer even to withdraw the property from auction, the latter has been held to be quite justified by law.<sup>12</sup>

1. *Mesnard v. Aldridge*, 3 Esp. 271; *Bywater v. Richardson*, 1 Ad. & Ed. 508; *Freme v. Wright*, (1819) 4 Madd. 364; Hals., (3rd Edn.), Vol. 2, p. 80.

2. Hals., Vol. 2, Art. 158; Sub-section (4) of section 64.

3. *Parnell v. Taylor*, 2 L.J. Ch. 195.

4. Hals., Vol. 2, pp. 78-79.

5. *Ibid.*

6. *Parfitt v. Jepson*, 46 L.J.Q.B. 529,

7. *Ibid.*

8. *Union Bank v. Munster*, 37 Ch. D. 51.

9. *Reg. v. Lewis*, 11 Com. C. 404.

10. *Twining v. Marrice*, 2 Bro. C.C. 326; *Mason v. Armitage*, 13 Ves. 24; *Fuller v. Abrahams*, 6 Moo. C.P. 316.

11. See Hals., Vol. 2, Art. 167.

12. *Ibid.*, see also *Doolubhdas v. Ramlal*, 15 Jur. 257; *Galton v. Emuss*, 13 L.J. Ch. 388, *Re Carew's Estate Act*, 28 L.J. Ch. 218; *Heffer v. Martyn*, 36 L.J. Ch. 372.



**(13) Transfer of the property.**

As already noted, on the fall of the hammer, the offer is accepted, and the goods (if specific) become the property of the buyer.<sup>1</sup> This is so even if there is a condition of sale that they are not to be removed before payment; and such a condition does not prevent the buyer, to whom a lot has been knocked down, from re-selling the goods forthwith.<sup>2</sup> And even if there is a condition that the goods shall be taken away and paid for within a given time, and upon the failure of the buyer to comply with that condition they shall be re-sold, the buyer may still be sued for the price, and cannot claim that the goods must be re-sold, and the difference between the contract price and the re-sale price alone be charged against him.<sup>3</sup>

This rule, however, that the contract is completed by the fall of the hammer is subject to the provisions of sub-section (5). Where a sale is notified to be subject to a reserved price, the bidding and acceptance of a bid are subject to the condition that the reserved price has been reached. If the goods are knocked down to a bidder at a price below the reserved price, there is no enforceable contract, for a conditional acceptance of a conditional offer cannot amount to a bidding contract.<sup>4</sup>

In *Dennant v. Skinner and Collom*<sup>5</sup>, at an auction sale motor vehicles were sold to a man who was the highest bidder. After the sale, the purchaser made misrepresentations as to his identity to the auctioneer. Believing these misrepresentations the auctioneer allowed the purchaser to take delivery of the vehicles and accepted in payment a cheque accompanied by the purchaser's certificate to the effect that the property in the vehicles would not pass to him until his cheque had been honoured. The purchaser sold one of the motor vehicles to the third party who in turn sold it to the defendant. The purchaser's cheque was dishonoured. The auctioneer brought action to recover from the defendant the motor vehicle or its value. It was *held*: (i) This was not a case of larceny by a trick so as to prevent the property from passing to the purchaser. (ii) The property so passed on the fall of the hammer and there was no effective condition that it should not pass until the cheque had been honoured. (iii) The property having passed on the fall of the hammer, it was not possible for the purchaser, merely by signing such a certificate, to divest himself of the property and to re-vest in the vendor. It was observed:

At an auction sale apart from any question of reserve price, when a lot is knocked down to the highest bidder by the fall of the hammer, whoever the highest bidder may be, the property in the lot passes to him. When it comes to removing the lot without paying cash for it, other questions arise, but so far as the contract is concerned and the passing of the property in the object sold, ordinarily the identity of the buyer does not enter into the question

1. See *Sweeting v. Turner*, (1871) L.R. 7 Q.B. 310; *Shankland v. Robinson & Co.*, (1920) S.C. (H.L.) 103; cf. *Saint v. Pilley* (1875) L.R. 10 Ex. 137 (fixtures).

2. *Scott v. England* (1844) 2 D. & L. 523, 69 R.R. 868,

3. *Robinson Fisher & Harding v. Behar*, (1927) 1 K.B. 513; cf. Section 54 and notes thereunder.

4. *McManus v. Fortescue*, (1907) 2 K.B. 1 C.A.

5. (1948) 2 All E.R. 29.



any more than it ordinarily does on the sale of an article in a retail shop. A contract of sale is concluded in an auction sale on the fall of the hammer unless that *prima facie* rule is excluded from applying because of a different intention appearing or because there was some condition in the contract which prevented the rule from applying. When the property is delivered to the highest bidder after it was knocked down to him, and is taken away by him, onus is upon the auctioneer to show that he is still entitled to possession of the property.

It may be observed that in England owing to the Statute of Frauds, where the value of the goods exceeds £10, there must, in order that the contract may be enforceable against the seller and buyer respectively, be a memorandum of it signed by the seller and buyer, or their agent, and the auctioneer in the case of a sale by auction, has the implied authority of both seller and buyer to sign the memorandum. But on account of repeal of S. 4 of the (English) Sale of Goods Act, 1893, by the Law Reform (Enforcements of Contracts) Act, 1954, S. 1, this has become practically obsolete. In India, however, apart from any express conditions, this is not necessary and the contract is enforceable against both as the buyer's offer is accepted.<sup>1</sup>

**Sections 62, 64—Scope—Auction sale—Condition of sale absolving seller from liability for any misdescription as to quality and quantity of goods—Condition is reasonable and binding on purchaser—Innocent misdescription as to quantity of goods—Seller not liable for damages for short delivery.**

Under S. 62 of the Act, it is open to the parties to enter into special stipulations varying the ordinary rights and obligations attached to a transaction of sale so long as such stipulations are not illegal. Thus, though under S. 64 of the Act which deals with auction sales, certain implications may arise upon an auction sale being held, it is possible for the parties by special agreement to vary some of the rights and obligations arising from such sale.

The plaintiff brought a suit for damages on account of short delivery in respect of certain goods purchased by him at an auction sale. One of the conditions of sale given in the hand-bills was as follows: "Should any mistake be made in describing a lot specially in stating quality, quantity or measurement, such mistake will not be held to vitiate or affect the sale of such lot in any way, it being understood that intending purchasers should satisfy themselves on all points before bidding. The lots will be at the risk and expense of the purchasers from the moment the sale is declared and would be removed by them with all faults and errors of description." It was *held*: The plaintiff was not entitled to any damages in view of the above condition of sale which was really designed to protect the seller in cases where there was no such fundamental mistake or misdescription as going to the root of the contract and taking away the very foundation of the transaction. Although certain descriptions had been given in the hand-bills about the quantity and quality of the goods to be sold, no actual warranty was being given by the sellers as to the accuracy of such description and the buyer was put

1. See Pollock & Mulla, Sale of Goods

Act, pp. 342 and 343.



on his guard to verify the correctness of the description before bidding. Any misdescription in the hand-bill was at the highest an innocent misdescription and not a fraudulent misdescription for which no claim for damages would lie. The plaintiff could have rescinded the whole transaction after restoring the goods purchased by him but that course was not adopted and no restitution in integrum was now possible. Further as the goods taken delivery of were actually worth much more than the price paid, the plaintiff had not really suffered any loss as a result of the transaction.<sup>1</sup>

*Miscellaneous*

**Section 64(2)—Coffee Act, 1942. Ss. 25, 26, 34.**

**Held :** The contention that under the provisions of the Coffee Act, 1942, the Chief Marketing Officer has no power to accept any but the highest bid at an auction sale of coffee cannot be accepted. Section 26 directs the Board to take all practical measures to market the coffee included in the pool. Power to accept lower bid in preference to highest bid is not *ultra vires*.

[*Coffee Board, Bangalore v. Famous Coffee and Tea Works, Coimbatore*, A.I.R. 1965 Mad. 14]

**\*64A.** (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,—

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition ; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax,

1. *Hanutmal Bhutoria v. Dominion of India*, A.I.R. 1961 Cal. 54.

\*Substituted by the Indian Sale of Goods (Amendment) Act, 1963, S. 5.



and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of sub-section (1) apply to the following taxes, namely :

(a) and duty of customs or excise on goods,

(b) any tax on the sale or purchase of goods.

Section 64A of the Act has been substituted by section 5 of the Indian Sale of Goods (Amendment) Act, 1963. The previous section ran as follows :

“64A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time :

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty and he shall not be liable to pay, or be sued for or in respect of, such deduction.”

The change was thus explained in *Notes on Clauses* to the Bill (The *Gazette of India—Extraordinary*, Part II—Section II, pp. 659 to 662).

“Section 64A of the Act makes the necessary statutory provisions in case where a duty of customs or excise on any goods is imposed, increased or remitted after the making of any contract for the sale of the goods and the contract does not contain any provision regarding the payment of such duty. The Law Commission have recommended that on principle a similar provision should be made to deal with the case of imposition or change in the rate of a sale or purchase tax subsequent to the making of a contract for the sale of goods. Section 64A is being amended accordingly.”

**(1) Section 64A (old)—Finance Act, 1951, S. 7 (2)—Imposition of excise duty with retrospective effect—Not beyond legislative competence of Parliament.** (*M/s. Chhotabhai v. Union of India*, A.I.R. 1962 S.C. 1006).

**(2) Section 64A(b)—Words “deduct” and “deduction” mean subtract or take off—They have no relation to physical act of payment of price.**

It is not appropriate or possible to give to the words “deduct” and “deduction” in sub-section (b) of S. 64A, a meaning which relates to the



physical act of deduction at the time of payment of price. The phrase "so much from the contract price" has no relation to the physical act of payment of price. The word "deduct" in the context refers and relates to and means the right to subtract and/or take off the duty in the process of calculation of and arriving at the contract price. In respect of such deduction, the liability to pay price is wiped off.

The provisions of S. 64A of the Act are applicable only when the incidence of imposition, increase, remission or abolition of duty is connected with and related to the goods of a particular contract for sale of goods between a seller and a buyer.<sup>1</sup>

The object of the old section 64A was thus explained in the *Statement of Objects and Reasons*:

"The attention of the Government of India has been drawn to a recent judgment of the Lahore High Court in a civil revision case in which it was held that since the wording of the Preamble of the Indian Tariff Act, 1934 (XXXII of 1934), refers only to customs duties on goods imported into or exported from British India, section 10 of the Act, which permits the addition to or deduction from a contract price of an increase or decrease in duty imposed after the making of the contract, does not apply to the excise duty on sugar produced in British India and intended to be sold within the country for home consumption. In order to put the matter beyond doubt and since the subject is germane to the law relating to the sale of goods and contract of sale, it is proposed to repeal this section of the Indian Tariff Act and re-enact it as a section of the Indian Sale of Goods Act, 1930."

**65.** Chapter VII of the Indian Contract Act, 1872, is hereby repealed.

Repeal.

This section repeals the whole of chapter VII of the Indian Contract Act. Illustrations to the provisions of the present Act have not been given so that the courts are left to construe the sections as they stand.

This section was repealed by Repealing Act, 1938 (Act I of 1938) S.2 and Sch.

Rules of construction are explained on pages 4 to 11 and may be referred to.

**\*66.** (1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to affect:

Savings.

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

1. Central Hindustan Indian Trading Co. (Private) Ltd. v. Pitty Brothers (Private) Ltd., A.I.R. 1962 Bom. 222,

\*Analogous law.  
Sections 60 and 61 of the English Sale of Goods Act, 1893.



(b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(c) anything done or suffered before the commencement of this Act, or

(d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or

(e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contract for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge or other security.

### Synopsis

(1) *Sub-section (1).*

(3) *Sub-section (3).*

(2) *Sub-section (2).*

This section contains several saving clauses. Section 3 of the Act is also in the nature of a saving clause and might very well have been incorporated in this section instead of being enacted as a separate section. Sub-sections (2) and (3) are based on sub-sections (1) and (4) respectively of the English Act.

#### (1) **Sub-section (1).**

Clauses (a) to (c) of sub-section (1) save all rights and liabilities which arose before the Act came into force, all proceedings taken in connection with such rights and liabilities and all transactions made before the Act. The Act is thus not retrospective. And even without such express provisions, an Act is not construed as retrospective unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require such a construction.<sup>1</sup>

Clause (b) saves enactments relating to the same subject as this Act, such as the Indian Merchant Shipping Act, 1923, and the Code of Civil Procedure, 1908, which contain special provisions relating to the sale of goods.

Clause (e) really provides for the contingency of a *lacunae* in the Act.

#### (2) **Sub-section (2).**

Sub-section (2) saves the provisions of the law of insolvency relating to contract for the sale of goods. The Acts now in force in India

1. *Lauri v. Renad*, (1892) 3 Ch. 402, 421 C.A.



relating to insolvency are in the Presidency Towns Insolvency Act (III of 1909), the Provincial Insolvency Act (V of 1920), the Companies Act, 1956, and see also Order 22, R. 8 of the Code of Civil Procedure, 1908.

**(3) Sub-section (3).**

Sub-section (3) declares that the Act does not apply to ostensible sales, or transactions which, though they have the outward semblance of contracts of sale, are in substance transactions of mortgage, pledge or other security. These are dealt with by the Transfer of Property Act and sections 172-179 of the Indian Contract Act.

A mortgage of goods must be distinguished from the sale with a condition for re-sale to the original seller.<sup>2</sup> A pledge is a bailment of goods as security for payment of a debt or performance of a promise.

1. *Beckett v. Tower Assets Co.*, (1891) 1 Q.B. 1 at p. 25.

2. Section 172 of the Indian Contract Act.



## APPENDIX A

### THE SALE OF GOODS ACT, 1893

(56 & 57 Vict. c. 71)

*An Act for codifying the Law relating to the Sale of Goods.*

(20th February, 1894).

#### PART I.—Formation of the Contract

##### *Contract of Sale*

**1. Sale and agreement to sell.**—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

**2. Capacity to buy and sell.**—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property :

Provided that where necessaries are sold and delivered to an infant or minor, or a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor, or other person, and to his actual requirements at the time of the sale and delivery.

##### *Formalities for the Contract*

**3. Contract of sale how made.**—Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties :

Provided that nothing in this section shall affect the law relating to corporations.

**4. Contract of sale for ten pounds and upwards.**—*Repealed by S. 1 of the Law Reform (Enforcement of Contract) Act, 1954.*



### *Subject Matter of Contract*

**5. Existing or future goods.**—(1) The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingent which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

**6. Goods which have perished.**—Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

**7. Goods perishing before sale but after agreement to sell.**—Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

### *The Price*

**8. Ascertainment of price.**—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

**9. Agreement to sell at valuation.**—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is avoided: provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

### *Conditions and Warranties*

**10. Stipulations as to time.**—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.



**11. When conditions to be treated as warranty.**—(1) In England or Ireland—

- (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.
- (b) Whether a stipulation in contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.
- (c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition on warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

**12. Implied undertaking as to title etc.**—In contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass :

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

**13. Sale by description.**—Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.



**14. Implied conditions as to quality or fitness.**—Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

#### *Sale by Sample*

**15. Sale by sample.**—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of contract for sale by sample—

- (a) There is an implied condition that the bulk shall correspond with the sample quality ;
- (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;
- (c) There is an implied condition that the buyer shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

### **PART II.—Effects of the Contract**

#### *Transfer of Property as between Seller and Buyer*

**16. Goods must be ascertained.**—Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

**17. Property passes when intended to pass.**—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.



(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

**(18) Rules for ascertained intention**—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to time at which the property in the goods is to pass to the buyer :

**Rule 1**—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or time of delivery, or both, be postponed.

**Rule 2**.—Where there is a contract for the sale of the specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.

**Rule 3**.—Where there is a contract for sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

**Rule 4**.—When goods are delivered to the buyer on approval or on “sale or return” or other similar terms the property therein passes to the buyer :

- (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction :
- (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

**Rule 5**.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

**19. Reservation of right of disposal**.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain



conditions are fulfilled. In such cases, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading, the property in the goods does not pass to him.

**20. Risk *prima facie* passes with property.**—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

### *Transfer of Title*

**21. Sale by person not the owner.**—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act, shall affect—

- (a) The provisions of the Factors Act, or any enactment enabling the apparent owner of goods to dispose of them as if he were true owner thereof ;
- (b) The validity of any contract of sale, under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction.

**22. Market overt.**—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to sale of horses—*Repealed by Criminal Law Act, 1967, Sch. III, Pt. III.*

(3) The provisions of this section do not apply to Scotland.



**23. Sale under voidable title.**—When the seller of goods has voidable title thereof but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

**24. Revesting of property in stolen goods on conviction of offender.**—

*Repealed by Schedule III, Part III, of the Theft Act, 1968.*

**25. Seller or buyer in possession after sale.**—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy any goods obtains with the consent of the seller, possession of goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Act.

**26. Effects of writs of execution.**—(1) A writ of *fieri-facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same:

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person has at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff

(2) In this section the term "sheriff" includes any office charged with the enforcement of writ of execution.

(3) The provisions of this section do not apply to Scotland.

### **PART III.—Performance of the Contract**

**27. Duties of seller and buyer.**—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.



**28. Payment and delivery are concurrent conditions.**—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

**29. Rules as to delivery.**—Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence : Provided that, if the contract be for the sale of specific goods which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) When the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf : Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

**30. Delivery of wrong quantity.**—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

**31. Instalment deliveries.**—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes



defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

**32. Delivery to carrier.**—(1) Where in pursuance of a contract of sale, the seller is authorised or required to send the goods to buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

**33. Risk where goods are delivered at distant place.**—Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

**34. Buyer's right of examining the goods.**—(1) Where the goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

**35. Acceptance.**—The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

**36. Buyer not bound to return rejected goods.**—Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.



**37. Liability of buyer for neglecting or refusing delivery of goods.**—When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods: Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

#### **PART IV.—Rights of Unpaid Seller against the Goods**

**38. Unpaid seller defined.**—(1) The seller of goods is deemed to be “unpaid seller” within the meaning of this Act—

- (a) When the whole of the price has not been paid or tendered ;
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Part of this Act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

**39. Unpaid seller’s right.**—(1) Subject to the provisions of this Act and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a) A lien on the goods (or right to retain them) for the price while he is in possession of them ;
- (b) In case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them ;
- (c) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

**40. Attachment by seller in Scotland.**—In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding ; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

#### *Unpaid Seller’s Lien*

**41. Seller’s lien.**—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to certain possession of them until payment or tender of the price in the following cases, namely ;



- (a) Where the goods have been sold without any stipulation as to credit ;
- (b) Where the goods have been sold on credit, but the term of credit has expired ;
- (c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

**42. Part delivery.**—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

**43. Termination of lien.**—(1) the unpaid seller of goods loses his lien or right of retention thereon—

- (a) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;
- (b) When the buyer or his agent lawfully obtains possession of the goods ;
- (c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

### *Stoppage in transitu*

**44. Right of stoppage in transitu.**—Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

**45. Duration of transit.**—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water or other bailee or custodian for the purpose of transmission to the buyer until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer,



(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

**46. How stoppage in transitu is effected.**—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the direction of, the seller. The expenses of such re-delivery must be borne by the seller.

#### *Re-sale by Buyer or Seller*

**47. Effect of sub sale or pledge by buyer.**—Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto :

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

**48. Sale not generally rescinded by lien or stoppage in transitu.**—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.



(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

## **PART V.—Actions for Breach of the Contract**

### *Remedies of the Seller*

**49. Action for price.**—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

**50. Damages for non-acceptance.**—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.

### *Remedies of the Buyer*

**51. Damages for non-delivery.**—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.



(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver.

**52. Specific performance.**—In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

**53. Remedy for breach of warranty.**—(1) Where there is breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may—

- (a) set up against the seller the breach or warranty in diminution or extinction of the price ; or
- (b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damages.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

**54. Interest and special damages.**—Nothing in this Act shall affect the right of the buyer or his seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

## **PART VI.—Supplementary**

**55. Exclusion of implied terms and conditions.**—Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the



course of dealing between the parties, or by usage if the usage be such as to bind both parties to the contract.

**56. Reasonable time a question of fact.**—Where, by this Act, any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

**57. Rights, etc. enforceable.**—Where any right, duty or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

**58. Auction sales.**—In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid.

(3) Where a sale by auction is not noticed to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer.

(4) A sale by auction may be notified to be subject to a reserved or upset price and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller or any one person on his behalf may bid at the auction.

**59. Payment into court in Scotland when breach of warranty alleged.**—In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

**60. Repeals.**—*Repealed by the Statute Law Revision Act, 1908.*

**61. Savings.**—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rule of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating case, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale or any enactment relating to the sale of goods which is not expressly repealed by this Act.



(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothecation for rent in Scotland.

**62. Interpretation of terms.**—(1) In this Act, unless the context of subject-matter otherwise requires,—

“Action” includes counterclaim and set-off, and in Scotland condescendence and claim and compensation :

“Bailee” in Scotland includes custodier :

“Buyer” means a person who buys or agrees to buy goods :

“Contract of sale” includes an agreement to sell as well as a sale :

“Defendant” includes in Scotland defender, respondent, and claimant in a multiplepinding :

“Delivery” means voluntary transfer of possession from one person to another :

“Document of title to goods” has the same meaning as it has in the Factors Acts :

“Factors Acts” mean the Factors Act, 1889 ; the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same :

“Fault” means wrongful act or default :

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale :

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale :

“Lien” in Scotland includes right of retention :

“Plaintiff” includes pursuer, complainer, claimant in a multiplepinding and defendant or defender counterclaiming :

“Property” means the general property in goods, and not merely a special property :

“Quality of goods” includes their state or condition :

“Sale” includes a bargain and sale as well as a sale and delivery :

“Seller” means a person who sells or agrees to sell goods :

“Specific goods” means goods identified and agreed upon at the time a contract of sale is made :

“Warranty” as regards England and Ireland, means an agreement with reference to goods which are subject of a contract of sale, but



collateral to the main purpose of such contract, the breach of which gives rise to claim of damages, but not a right to reject the goods and treat the contract as repudiated.

As regards Scotland, breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) **Good faith.**—A thing is deemed to be done “in good faith” within the meaning of this Act when it is in fact done honestly whether it be done negligently or not.

(3) **Insolvent.**—A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debt in the ordinary course of business or cannot pay debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) **Deliverable.**—Goods are in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

**63. Commencement.**—*Repealed by the Statute Law Revision Act, 1908 as spent.*

**64. Short title.**—This Act may be cited as the Sale of Goods Act, 1893.

## SCHEDULE

*Repealed by the Statute Law Revision Act, 1908.*

## APPENDIX B

### THE INDIAN CONTRACT ACT, 1872

#### CHAPTER VII.—Sale of Goods

**76. Goods defined.**—In this chapter, the word “goods” means and includes every kind of movable property.

**77. “Sale” defined.**—“Sale” is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

**78. Sale how effected.**—Sale is effected by offer and acceptance of ascertained goods for a price, or of price for ascertained goods, together with payment of the price or delivery of the goods; or with tender part payment, earnest or part delivery; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

*Illustrations.*—(a) B offers to buy A’s horse for 500 rupees. A accepts B’s offer, and delivers the horse to B. The horse becomes B’s property on delivery.



- (b) A sends goods to B, with the request that he will buy them at a stated price if he approves of them or return them, if he does not approve of them. B retains the goods and informs A that he approves of them. The goods become B's when B retains them.
- (c) B offers A for his horse 1,000 rupees, the horse to be delivered to B on a stated day, and the price to be paid on another stated day. A accepts the offer. The horse becomes B's as soon as the proposal is accepted.
- (d) B offers A for his horse 1,000 rupees on month's credit. A accepts the offer. The horse becomes B's as soon as the offer is accepted.
- (e) B, on the first January, offers to A for a quantity of rice, 2,000 rupees, to be paid on the first March following, the rice not to be taken away till paid for. A accepts the offer. The rice becomes B's as soon as the offer is accepted.

**79. Transfer of ownership of thing sold, which has yet to be ascertained, made or finished.**—Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership of the thing is not transferred to the buyer, until it is ascertained, made or finished.

*Illustration.*—B orders A, barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B pays to A money from time to time on account of the price. The ownership of the barge does not pass to B until it is finished.

**80. Completion of sale of goods which the seller is to put into state in which buyer is to take them**—Where by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

*Illustration.*—A, a ship-builder, contracts to sell to B for a stated price, a vessel which is lying in A's yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up and delivered.

**81. Completion of sale of goods when seller has to do anything thereto in order to ascertain price**—Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

*Illustrations.*—(a) A, the owner of a stack of bark, contracts to sell it to B, weigh and deliver it, at 100 rupees per ton. B agrees to take and pay for it on a certain day. Part is weighed and delivered to B; the ownership of the residue is not transferred to B until it has been weighed pursuant to the contract.

(b) A contracts to sell a heap of clay to B at a certain price per ton. B is, by the contract, to load the clay in his own carts and to weigh each load at a certain weighing machine which his carts must pass on their way from A's ground to B's place of deposit. Here nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at once.

**82. Completion of sale when goods are ascertained at date of contract.**—Where the goods are not ascertained at the time of making the agreement of sale, it is necessary to the completion of the sale that the goods shall be ascertained.

*Illustration.*—A agrees to sell to B 20 tons of oil in A's cisterns. A's cisterns contain more than 20 tons of oil. No portion of the oil has become the property of B.



**83. Ascertainment of goods by subsequent appropriation.**—Where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained and the sale is completed.

*Illustration.*—A, having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, contracts to sell B 20 hogsheads of it. After the contract A fills 20 hogsheads with the sugar, and gives notice to B that the hogsheads are ready and requires him to take them away. B says he will take them as soon as he can. By this appropriation by A, and assent by B, the sugar becomes the property of B.

**84. Ascertainment of goods by seller's selection.**—Where the goods are not ascertained at the time of making the contract of sale and by the terms of the contract the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has right to select any goods answering to the contract, any by his doing so the goods are ascertained.

*Illustration.*—B agrees with A to purchase of him, at a stated price to be paid on a fixed day, 50 maunds of rice, out of a large quantity in A's granary. It is agreed that B shall send sacks for the rice, and that A shall put the rice into them. B does so, and A puts 50 maunds of rice into the sacks. The goods have been ascertained.

**85. Transfer of ownership of movable property, when sold together with immovable.**—Where an agreement is made for the sale of immovable and movable property combined, the ownership of the movable property does not pass before the transfer of the immovable property.

*Illustration.*—A agrees with B for the sale of a house and furniture. The ownership of the furniture does not pass to B until the house is conveyed to B.

**86. Buyer to bear loss after goods have become his property.**—When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.

*Illustrations.*—(a) B offers and A accepts, 100 rupees for a stack of firewood standing on A's premises, the firewood to be allowed to remain on A's premises till a certain day, and not to be taken away till paid for. Before payment and while the firewood is on A's premises it is accidentally destroyed by fire. B must bear the loss.

(b) A bids 1,000 rupees for a picture at a sale by auction. After the bid it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller; if afterwards, on A.

**87. Transfer of ownership of goods agreed to be sold while nonexistent.**—When there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done, after the goods are produced in pursuance of the contract by the seller, or by the buyer with the seller's assent.

*Illustrations.*—(a) A contracts to sell to B, for a stated price, all the indigo which shall be produced at A's factory during the ensuing year. A, when the indigo has been manufactured, gives B an acknowledgment that he holds the indigo at his disposal. The ownership for the indigo vests in B from the date of the acknowledgement.

(b) A, for a stated price, contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops then standing. Under this



contract B, with the assent of A, takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in B.

- (c) A, for a stated price, contracts that B may take and sell any crops that shall be grown on his land in succession to the crop then standing. Under this contract, B applies to A for possession of some crops grown in succession to the crops which were standing at the time of the contract. A refuses to give possession. The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession.

**88. Contract to sell and deliver at a future day, goods not in seller's possession at date of contract.**—A contract for the sale of goods to be delivered at the future day is binding though the goods are not in the possession of the seller at the time of making the contract; and though, at that time he has no reasonable expectations of acquiring them otherwise than by purchase.

*Illustration*—A contracts on the first January, to sell 50 shares in East India Railway Company, to be delivered and paid for on the first March of the same year. A, at the time of making the contract, is not in possession of any shares. The contract is valid.

**89. Determination of price not fixed by contract.**—Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the Court considers reasonable.

*Illustration.*—B, living at Patna, orders of A, a coach-builder of Calcutta, a carriage of a description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the Court must decide what price it considers reasonable.

## Delivery

**90. Delivery how made.**—Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer or any person authorized to hold them on his behalf.

*Illustrations.*—(a) A sells to B a horse, and causes or permits it to be removed from A's stables to B's. The removal to B's stable is a delivery.

- (b) B, in England, orders 100 bales of cotton from A, merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting of cotton on board the ship is a delivery to B.

- (c) A sells to B certain specific goods which are locked up in a godown. A gives B the key of the godown, in order that he may get the goods. This is a delivery.

- (d) A sells to B five specific casks of oil. The oil is in the warehouse of A. B sells the five casks to C. A receives warehouse rent for them from C. This amounts to a delivery of the oil to C, as it shows an assent on the part of A to hold the goods of warehouseman of C.

- (e) A sells to B 50 maunds of rice in the possession of C, a warehouseman. A gives B an order to C to transfer the rice to B, and C assents to such order, and transfers the rice in his books to B. This is a delivery.

- (f) A agrees to sell to B five tons of oil, at 1,000 rupees per ton, to be paid for at the time of delivery. A gives to C a wharfinger, at whose wharf he had twenty tons of the oil, an order to transfer five of them into the name of B. C makes the transfer in his books and gives A's clerk a notice of transfer for B. A's clerk takes the transfer notice to B and offers to give it to him on payment of the price of the oil. B refuses to pay. There has been no delivery to B, as B never assented to make C his agent, to hold for him the five tons selected by A.



**91. Effect of delivery to wharfinger or carrier.**—A delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

*Illustration.*—B, at Agra, orders A, who lives at Calcutta, three casks of oil to be sent to him by Railway. A takes three casks of oil directed to B to the railway station and leaves them there without conforming to the rules which must be complied with in order to render the Railway Company responsible for their safety. The goods do not reach B. There has not been a sufficient delivery to charge B in a suit for the price.

**92. Effect of part delivery.**—A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole, but a delivery of part of the goods, with the intention of severing it from the whole, does not operate as delivery of the remainder.

*Illustrations.*—(a) A ship arrives in a harbour laden with a cargo consigned to A, the buyer of the cargo. The captain begins to discharge it and delivers over part of the goods to A in progress of the delivery of the whole. This is a delivery of the cargo to A for the purpose of passing the property in the cargo.

(b) A sells to B a stack of firewood, to be paid for by B on delivery. After the sale, B applies for and obtains from A leave to take away some of the firewood. This has not the legal effect of delivery of the whole.

(c) A sells 50 maunds of rice to B. The rice remains in A's warehouse. After the sale, B sells to C 10 maunds of the rice and A at B's desire sends the 10 maunds to C. This has not the legal effect of a delivery of the whole.

**93. Seller not bound to deliver until buyer applies for delivery.**—In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.

**94. Place of delivery.**—In the absence of any special promise as to deliver, goods sold are to be delivered at the place at which they are at the time of the sale ; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not then in existence, at the place at which they are produced.

### Seller's Lien

**95. Seller's lien.**—Unless a contrary intention appears by the contract, a seller has lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid.

**96. Lien where payment to be made at a future day, but no time fixed for delivery.**—Where, by the contract, the payment is to be made on a future day, but no time is fixed for the delivery of the goods, the seller has no lien and the buyer is entitled to a present delivery of the goods without payment. And if the buyer becomes insolvent before delivery of the goods, or if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price.

*Explanation* —A business is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.



*Illustration.*—A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse. Before the expiry of the three months, B becomes insolvent. A may retain the goods for the price.

**97. Seller's lien where payment to be made at future day, and buyer allows goods to remain in seller's possession.**—Where by the contract, the payment is to be made at a future day and the buyer allows the goods to remain in the possession of the seller until that day, and pay for them, the seller may retain the goods for the price.

*Illustration.*—A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse till the expiry of three months, and then does not pay for them. A may retain the goods for the price.

**98. Seller's lien against subsequent buyer.**—A seller in possession of goods sold, may retain them for price against any subsequent buyer, unless the seller has recognized the title of the subsequent buyer.

### Stoppage in Transit

**99. Power of seller to stop in transit.**—A seller who has parted with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

**100. When goods are to be deemed in transit.**—Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer and are not yet come into possession of the buyer or any person on behalf, otherwise than as being in possession of the carrier, or as being so lodged.

*Illustrations.*—(a) B, living at Madras, orders goods of A, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C, are in transit.

(b) B, at Delhi, orders goods of A, at Calcutta. A consigns and forwards the goods to B at Delhi. On arrival there, they are taken to the warehouse of B, and left there. B refuses to receive them, and immediately afterwards stops payment. The goods are in transit.

(c) B, who lives at Poona, orders goods of A at Bombay. A sends them to Poona, by C, a carrier appointed by B. The goods arrive at Poona, and are placed by C, at B's request in C's warehouse for B. The goods are no longer in transit.

(d) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(e) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. B delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable, to A's order or assigns. The cotton arrives at London but, before coming into B's possession, B becomes insolvent. The cotton has not been paid for. A may stop the cotton.

**101. Continuance of right of stoppage.**—The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit, and receiving the price, but



continues until the goods have been delivered to the second buyer or to some person on his behalf.

**102. Cessation of right on assignment by buyer of bill of lading.**—The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them.

*Illustrations.*—(a) A sells and consigns certain goods to B, and sends him the bill of lading. A being still unpaid B becomes insolvent, and while the goods are in transit, assigns the bill of lading for cash to C who is not aware of his insolvency. A cannot stop the goods in transit.

(b) A sells and consigns certain goods to B. A being still unpaid, B becomes insolvent and while goods are still in transit, assigns the bill of lading for cash to C, who knows that B is insolvent. The assignments not being in good faith, A may still stop the goods in transit.

**103. Stoppage where bill of lading is pledged to secure specific advance.**—Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith the seller cannot, except on payment or tender to the pledge of advance so made, stop the goods in transit.

*Illustrations.*—(a) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C, to secure a specific advance of 5,000 rupees made to him upon the bill of lading by C. B becomes insolvent, being indebted to C to the amount of 9,000 rupees. A is not entitled to stop the goods except on payment or tender to C of 5,000 rupees.

(b) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C, to secure the sum of Rs. 5,000 due from him to C, upon a general balance of account. B becomes insolvent. A is entitled to stop the goods in transit without payment or tender to C of the 5,000 rupees.

**104. Stoppage how effected.**—The seller may effect stoppage in transit, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are.

**105. Notice of seller's claim.**—Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under such circumstances, that the principal by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

**106. Right of seller on stoppage.**—Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

*Illustration.*—A sells to B 100 bales of cotton; 60 bales having come into B's possession, and 40 being still in transit. B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit. A is entitled to hold the 40 bales until the price of the 100 bales is paid.

### Re-sale

**107. Re-sale on buyer's failure to perform.**—Where the buyer of goods fails to perform his part of the contract, either by not taking the



goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may after giving notice to the buyer of his intention to do so, re-sell them after the lapse of a reasonable time and the buyer must bear any loss, but is not entitled to any profit, which may occur on such re-sale.

**108. Title conveyed by seller of goods to buyer.**—No seller can give to the buyer of goods a better title to those goods than he has himself except in the following cases :

*Exception 1.* When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehousekeeper's certificate, wharfinger's certificate, or warranty or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods, of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary :

Provided that the buyer acts in good faith, and under circumstances which are not such as to raise reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

*Exception 2.* If one of several joint owners, of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

*Exception 3.* When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person, who before the contract is rescinded, buys them in good faith of the person in possession, unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession of those whom he represents.

In this case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.

*Illustrations.*—(a) A buys from B, in good faith, a cow which B had stolen from C. The property in the cow is not transferred to A.

(b) A, a merchant, entrusts B, his agent, with a bill of lading relating to certain goods, and instructs B not to sell the goods for less than a certain price, and not to give credit to D. B sells the goods to D for less than that price, and gives D three months' credit. The property in the goods passes to D.

(c) A sells to B goods of which he has the bill of lading but the bill of lading is made out for delivery of the goods to C, and it has not been endorsed by C. The property is transferred to B.

(d) A, B and C are joint Hindu brothers, who own certain cattle in common, A is left by B and C possession of a cow, which he sells to D. D purchases *bona fide*. The property in the cow is transferred to D.

(e) A, by a misrepresentation not amounting to cheating, induces B to sell and deliver to him a horse. A sells the horse to C before B has rescinded the contract. The property in the horse is transferred to C ; and B is entitled



to compensation from A for any loss which B has sustained by being prevented from rescinding the contract.

- (f) A compels B by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and before B rescinds the contract, sells the horse to C. The property is not transferred to C.

### Warranty

**109. Seller's responsibility for badness of title.**—If the buyer or any person claiming under him, is by reason of the invalidity of the seller's title, delivery of the thing sold, the seller is responsible to the buyer, or the person claiming under him for loss caused thereby unless a contrary intention appears by the contract.

**110. Establishment of implied warranty of goodness or quality.**—An implied warranty of goodness or quality may be established by the custom of any particular trade.

**111. Warranty of soundness implied on sale of provisions.**—On the sale of provisions, there is an implied warranty that they are sound.

**112. Warranty of soundness implied on sale of goods by sample.**—On the sale of goods by sample, there is implied warranty that the bulk corresponds in quality to the sample.

**113. Warranty implied where goods are sold as being of a certain denomination.**—Where goods are sold as being of a certain denomination, there is implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have brought them by sample, or after inspection of the bulk.

*Explanation.*—But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

*Illustrations.*—(a) A, at Calcutta, sells to B twelve bags of "waste silk", then on its way from Murshidabad to Calcutta. There is an implied warranty by A that the silk shall be such as is known in the market under the denomination of "waste silk".

(b) A buys, by sample, and after having inspected the bulk, 100 bales of "Fair Bengal" cotton. The cotton proves not to be such as is known in the market as "Fair Bengal". There is a breach of warranty.

**114. Warranty where goods ordered for a specified purpose.**—Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by seller that the goods supplied are fit for that purpose.

*Illustration.*—B orders of A, a copper manufacturer, copper for sheathing a vessel. A, on this order, supplies. There is an implied warranty that the copper is fit for sheathing a vessel.

**115. Warranty on sale of article of well-known ascertained kind.**—Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

*Illustration.*—B writes to A, the owner of a patent invention for cleaning cotton—"Send me your patent cotton cleaning machine to clean the cotton at my factory." A sends the machine according to order. There is an implied warranty by A that it is the article known as A's patent cotton-cleaning machine but none that it is fit for the particular purpose of cleaning the cotton at B's factory.



**116. Seller when not responsible for latent defects.**—In the absence of fraud and of any express warranty, of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it.

*Illustration.*—A sells to B a horse. It turns out that the horse had, at time of the sale, a defect of which A was unaware. A is not responsible for this.

**117. Buyer's right on breach of warranty.**—Where a specific article, sold with warranty, has been delivered and accepted, and the warranty is broken, the sale is not voidable; but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

*Illustration.*—A sells and delivers to B a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but B is entitled to compensation from A for loss caused by the unsoundness.

**118. Right of buyer on breach of warranty in respect of goods not ascertained.**—Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken the buyer may accept the goods or refuse to accept the goods when tendered or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them, provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial.

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty, but if he accepts the goods, and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty.

*Illustrations.*—(a) A agrees to sell, and, without application on B's part, delivers to B 200 bales of unascertained cotton by sample. Cotton in accordance with sample is delivered to B. B may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(b) B agrees to buy of A twenty-five sacks of flour by sample. The flour is delivered to B, who pays the price. B upon examination finds it not equal to sample; B afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from A for any loss caused by the breach of warranty.

(c) B makes two pairs of shoes for A by A's order. When the shoes are delivered they do not fit A. A keeps both pairs for a day. He wears one pair for a short time in the house, and takes long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect in the second pair.

### *Miscellaneous*

**119. When a buyer may refuse to accept if goods not ordered are sent with goods ordered.**—When the seller sends to the buyer goods not ordered with the goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

*Illustration.*—A orders of B specific articles of China. B sends these articles to A in a hamper, with other articles of China which had not been ordered. A may refuse to accept any of the goods sent,



**120. Effect of wrongful refusal to accept.**—If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

**121. Right to seller as to rescission on failure of buyer to pay price at time fixed.**—When goods sold have been delivered to the buyer the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed, unless it was stipulated by contract that he should be so entitled.

**122. Sale and transfer of lots sold by auction.**—Where goods are sold by auction, there is a distinct and separate sale of goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

**123. Effect of use by seller, of pretended biddings to raise price.**—If, at a sale by auction, the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

### **The Indian Contract (Amendment) Act, 1930**

(Act IV of 1930)

(Received the assent of the Governor-General on the 15th March, 1930)

*An Act to amend the Indian Contract Act, 1872*

Whereas it is expedient to amend the Indian Contract Act, 1872, for the purposes hereinafter appearing ; it is hereby enacted as follows :

**1. Short title and commencement.**—(1) This Act may be called the Indian Contract (Amendment) Act, 1930.

(2) It shall come into force on the first day of July, 1930.

**2.** For Section 178 of Indian Contract Act, 1872, the following section shall be substituted, namely :

**178. Pledge by mercantile agent.**—Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of the title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner of the goods to make the same provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

*Explanation.*—In this section the expression “mercantile agent” and “documents of title” shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.

**178-A. Pledge by person in possession under voidable contract.**—When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.”



## APPENDIX C

## REPORT OF THE SPECIAL COMMITTEE

To

His Excellency The Governor-General in Council,

In accordance with the Legislative Department Resolution No. 47129 C & G, dated the 20th March 1929 ( Appendix A ), we the members of the Committee appointed by the Government of India to examine the provisions of the Indian Sale of Goods Bill, have the honour to submit the following report :

1. The Constitution of the Committee was as follows:—

**Chairman**

The Honourable Sir Brojendra Lal Mitter, Kt., Bar-at-law, Law Member, the Council of the Governor-General.

**Members**

(1) Mr. D.F. Mulla, C. I. E. : M. A., L. L. B., Officiating Advocate-General, Bombay.

(2) Mr. M. R. Jayakar, M. A., L. L. B., Bar-at-law, M.L.A.

(3) Mr. Alladi Krishnaswamy Ayyar. Advocate-General, Madras.

Mr. T. M. Wright, C.I.E. ; I.C. S., Joint Secretary and Draftsman to the Government of India, Legislative Department attended the meetings of the Committee and Mr. J. R. Dhurandhar, L. L. B., Assistant Secretary to the Government of Bombay, Legal Department acted as Secretary to the Committee.

(2). The Committee assembled at Simla on the 29th April, 1929, when its first meeting was held, and continued its deliberations daily until the 9th May, 1929. A bill to amend and define the law relating to the sale of goods, with the notes setting forth the reasons for the proposed amendments which had already been prepared in the Legislative Department of the Government of India was placed before us, and formed the basis of our discussions.

3. Before the passing of the Indian Contract Act, 1872, Chapter VII of which contains the law relating to the sale of goods or movables, the law on this subject was not only not uniform throughout British India but was also, outside the limits of the original jurisdiction of the High Courts, extremely uncertain in its application. Within the limits of the Presidency Towns, the rules of English law, including those in the Statute of Frauds were applied, whilst in the mofussil it was doubtful whether the Statute of Frauds was applicable and, as observed by Indian Law Commissioners in their second Report, the Judge was to a great extent without the guidance of any positive law beyond the rule that his decision should be such as deemed to be in accordance with "justice, equity and good conscience." To remedy this unsatisfactory state of affairs, the Indian Law Commissioners framed, in their second Report, dated, the 28th July,



1866, a set of rules relating to the general law of contracts including therein provisions relating to the sale of movables. The draft of the Law Commissioners underwent several changes at the hands of the then Law members, Sir Henry Maine and Sir James Stephen, and also in the Select Committee of the Indian Legislature. But as stated by Sir James Stephen himself while presenting the Report of the Select Committee on the Indian Contract Bill the chapter on the sale of goods except in regard to the rules as to market overt, represented generally the English law on the subject as it then stood.

4. The rules of English law relating to the state of goods had grown up mainly out of judicial decisions. Along with the general law of contract, they were the product of many generations and were adapted to the circumstances and exigencies of the times and the dealings of the people. They were, however, largely dominated by the provisions of the Statute of Frauds which was passed in the reign of Charles the Second. The Law Commissioners, as well as those who were ultimately responsible for framing of the Indian Contract Act, at once realised that the provisions of the Statute of Frauds, although followed in the Presidency Towns, were not suitable to the conditions prevailing in this country, and that "any law relating to this important subject must at any rate be free from the inexpressible confusion and intricacy which is thrown over every part of that Statute in consequence of its vague language."

5. In 1870, various branches of law were being codified in British India. The main object in view was in the words of Sir James Stephen, "that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Native Government servants without extrinsic help from the English law libraries." What was urgently needed was a guide for the judge or magistrate who had but little training, derived little or no assistance from the Bar and worked at a distance from any law library.

6. Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time has revealed defects the removal of which has become necessary in order to keep the law abreast of the developments of modern business relations. The law relating to the sale of goods appertains mainly to two mercantile transactions. There can be no doubt that during the last half century conditions in this country relating to trade business have undergone material changes. Methods of business have largely altered and new relations have arisen between man and man. In dealing with these relations, it has been necessary to give recognition to new principles, and the Indian Courts have found that a law enacted more than fifty years ago is entirely inadequate to enable them to deal with these new relations or give effect to the new principles. The result has been that on various occasions the Courts have had to hold that Chapter VII of the Indian Contract Act is not exhaustive, and to impart therein analogies from the decisions of the English Courts.

7. The English law relating to the sale of goods which was admittedly the basis of Chapter VII of the Indian Contract Act had itself since 1872 undergone drastic changes and was finally codified in 1893 by the present Sale of Goods Act (56 & 57 Vict., c. 71), which discards many of



the old common law rules upon which Chapter VII of the Indian Act was based, in favour of provisions more suited to modern conditions or more convenient in actual practice.

8. By the Bill referred for our consideration, the law relating particularly to the sale of goods is embodied in a separate enactment, although many of the general principles contained in the Indian Contract Act will continue to be applicable thereto. When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not, and could not pretend to be, a complete code upon the branch of law to which it related. He, however, expressed a hope that in latter years it would be easy to enact supplementary chapters relating to the several branches of the law of contract which the Bill did not touch. This hope has never been fulfilled. In later years it was found more convenient to have separate enactments for the several branches of the law of contract, *e.g.* the Transfer of Property Act, the Negotiable Instruments Act, the Merchant Shipping Act. In our opinion, in view of the complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of law relating to contract in separate self-contained enactments; and we hope that the Bill which we attach to our Report may be passed into law at an early date and may be but the first of the series required to complete the task which we have outlined above.

9. The Bill referred to us was mainly based on the English Sale of Goods Act, 1893. This Act has stood the test of nearly thirty-five years of practical application, and in the words of Lord Parker in *re Parchim* (1918) A.C. 157 at pages 160-161 "is a very successful and correct codification of this branch of the mercantile law." As is shown in Appendix B<sup>1</sup> to our Report most of Colonies and Overseas Dominions have adopted and re-enacted the Act with only such small variations as have been found necessary to adapt its provisions to local circumstances. It is also remarkable that the Uniform Sales Act, passed in 1906 in the United State of America and adopted in twenty out of fifty-three States and territories, is based very largely on the English Act. These facts constitute striking evidence of the completeness and the universal suitability of its provisions.

10. In mercantile transactions a conflict of laws should, as far as possible, be avoided. Uniformity of law in various countries particularly in those which have business or trade dealings with one another, is highly convenient and desirable. We, therefore, approve of the proposal to adopt the provisions of English Sale of Goods Act so far as they are suitable to Indian conditions as the basis for the present Bill, and thus to make the Indian law relating to the sale of goods as nearly as possible uniform with the law in force in other parts of British-Empire.

11. The provisions of the English Act are far more elaborate and comprehensive than those of Chapter VII of the Indian Contract Act, and in their arrangement the English Act is more logical and methodical. As we have already observed, it has revised and brought up to-date the rule of the English Common Law. Moreover, the adoption of the English Act

1. Not reproduced in the present edition.



as the basis of the present Bill will enable Indian Courts to interpret its provisions in the light of the decisions of the English Courts.

12. In adopting the provisions of the English Act we have not been unmindful of the needs and exigencies of this country. Wherever it has been found that a rule obtaining in England, such as that relating to market overt, is not suitable to Indian conditions, the rule has been rejected. We have, moreover, carefully scrutinised the provisions of the English Act in the light of the decisions of the English Courts since 1893, and where those decisions have shown the provisions of the English Act to be defective or ambiguous, we have attempted to improve upon them. We have also retained several of the provisions of the Indian Contract Act which we consider necessary or useful to meet special conditions existing in India. The Bill as revised by us on the above lines is attached to our Report.

13. A detailed explanation of the various clauses of the Bill is set out in our notes in Appendix C.<sup>1</sup> But we think it desirable to draw attention to the following points of Importance :

- (a) The present Bill embodies the principles that the question whether a contract for the sale of goods does or does not pass the property in the goods from the seller to the buyer must in all cases be determined by the intention of the parties to the contract. The provisions of Chapter VII of the Indian Contract Act are vague and conflicting on this point. The Bill codifies the rule by which that intention may be ascertained but the operation of these rules will be displaced by any terms of the contract defining the intention or by any attendant circumstances, including the conduct of the parties, rendering it ascertainable. In following this principle, we have borne in mind that in mercantile matters the certainty of the rule is often of more importance than the substance. If the parties know before hand what their legal position is, they can provide for their particular wants by express stipulation. Sale, after all, is a consensual contract, and the Bill does not prevent the parties from making any bargain they please. Its object is to lay down clear rules for the cases where the parties have either formed no intention or failed to express it.
- (b) The distinction between a sale and agreement to sell which was not clear in Chapter VII of the Indian Contract Act, has been clearly brought out. This distinction is very necessary to determine the right and liabilities of the parties to the contract.
- (c) It is made clear that a contract of sale can be made by mere offer and acceptance. Neither payment nor delivery is necessary for the purpose.
- (d) Before 1893 the law in England relating to warranties and conditions was in very confused state. In the Indian Contract Act the word "warranty" has been used in a vague sense. In some provisions it denotes a condition which would enable a

1. The Appendix is not reproduced in this work.



party aggrieved by its breach to repudiate the contract, while in others it enables him to claim damages only. In the Bill this ambiguity has been removed.

- (e) There is much conflict of decisions in India regarding the meaning of Section 103 of the Indian Contract Act which relates to sales by ostensible owners. This is to a certain extent due to the obscure phraseology of the section itself. We have tried to remove this obscurity in clauses 27 to 30 of the Bill to simplify the law on the subject.
- (f) We have elaborated the rules relating to delivery to carriers, stoppage in transit and auction sales.
- (g) We have anxiously considered the question of the retention of the Illustrations appearing in Chapter VII of the Indian Contract Act and of the insertion of Illustrations to new provisions. Our decision is that the better policy is to forego all Illustrations, leaving the Court to construe the sections as they stand.

14. In conclusion, we desire to place on record our high sense of obligation to Mr. W.T.M. Wright and Mr. J.R. Dhurandhar, who attended the meetings of the Committee and took part in deliberations. Mr. Wright rendered us great assistance in drafting the clauses of the Bill and in preparing this Report. Mr. Dhurandhar who acted as Secretary brought to bear upon the work great industry in collecting references and otherwise assisting us in the preparation of our notes.

Simla ;  
20th June, 1929.  
Bombay  
11th June, 1929.  
Bombay ;  
17th June, 1929.  
Ootacamund ;  
11th June, 1929.

B.L. Mitter.  
D. F. Mulla.  
M. R. Jayakar.  
A. Krishnaswami Aiyer.

## APPENDIX D

### REPORT OF THE SELECT COMMITTEE

We, the undersigned members of the Select Committee to which the Bill to define and amend the law relating to the sale of goods was referred, have considered the Bill and papers noted in the margin and have the honour to submit this our report, with the Bill as amended by us annexed hereto.

The history of this Bill is as follows : In 1926-27 an exhaustive examination of the case law bearing on certain portions of the Indian Contract Act, 1872, including Chapter VII, which embodies the law relating to sale of goods, was made in the Legislative Department under the supervision of the late Mr. S. R. Das, the law Member of the Executive Council of the Governor-General. In 1928 the results of that examination were considered by Mr. D. F. Mulla (now Sir Dinsha Mulla)



at that time holding the office of the Law Member, and a draft Bill was prepared on the lines of the English Sale of Goods Act, 1893 (56 and 57 Vic. c. 71) embodying the provisions of law relating to sale of goods in a separate enactment. In order to ensure general approval for a measure of such a highly technical character, the Government of India in 1929 appointed a Committee consisting of the Honourable the Law Member, Sir Dinsha Mulla, Mr. Krishnaswami Aiyar, the Advocate General of Madras, and Mr. M.R. Jayakar, Barrister-at-law, M.L.A., to consider generally the question of amending the law relating to sale of goods contained in Chapter VII of the Indian Contract Act, 1872, and in particular to examine the draft Bill. This Committee agreed to the proposal that the law relating to the sale of goods should be embodied in a separate enactment, and considered the draft Bill referred to them, in which they made certain additions and alterations. The Bill as settled by the Committee was circulated for opinion by executive order, and was introduced in the Legislative Assembly in September 1929. The reasons for the various clauses of the Bill are fully set out in the Report of the Committee which was appended as a Statement of Objects and Reasons thereto. The opinions received show that the Bill has met with almost unanimous approval in legal and commercial circles. The object, therefore, for which the Committee was appointed, has been amply justified.

After considering the opinions received, we find ourselves in agreement with almost all the provisions contained in the Bill. We entirely approve of the scheme followed in the Bill adopting as far as possible the provisions of the English Sale of Goods Act, 1893, in arrangement as well as wording. As pointed out in paragraph 9 of the Committee's Report referred to above, that Act has met with uniform approval and has stood the test for more than a third of a century. It has been adopted in most of the Overseas Dominions and Colonies and also in the United States of America. We feel that in commercial transactions there ought to be as far as possible uniformity of law in countries which have dealings with one another.

In the following notes we deal only with those provisions of the Bill which we consider require amendment, and with the more important suggestions received which we have been unable to accept.

Clause 1.—We propose that the Act should come into force on the first day of July, 1930.

Clause 2.—We have omitted the definition in sub-clauses (1), (3) and (14) as not being necessary, and we have added a definition of "mercantile agent" in view of use of that expression in clauses 27 and 30 as amended by us. The definition is taken from section 1 of the English Factors Act, 1889.

In sub-clause (9) (now sub-clause 7) in the definition of "goods", we have substituted "stocks and shares" for the words "stocks and share certificates" for greater accuracy.

A suggestion has been made that a mate's receipt should be included in the definition of "documents of title to goods". We considered the suggestion and have come to the conclusion, that notwithstanding the irregular practices in Calcutta of treating a mate's receipt on the same footing as a bill of lading, a mate's receipt cannot be treated as a document



of title. A mate's receipt is a mere acknowledgment of the receipt of goods on behalf of the ship. The person in possession of the mate's receipt is as a general rule entitled to a bill of lading, which is the document of title to the goods. The High Court of Calcutta has taken the same view and we are not aware of any judicial decision which regards a mate's receipt as a document of title. In England it has been held that mere endorsement or transfer of a mate's receipt without notice to the ship-owner or his agent does not pass the property in the goods, and a custom to that effect is bad. (See Scrutton on Charter Parties, page 169). If a mate's receipt were treated as a document of title, then on the issue of a bill of lading without the mate's receipt having been surrendered, there will be two documents of title in existence relating to the same goods. This would be highly undesirable from a business point of view.

Clause 5.—In sub-clause (1) we have provided for 'part payment' and 'part delivery' in pursuance of suggestions made.

Clauses 8 and 10.—For the words "agreement becomes void" which occur in both clauses, we have substituted the words "agreement is avoided". In our opinion the latter expression, which occurs in the corresponding sections of the English Act, conveys the intention most clearly.

Clause 12.—In sub-clause (3) we have added the words "and treat the contract as repudiated", as their omission was unintentional. The clause now adheres closely to the definition of the word "warranty" in section 62 of the English Act.

Clause 25.—It is suggested that a railway receipt should be placed on the same footing as a bill of lading in sub-clauses (2) and (3). In our opinion this suggestion is ill-conceived. Sub-clause (2) is really a prelude to sub-clause (3) and both of them refer to carriage by sea. A reference to a railway receipt in either of them would be inappropriate. In our opinion the case of transmission by rail is covered by sub-clause (1).

Clauses 27 and 29.—Clause 27 deals with the sale of goods by a person who is not the owner thereof. Clause 29 deals with the sale of goods by a person who has obtained possession thereto under a voidable contract. The suggestions received on these two subjects may be divided into three classes :

(1) The English law relating to sale in market overt should be introduced in British India "as it will relieve merchants of their anxiety when dealing with goods, especially in case of jewellery, ornaments, etc."

(2) The words at the end of clause 29 relating to offences should be deleted.

(3) A sale in a shop during business hours by shop-keeper or his servants should pass a valid title to a *bona fide* purchaser for value.

First, as to sales in market overt, the English law is thus stated in Benjamin on Sale (6th ed. p. 17 *et seq.*) :

"An important exception to the rule that a man cannot make a valid sale of goods that do not belong to him, is presented in the case of sales made in market overt. Section 22 of the Sale of Goods Act, 1893, provides that 'where goods are sold in market overt, according to the usage



of the market, the buyer acquired a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.' Market overt in the country is held by charter or prescription on special days ; but in the City of London every day except Sunday is. In the country the only place that is market overt is the particular spot ground set apart by custom for the sale of particular goods, and this does not include shops, but in the City of London every shop in which goods are exposed publicly for sale is market overt for such goods as the owner openly professes to trade in. Market overt is an 'open public and legally constituted market.' The shop in London must be one in which goods are openly sold, that is, sold in the presence and sight of any one entering the shop."

In London this custom is confined to shops in the City ; it does not extend to the whole of the metropolitan area. It does not protect a sale in a shop outside the City bounds *e. g.* in Regent Street ; nor a sale in a place within the City bounds which is not a shop, *e. g.*, a public auction room. [See *Clayton v. Ley Roy*, (1911) 2 K.B. 1031].

If the rule as to sale in market overt is to be introduced in British India, the first question that arises is as to the places to which it should be implied. This is a difficult question. Outside the City of London a market may become a market overt either by grant or prescription but the custom does not apply to a market established by a local Act. It is also doubtful whether the user, though for twenty years, of a market *de facto* is sufficient to establish a legal market so as to make sales therein sales in market overt. Such being the intricacies of the English law, we do not think it would be safe to introduce the rule as to sales in market overt throughout the length and breadth of British India.

The second suggestion is that the words at the end of clause 29, relating to offences, should be deleted. The present law on the subject is contained in Exception 3 of Section 108 of the Indian Contract Act, 1872, which is as follows :

When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession : unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession of those whom he represents.

The above Exception presupposes a contract, and does not apply unless there is a contract. Where goods are obtained by theft, there is no contract, and the Exception does not apply. The thief has no title and can give none.

Where goods have been obtained by fraud, the person who has obtained them may either have no title at all, or a voidable title, according to the nature of the transaction. If the nature of the fraud be such that there never was a contract between the parties (as, for instance, if A obtains goods from B by falsely pretending to be X's agent, though buying on his own account) then the person who obtains the goods has no title, and can give none. In this case also there is no contract between A and B. But if A buys goods from B and the price is paid partly in cash



and partly by giving a bill purporting to be accepted by X, and A then sells the goods to C and it turns out that X was a fictitious person, and that B was defrauded, there is a contract which B may affirm or rescind at his option. In other words, to use the language of Exception 3, there is "a contract voidable at the option of the other party thereto." But the contract was procured by A by cheating B, and cheating is an offence under section 415 of the Indian Penal Code. The contract having been procured by an offence the property in the goods does not, under the existing Indian law, pass to A, though it does under the English law. This is indeed a hard case, and it is proposed to amend section 108 by eliminating the words at the end beginning with "unless the circumstances," etc. At the same time to make it quite clear to what cases clause 29 applies, we have in that clause specifically referred to sections 19 and 19A of the Indian Contract Act, 1872. A contract under these sections is voidable on the ground of misrepresentation, fraud, coercion or undue influence.

The first condition necessary for the application of clause 29 as now drafted is that there must be contract. It is clear that there can be no contract where goods have been obtained by theft, as defined in section 378 of the Code. Clause 29 as drafted by us will apply to this class of cases. The principal change made by clause 29 in the existing law is that a person buying in good faith from a person who has obtained possession of goods under a voidable contract, acquires a good title to the goods, even if the contract was induced by fraud amounting to cheating.

A similar clause in respect of pledges has been inserted in the Indian Contract (Amendment) Bill. That clause will be section 178A of the Indian Contract Act, 1872.

The above changes have been suggested in many of the opinions from the commercial bodies.

The third suggestion is that a sale in a shop during business hours by the shop-keeper or his servant should pass a valid title to a *bona fide* purchaser for value. This goes far beyond anything known in the English law, and even beyond the law as to sales in market overt. It is impossible to accede to such a suggestion.

Clause 30.—We have amended clause 30 by adding in two places the words "or by a mercantile agent acting for him." This had rendered it necessary to define the expression "mercantile agent," and we have defined it accordingly in the definition clause. We have used this term also in clause 27 of the Bill and in the clause 2 of the Indian Contract (Amendment) Bill.

Clause 54.—In this clause we have provided that the re-sale shall take place within a reasonable time.

Clause 60.—There is a suggestion that a provision should be made in this clause to the effect that in the case of anticipatory breach damages should be assessed on the basis of the market price on the date of repudiation. We do not approve of this suggestion; for if damages are assessed on the basis of the market rate on the date of the repudiation, a party apprehending heavy loss on the due date may take advantage of a favourable market and repudiate the contract before the due date. This



we considered unreasonable. In a series of decisions it has been laid down that damages in such cases are to be assessed as on the due date (*Vide* I.L.R. 30 Cal. 477, 36 Cal. 617, 43 Cal. 305). In our opinion the measure of damages must be left to the general provision contained in sections 73 and 74 of the Indian Contract Act.

2. We have made a few alterations of a purely drafting nature to which we have not thought it necessary to refer in detail.

3. The Bill was published as follows :

### In English

Gazette			Date
Gazette of India	...	...	17th September, 1929.
Fort St. George Gazette	...	...	6th August, 1929.
Bombay Government Gazette	...	...	5th September, 1929.
Calcutta Gazette	...	...	1st August, 1929.
United Provinces Gazette	...	...	6th July, 1929.
Punjab Government Gazette	...	...	30th August, 1929.
Burma Gazette	...	...	27th July, 1929.
Central Provinces Gazette	...	...	27th July, 1929.
Assam Gazette	...	...	18th September, 1929.
Bihar and Orissa Gazette	...	...	7th August, 1929.
Coorg District Gazette	...	...	2nd September, 1929.
Sind Official Gazette	...	...	19th September, 1929.
North West Frontier Gazette	...	...	2nd August, 1929.

### In the vernacular

Province		Language		Date
Madras	...	Tamil	...	1st October, 1929.
		Telugu	...	1st October, 1929.
		Hindustani	...	22nd October, 1929.
		Kanarese	...	8th October, 1929.
		Malayalam	...	1st October, 1929.
Bombay	...	Marathi	...	14th November, 1929.
		Gujarathi	...	14th November, 1929.
		Kanarese	...	12th December, 1929.
		Urdu	...	26th December, 1929.
Central Provinces	...	Marathi	...	26th October, 1929.
		Hindi	...	2nd November, 1929.
Sindh	...	Sindhi	...	24th October, 1929.

B.L. MITTER.  
D.F. MULLA.  
M. SHAH NAWAZ.  
ABDUL QADIR SIDDIQI.

The 18th January, 1930,



## APPENDIX E

## THE INDIAN BILLS OF LADING ACT, 1856.

(Act IX of 1856).

*(Received the assent of the Governor-General on the 11th April, 1856)*

An Act to amend the law relating to Bills of Lading.

Whereas by the custom of merchants a bill of lading of goods being transferable by the endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property ; And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid ; It is enacted as follows :

1. Every consignee of goods named in a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment, or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, of his receipts of the goods by reason or in consequence of such consignment or endorsement.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board : Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or the holder, or some person under whom the holder claims.



## APPENDIX F

## "C.I.F." "F.O.B." AND "EX-SHIP" CONTRACTS

## "C.I.F." CONTRACTS

## Nature of contract.

**Evolution of contract.**—The commercial reason for the evolution of "C.I.F." contract lies in the length of time taken in the carriage of goods by sea. It is to the advantage of neither seller nor buyer that the goods, the subject-matter of the contract, should remain *en de hors* commerce while they are in course of shipment. It is to the seller's interest to receive the money equivalent of the goods as soon as possible after the date of the contract of sale, until he had received actual payment of the price he normally desires to be able if he wishes, to obtain credit upon the security of the transaction. The buyer, on the other hand, normally desires to be able to deal with the goods, for re-sale or finance as soon as possible. To meet these business necessities on the part of both buyer and seller the "C.I.F." contract was evolved.<sup>1</sup>

A C.I.F. or C.F.I. contract, as it is sometimes called, is a contract for the sale of goods upon cost, freight and insurance terms. This type of contract has certain peculiar features which distinguish it from the ordinary contract for the sale of goods. Although the C.I.F. contract does not fall outside the scope of the Sale of Goods Acts<sup>2</sup> (English and Indian), there are certain provisions in those Acts which are either wholly inapplicable to this class of contracts, or when applied to it must be read subject to certain qualifications.

Under an ordinary C.I.F. contract the seller has "*firstly*" to ship at the port of shipment goods of the description contained in the contract; *secondly*, to procure contract of affreightment under which goods will be delivered at the destination contemplated by the contract; *thirdly*, to arrange for an insurance upon terms current in the trade which will be available to the buyer; *fourthly*, to make out an invoice as described by Blackburn J. in *Ireland v. Livingston*,<sup>3</sup> or in some similar form; and *finally* to tender these documents to the buyer, so that he may know what freight he has to pay, and obtain delivery of the goods if they arrive or recover for their loss if they are lost on the voyage.<sup>4</sup> Such terms constitute an arrangement that the delivery of the goods, provided they are in conformity with the contract shall be delivery on board the ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price. In this case sellers of San Francisco and London, sold buyers a quantity of Pacific Coast hops c.i.f. London, Liverpool or Hull, 'terms net cash.' Sellers advised buyers that they were ready to ship and asked for

1. Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 164.

2. See Biddell Brothers v. Clemens Horst, (1911) 1 K.B. 934 at p. 955, et seq. per Kennedy L.J. Affd. tit. rev. by H.L. (1912) A.C. 18. The decision in

C.A. itself was reversed by H.L.

3. (1872) L.R. 5 H.L. at p. 406.

4. Biddell Brothers v. E. Clemens Horst & Co. (1911) 1 K.B., per Hamilton J. at p. 220; T.D. Kumar v. Beruck, A.I.R. 1925 Cal. 941; 89 I.C. 636.



payment on tender of shipping documents, but buyers replied that they would only pay against the delivery of the goods, and examination of each bale. It was *held* that S. 28 of the English Sale of Goods Act, 1893 (corresponding to S. 32 of the Indian Act) applied and buyers were liable to pay upon tender of the documents.

To the five requisites above, a sixth one may be added, namely that the sellers must with all reasonable despatch send forward the shipping documents to the buyer at the place of destination, or if none such is named in the contract, *prima facie*, at the residence or place of business of the buyer.<sup>1</sup>

### Duties of seller.

#### (a) *Shipment of the goods.*

The first duty of the seller is to ship at the port of shipment goods of the contract description. If the goods do not correspond with the contract description, there is a breach of contract when the goods are shipped<sup>2</sup> although, when the claim is for non-delivery, the place of breach is the place where the documents ought to have been tendered.<sup>3</sup> The case would no doubt be different where there has been an absolute refusal to ship.<sup>4</sup>

"Shipment" in an English contract means putting on board a ship, and evidence of usage to the contrary cannot be given to contradict the express terms of the contract.<sup>5</sup>

Generally speaking, in a "C.I.F." contract the time of shipment is a condition of the contract and not merely a warranty,<sup>6</sup> and a breach of a term as to date of shipment entitles the buyer to repudiate the contract. Where no time for shipment is stated the goods must be shipped within a reasonable time.<sup>7</sup>

In the absence of express agreement as to the route of shipment the goods must be shipped by a usual route or where that route becomes impracticable by some alternative route which may be reasonable and

1. *Johnson v. Taylor*, (1920) A.C. 144, at p. 156, per Lord Atkinson. See also *Landauer v. Craven*, 1912, 17 Com. Cas. 193, at p. 202; *Groom v. Barber*, (1915) 1 K.B. 316; *Karberg v. Blythe* (1916) 1 B.C. 495, at p. 513.
2. *Parker v. Schuller* (1901) 17 T.L.R. 299 C.A.; *Crozier v. Auerbach* (1908) 2 K.B. 161 C.A.
3. *Biddell Bros. v. E. Clemens Horst*, supra per Kennedy L.J. at pp. 961, 962.
4. See *Johnson v. Taylor* (1920) A.C. 144.
5. *Mowbray Robinson & Co. v. Rosser* (1922) 91 L.J. (K.B.) 524 C.A.; but the language of the particular contract may indicate a wider meaning (see *Halsbury, Laws of England*, 3rd Edn., Vol 34, p. 167). See also *Hansson v. Hamel*, (1922) 2 A.C. 36, at p. 47 and *Foreman v. Blackburn*, (1928) 2

- K.B. 60 as to the meaning of "shipment." See also *Verseux (Mitchell) S.A.R.L. v. Schwetz and Co. (Grain)* (1971) 1 Lloyd's Rep. 391—The parties did not contemplate that since the contract had been varied, there still had to be fifteen days' notice of the port of destination. See 100 *European Grain & Shipping v. J.H. Rayner & Co.*, (1970) 2 Lloyd's Rep. 239—Shipment delayed by strike; specific clause in the contract covering delay of shipment by strike; buyers rejecting appropriation of goods by seller to the contract; judgment for the sellers.
6. *Bowes v. Shand* (1877) 2 App. Cas. 455.
7. *Landauer & Co. v. Craven and Speeding Brothers*, (1912) 2 K.B. 94, per *Scrutton J.* at p. 105,



practicable in the circumstances.<sup>1</sup> The goods must be shipped by the vessel or type of vessel stipulated in the contract<sup>2</sup> or, if the contract is silent on this point, by a type of vessel customary in the trade.<sup>3</sup> Breach by the seller of any of these terms, whether express or implied, entitles the buyer to repudiate the contract.<sup>4</sup>

If the goods are not of the description contained in the contract, the buyer's right to reject them or to recover damages for breach of contract is not precluded because the buyer has paid against the documents.<sup>5</sup>

*(b) Procuring a contract of affreightment—bill of lading.*

The seller must procure a contract of affreightment to ultimate destination covering the whole transit.<sup>6</sup> A through bill of lading from an intermediate port is insufficient.<sup>7</sup> Where goods were shipped from Norway for Japan under c.i.f. contract, and were transhipped at Hamburg, it was held that the buyers were not bound to accept a document purporting to be a through bill of lading issued at Hamburg, on the ground that it was not issued on shipment and did not give the buyers any protection during the first stage of the transit.<sup>7</sup>

The contract of affreightment must be a reasonable contract and must satisfy S. 39 (2) of the Act. The duty of the seller to procure a contract of affreightment is satisfied if he procures a contract of affreightment which is normal and usual in the trade.<sup>8</sup> He must also procure a bill of lading evidencing the contract of affreightment. No other document *e.g.*, delivery order<sup>9</sup> or ship's release,<sup>10</sup> will amount to a good tender under the contract.

The typical bill of lading, as known to merchants, is a receipt for goods shipped on board a ship; it is signed by the person who contracts to carry them, or his agent normally the master to the ship and it states the terms of the contract of carriage under which the goods have been delivered to and received by the ship.<sup>11</sup> During the period of transit and voyage, the bill of lading is, by the law merchant, recognised as the symbol of the goods described in it; and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods. Property

1. *Postlethwaite v. Freeland* (1880) 5 App. Cas. 599, at p. 616.

2. *Cf. Ashmore & Son v. Cox*, (1899) 1 Q.B. 436, at p. 441.

3. *Ranson, Ltd. v. Manufacture d'Engrais* (1922) 13 L.J. L.R. 205. See *Thomas Brothwick (Glasgow) Ltd. v. Bunge & Co. Ltd.*, (1969) 1 Lloyd's Rep. 17—Shipment per *Bristol City* expected ready to load 3rd/5th January, or substitute; seller has right to substitute vessel.

4. *Ibid.*, *Ashmore & Son v. Cox*, *supra*; see also Halsbury, *Laws of England*, 3rd Edn., Vol. 34, pp. 167, 168.

5. *Polenghi v. Dried Milk Co.* (1904) 10 Com. Cas. 42; see *Biddell Bros. v. E. Clemens Horst*, *supra*.

6. *Landauer v. Craven*, *supra*; *Biddell*

*Bros. v. E. Clemens Horst Co.*, *supra*; *Johnson v. Taylor Bros* (1920) A.C. 144; *Lecky v. Ogilvy*, 3 Com. Cas. 29 (C.A.).

7. *Hansson v. Hamel*, *supra*.

8. *Burstall & Co. v. Grimsdale*, (1906) 11 Com. Cas. 280, a c. i. f. contract may involve some land transit.

9. *Re Denbigh Cowan & Co. and Atcherley (R) & Co.* (1921), 90 L.J. (K.B.) 836, C.A.

10. *Heilbut, Symons & Co. Ltd. v. Harvey & Co.*, (1922), 12 L.L.R. 455.

11. *Sewell v. Burdick*, (1884) 10 App. Cas. 74, at p. 105.

See also *Nissim I. Bakher v. Haji Sultanalli Shustary*, (1915) 17 Bom. L.R. 249.



in the goods passes by such endorsement whenever it is the intention of the parties that the property should pass, just as in similar circumstances the property would pass by actual delivery of the goods.<sup>1</sup> The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons.<sup>2</sup> He is thus in the same commercial position as if the goods were in his physical possession subject to the qualification that he takes the risk of non-delivery of the goods by the ship-owner and that in order to obtain actual delivery of the goods from the ship-owner, he may be obliged to discharge the ship-owner's lien for freight.<sup>3</sup>

Whether a particular form of receipt for goods is a bill of lading such as is required under a *c.i.f.* contract, would appear to be a question of fact in each case.<sup>4</sup>

The characteristics generally required by the common law to exist in a bill of lading if it is to be a good tender, under a *c.i.f.* contract are so required only because it is the general custom of merchants that such a bill of lading shall possess those characteristics.

If in any particular trade there is a custom that bills of lading should have other characteristics in addition to or in substitution for those generally required by the custom of merchants, then in that trade bills of lading, to be good tender, need only conform to that custom.<sup>5</sup>

In the absence of stipulation to the contrary the bill of lading must be one which will give the holder a right of action against the ship-owner in respect of the goods from time of shipment until arrival at destination.<sup>6</sup> The bill of lading must be produced upon shipment, *i.e.* as soon as is reasonably possible after the goods have been delivered.<sup>7</sup> The bill of lading must cover only the goods which are the subject-matter of the contract of sale.<sup>8</sup>

It has been observed that a contract of affreightment is put an end to by the outbreak of hostilities between the Governments of the shipper and the shipmaster.<sup>9</sup> The buyer is entitled to refuse to accept an enemy bill of lading even though the contract was entered into before war.<sup>10</sup>

### (c) Insurance.

In the case of goods under an ordinary contract, S. 39 (3) of the Act provides that where goods are sent by the seller to the buyer by a route involving, in sea transit, circumstances in which it is usual to insure the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and that if the seller fails so to do, the goods shall be

1. *Sanders Bros. v. Maclean* (1883) 11 Q.B.D. 327, C.A.
2. *Glyn, Mills & Co. v. East & West India Dock Co.*, (1882) 7 App. Cas. 591.
3. See Halsbury, *Laws of England*, 3rd Edn., Vol. 34, pp. 165, 166.
4. See *Diamond Alkali Corporation v. Bourgeois*, (1921) 3 K.B. 443, 452, 453, distinguishing, *The Marlborough Hill*, (1921) 1 A.C. 444 P.C.
5. *N. V. Arnold Otto Meyer v. Aune*,

- (1939) 3 All E.R. 168 (K.B.D.), 55 T.L.R. 876.
6. *Hansson v. Hamel and Harley Ltd.*, (1922) 2 A.C. 36.
7. *Landauer & Co. v. Craven*, *supra*.
8. *Re Keighley, Maxted & Co.*, (1894) 70 L.T. 155 C.A.
9. *Marshall v. Naginchand*, (1916) 18 Bom. L.R. 915.
10. *Karberg v. Blythe*, (1916) 1 K.B. 495 C.A.; *Duncan v. Schrempt*, (1915) 3 K.B. 355.



deemed to be at his risk during such sea transit. In the case of a *c.i.f.* contract, however, it is the duty of the seller to arrange for insurance on terms current in the trade for the benefit of the buyer. The question as to whether the policy tendered fulfills the requirement is one of fact.

The goods must be covered by the policy to an amount equal to their reasonable value on shipment.<sup>1</sup> The policy must be procured from responsible insurers, and must be a valid policy.<sup>2</sup> It must cover only the goods sold<sup>3</sup> and must cover them for the whole of the transit.<sup>4</sup>

The goods must be covered by an effective policy, and the fact that the goods arrive safely does not excuse the seller for not having effected or tendered a policy.<sup>5</sup> The buyer is entitled to have a policy tendered to him, and a mere assertion by the seller that a policy exists is insufficient.<sup>6</sup> An open cover protecting all goods shipped by the seller is not sufficient.<sup>1</sup> Similarly, a broker's cover note or a certificate of insurance is not a good substitute for an insurance policy.<sup>7</sup>

A seller who has effected a proper insurance under a *c.i.f.* policy may retain for his own benefit "increased value" policies which he has subsequently taken out.<sup>8</sup>

The seller is not bound to insure against war risks even if at the time of the contract war is imminent unless such insurance is usual.<sup>9</sup> It was accordingly held in *Nissim I. Bekhor v. Haji Sultanalli Shustary*<sup>10</sup> that where the seller's agent in England on the outbreak of the last Great War insured the goods which were shipped from Newport against war risks at 10 per cent. premium, the defendants were not liable to pay the war insurance premium. In *Groom v. Barber*<sup>11</sup>, the words "war risk for buyer's account" were held to mean that war risk was the buyer's concern, and if he wanted to cover war risk, he must get it done.

The contract by a seller to insure cattle sent abroad against "all risks" was held to be satisfied by taking out a Lloyd's "all risks" policy, if it contained the free of "capture and seizure" clause.<sup>12</sup>

In *J. H. Vantol Ltd. v. Fairclough Dodd & Jones Ltd.*, [(1955) 2 All E.R. 516], the contract which was made on a form issued by the London Oil and Tallow Trades Association contained a *force majeure* clause, Cl. 11, which provided: "A. In the event of war, hostilities or blockade preventing shipment this contract or any unfulfilled part thereof shall be

1. *Johnson v. Taylor Bros.*, (1920) A.C. 144 at p. 149. The insurance need not cover the freight.

2. *Cantiere Meccanico Brindisino v. Constant*, (1912) 17 Com. Cas. 182, p. 192.

3. *Lickox v. Adms*, (1876) 34 L.T. 404, C.A.

4. *Landauer & Co. v. Craven*, supra.

5. *Orient & Co. v. Brekke*, (1913) 1 K.B. 531.

6. *Manbre Saccharine Co. v. Corn Products Co.* (1919) 1 K.B. 198.

*Wilson v. Belgain Grain Co.* (1920) 2

K.B. 1; see also *Diamond Alkali v. Bourgeois*, supra.

8. *Strass v. Spillers*, (1911) 2 K.B. 756.

9. *Law & Bonar v. British American Tobacco Co.*, (1916) 2 C.B. 605.

10. (1915) 17 Bom. L.R. 249.

11. (1915) 1 K.B. 316.

12. *Yuill v. Scott*, (1908) 1 K.B. 270, C.A. but see *Vincentelli v. Rowlett*, (1916) 16 Com. Cas. 310; *British and Foreign Marine Insurance Co. v. Gaunt* (1921) 2 A.C. 41 at p. 57 (scope and limits of "all risks policy" discussed).



cancelled.....B. Should the shipment be delayed by...prohibition of export...or any other cause comprehended in the term *force majeure* other than war, hostilities, blockade, the time of shipment shall be extended by two months. Should the delay exceed two months, buyers shall have the option of cancelling the contract forthwith or accepting the goods for shipment as soon as possible but should the shipment not be possible within eight months from the date of shipment originally stipulated contract to be void. The option to be declared as soon as shippers announce their inability to ship within the extended period of two months .....If required sellers must produce proof to justify their claim for cancellation or extension." The sellers claimed that shipment had been delayed by *force majeure* within clause 11B of the contract. It was *held*: The sellers were not in default because (i) the shipment was delayed within the meaning of Cl. 11B of the contract although the prohibition on export did not continue throughout the whole of the period remaining after its inception within which the contract might be performed, and (ii) it was not necessary for sellers to prove that they were unable to purchase goods afloat. This case was, however, reversed on appeal in *Vantol Ltd. v. Fairclough Dodd Ltd.*, (1955) 3 All E.R. 750, and it was *held*: The shipment referred to in clause 11-B meant shipment, in accordance with the contract, *viz.*, during the months of December, 1950, January 1951; the shipment was not, therefore, delayed within the meaning of clause 11-B unless the delay was one which continued to or beyond the date allowed by the contract for shipment, *viz.*, Jan. 31, 1951, and accordingly the sellers were in breach of contract and the buyers were entitled to recover damages.

See also *Albert D. Garon & Co. v. Societe*, (1959) 2 All E.R. 693 **affirmed** on appeal in *Tsakiroglou & Co. v. Noble & Thorl*, (1960) 2 All E.R. 160,<sup>1</sup> which was further confirmed by the House of Lords in *Tsakiroglou & Co. v. Noble & Thorl*, (1961) 2 All E.R. 179—Performance possible by route which was not customary; closing of Suez Canal; existence of alternative route; contracts not frustrated.

Buyer is entitled to full benefit of existing insurance on goods purchased as insured<sup>2</sup>; but *not* where sellers had also called Existing insurance. "profit insurance"<sup>3</sup>; and *not* where contract stipulated any amount over 2 per cent. over the invoice amount to be for seller's account.<sup>4</sup>

#### (d) *The Invoice.*

The invoice is the written account of the particulars of goods delivered to the buyer with the value or prices or charge annexed.<sup>5</sup> Under *c.i.f.* contract the invoice must be made out debiting the buyer with the agreed price and giving him credit for the amount of freight which he will have to pay the ship-owner on actual delivery,<sup>6</sup> in some similar form.<sup>7</sup>

1. See also *Tsakiroglou & Co. Ltd. v. Noble Thorl G. m. b. H.*, (1959) 1 All E.R. 45 which was also affirmed in (1960) 2 All E.R. 160. (1958) 3 All E.R. 115 was, however, not followed.
2. *Ralli v. Universal Marine Insurance Co.*, 31 L.J. Ch. 313; *Powles v. Innes*, 11 M. & W. 10; *Landauer v. Asser*, (1905) 2 K.B. 184.

3. *Harland v. Barstall & Co.*, 84 L.T. 324.
4. *Strass v. Spillers & Baker*, (1911) 3 K.B. 759.
5. Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 171.
6. *Ireland v. Livingston*, (1872) L.R. 5 H.L. 395, at p. 406.
7. *Biddell Bros. v. E. Clemens Horst*, (1911) 1 K.B. 214, at p. 220.



When a *c.i.f.* contract provided for a provisional invoice to be sent "thirty running days" from the date of the bill of lading, the last possible day for its arrival was treated as the date when the breach of contract occurred.<sup>1</sup>

(e) *Tender of the documents.*

Shipping documents are necessary to enable the buyer to deal with the goods in the usual way of business and therefore a seller under a *c.i.f.* contract is bound to tender to the buyer the customary or agreed shipping documents. The contract often specifies in detail the documents to be tendered, and where this is so, all the documents called for by the contract must be tendered<sup>2</sup>; but where the contract is silent, it is sufficient if the seller tenders the bill of lading, policy of insurance, and invoice and where bills of lading are issued in sets of three the tender of one bill is sufficient in the absence of stipulation to the contrary.<sup>3</sup>

Where the contract is silent as to place of tender, the place of tender is *prima facie* the residence or place of business of the buyer<sup>4</sup>; but slight evidence of trade usage or of a course of business between the parties would be sufficient to rebut this presumption.<sup>5</sup>

The tender of document must be made at a reasonable hour.<sup>6</sup>

The documents tendered must be valid and effective at the time of tender.<sup>7</sup> All these documents must be made out in proper form, and in terms not inconsistent with the contract, and a tender of some only of the documents, or of insufficient or irregular documents, is an invalid tender.

The documents must be sent forward and tendered to the buyer with all reasonable despatch.<sup>8</sup> The documents must be valid shipping documents under which the buyer can obtain either the goods themselves or in case of their loss, a legal remedy for their non-delivery.<sup>9</sup> A bill of lading which has become a valid contract owing to the outbreak of war is not a valid shipping document.<sup>10</sup>

1. Produce Brokers Co. v. Weis, 87 L.J. K.B. 472.

2. Re Denbigh Cowan & Co. and Atcherley & Co. (1921) 90 L.J.K.B. 836. C.A.; Scott & Co. v. Barclays Bank Ltd. (1923) 28 Com. Cas. 253., C.A. See Panchaud Freres S. A. v. Establishments General Grain Co., (1970) 1 Lloyd's Rep. 537 C.A. — Late shipment; right to reject documents and right to reject goods.

3. Sanders Brothers v. Maclean, (1883) 11 Q.B.D. 327 C.A.; Caderberg v. Borries Craig & Co., (1885) 2 T.L.R. 20.; Biddell Bros. v. E. Clemens Horst Co., (1911) 1 K.B. 214.

4. Johnson v. Taylor Brothers & Co. Ltd. (1920) A.C. 114; Stein Forbes v. County Tailoring Co., (1916) 115 L.T. 215.

5. Thus, where payment is to be made

by a banker under a confirmed credit, the place of tender will be the banker's place of business.

6. Section 36, Sale of Goods Act, 930.

7. Cantiere Meccanico Brindisino v. Constant, 1912, 17 Com. Cas. 322 C.A. (void policy of insurance); Arnold Karberg & Co. v. Blythe, (1916) 1 K.B. 495, C.A. (contract of affreightment void owing to outbreak of war); cf. Re Weis & Co. Ltd. and Credit Colonial et Commercial, Antwerp (1916) 1 K.B. 346.

8. Johnson v. Taylor, supra; Sharpe v. Nosawa, (1917) 1 K.B. 814.

9. See Groom v. Barber, (1915) 1 K.B. 316; Karberg v. Blythe, (1916) 1 K.B. 495.

10. Marshall v. Naginchand, (1916) 18 Bom. L.R. 915; Karberg v. Blythe, supra.



A *c.i.f.* contract is not a mere sale of documents, so as to cast upon the buyer the risk of the documents remaining valid after shipment. It is still a sale of goods, though they are deliverable by means of documents and, as already pointed out, the documents must accordingly be proper and valid at the time of tender. If they are so, the buyer must pay upon them, although it may be obvious at that time that actual delivery of the goods is impossible in fact, for *prima facie* the buyer, as between him and the seller, receives all risks of delivery affecting the goods themselves.<sup>1</sup>

There is a valid tender if proper documents have been tendered, even after knowledge that the goods have been lost, provided that the goods are covered by a policy which can be assigned to the buyer.<sup>2</sup> An English buyer from a foreigner on *c.i.f.* terms is not entitled to ask for an English policy, but he may reject the goods if the policy tendered does not specify the risks insured against.<sup>3</sup>

As the buyer under a *c.i.f.* contract seldom sees the goods before the contract is entered into, practically all *c.i.f.* contracts are sales by description. Where the goods do not correspond with the description contained in the contract, the breach is deemed to take place when the goods were shipped.<sup>4</sup>

The cause of action for breach by non-delivery arises where the documents ought to have been tendered. The contract is broken when the documents ought to have been tendered and damages must be estimated accordingly.<sup>5</sup>

In *Comptoir d'Achat v. Luis de Ridder*, (1949) A.C. 293, 300, by a contract made in April 1940, the sellers, an Argentine company, sold to the buyers, a Belgian company, 500 tons of rye for shipment "*c.i.f.* Antwerp" on the terms contained in Form 41 of the London Corn Association. The contract provided for payment "on first presentation of and in exchange for first arriving copy/ies of bill/s of lading.....and/or delivery orders and policy/ies and/or certificate/s.....of insurance." Both the bill of lading and policies remained throughout in possession of the sellers or their agents. The sellers exercised their option to demand payment in exchange for a delivery order. A delivery order directed to the seller's agents at Antwerp was handed to the buyers against payment of this sum. It was endorsed by the agents with an undertaking to honour it. The sellers delivered to their agents two certificates of insurance and the delivery order in terms recognised the buyer's interest in these to the extent of their purchase. The charter party under which the ship sailed recognized no port of discharge but Antwerp. While she was still at sea the Germans invaded Belgium and occupied that town. By arrangement between the owners and the sellers as charterers, but without the consent the ship discharged her cargo at Lisbon, where it was sold by the sellers. It was admitted that the property in the rye had never passed to the buyers,

1. *Groom v. Barber*, supra ; *Olympia Oil Co. v. Produce Brokers Co.*, (1917) 1 K.B. 320 ; *Clark v. Cox, McEwen & Co.*, (1921) 1 K.B. 139.
2. *Manbre Saccharine Co. v. Corn Products Co.*, (1919) 1 K.B. 198.
3. *Malmberg v. Evans*, (1924) 29 Com.

- Cas. 235.
4. *Parker v. Schuller*, (1901) 17 T.L.R. 299 C.A. ; *Crozier v. Auerbach*, (1908) 2 K.B. 161, C.A.
5. *Sharpe v. Nosawa*, (1917) 2 K.B. 814 ; distinguished in *Produce Brokers v. Weis & Co.*, (1918) 85 L.J.K.B. 472.



who claimed total reimbursement of the sum paid by them. It was *held*: Despite the designation of the contract as "*c. i. f.*" the true effect of all its terms must be taken into account and in the light of these the contract was not "*c. i. f.*" but a contract to deliver at Antwerp. The payment made was not for the documents as representing the goods but for delivery of the goods themselves. There was a frustration of the adventure and not part performance and the consideration had wholly failed so that the buyers were entitled to recover the amount paid.

### Duties of buyer.

#### (i) Price.

The price payable is that agreed upon the contract of sale. Where duties are payable upon the goods, export duties, being part of the expenses of shipment, fall upon the seller, but import duties are payable by the buyer in the absence of stipulation to the contrary, and if the seller is obliged to pay them, he can recover the amount from the buyer.<sup>1</sup>

#### (ii) Payment.

In a c.i.f. contract where there is no express stipulation to the contrary, payment and tender of the documents, not payment and delivery of the goods, are concurrent conditions.<sup>2</sup> The term "net cash" is equivalent to "net cash against documents" and does not postpone the liability of the buyer to pay for the goods.<sup>3</sup> The buyer cannot insist on the right of inspection as a condition precedent to payment. The buyer's right to inspect the goods and reject them if they are not in conformity with the contract, nevertheless remains unimpaired.<sup>4</sup>

The buyer is bound to pay the price against the shipping documents irrespective of the ship.<sup>5</sup> If there is a term as to arrival of the ship, it only denotes the time when payment is due, and is not a condition of payment.<sup>6</sup>

In commercial practice it is common for the contract to provide that instead of payment becoming due in cash upon tender of the documents, the buyer shall accept a bill of exchange payable at a later date drawn upon him by the seller. In such a case it is the duty of the buyer, on tender of the bill of exchange together with the documents, to accept the bill of exchange; if he does not do so, he must return the bill of lading and the property in the goods does not pass to him.<sup>7</sup> If the contract provides that payment is to be made by draft drawn on the

1. American Commerce Co. Ltd. v. Boehm (Frederick) Ltd. (1919) 35 T.L.R. 224; see Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 172.

2. E. Clemens Horst Co. v. Biddell Bros., (1912) A.C. 18.

3. Biddell Bros. v. E. Clemens Horst Co. (1911) 1 K.B. 934 at p. 954.

4. Polenghi v. Dried Milk Co., (1904) 92 L. T. 64; 10 Com. Cas. 42.

5. See Mohan Lal v. Krishna, (1928) 13

Bom. L.R. 415, at p. 422. See also Daulatram Rameshwari Lal v. European Grain Shipping, (1971) 1 Lloyd's Rep. 368—Full and written notice of appropriation of shipment within the stipulated time given by the seller; buyer bound to pay the price.

6. See Kennedy on C.I.F. Contracts, 2nd Edn., p. 7.

7. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 173.



buyer, the latter is bound to accept the draft upon tender of the proper shipping documents. This he must do even though the goods be lost or destroyed at the time when the draft is presented.<sup>1</sup>

Where the buyers who had accepted the bill of exchange sent to them along with the shipping documents and also the shipping documents refused to honour the bills at maturity, they were held liable to pay interest after the due date.<sup>2</sup>

It has been held that purchaser under a c. i. f. contract is entitled to ask for a bill of lading, and he is not bound to pay upon proof merely that the goods have arrived at the port of departure.<sup>3</sup> It is open to the parties to a c. i. f. contract to substitute by agreement of a delivery order for a bill of lading. Such a variation does not affect the essentials of c. i. f. contract so as to relieve the seller from the obligation of tendering a policy of insurance to the buyer.<sup>4</sup> It is the duty of the consignor of goods under a c. i. f. contract to tender to the consignee the bill of lading and insurance policy before the price is demanded, and a delivery telegram sent by the shipping company is not equivalent to the bill of lading. In the absence of the usual documents of title, the consignee is entitled to inspect the goods and satisfy as to the same.<sup>5</sup>

“Where under a ‘c. i. f.’ contract it is expressly provided that payment shall be through a ‘banker’s credit’, it is a condition of the contract that the buyer should within a reasonable time make the necessary arrangements with a reasonable banker to issue a letter of credit in favour of the seller under which the banker gives an undertaking to the seller to accept or pay, as the case may be, in exchange for shipping documents, bills of exchange drawn upon him by the seller for the price of the goods. If the contract of sale, as is usual, calls for a ‘confirmed credit,’ it is not satisfied by the buyer procuring a letter of credit which is revocable. The mutual rights and liabilities as between the buyer and the banker are regulated by the terms of the contract between them under which the banker agrees to issue the required credit. Normally the banker stipulates that he will retain the documents of title as security until he has been reimbursed by the buyer. So far as the seller is concerned, however, the notification by the banker to the seller of the confirmed credit in his favour creates at least, when acted upon by the seller, an enforceable contract between the seller and the banker whereby the latter contracts to honour drafts drawn upon him in accordance with the terms of the notification. The contract between the banker and the seller thus made must be read by itself. It does not, without express words, incorporate the terms of the contract between the buyer and the seller.”<sup>6</sup>

1. *Bubby Hurry v. Hertz*, (1923) 4 Lah. 215 following *E. Clemens Horst v. Biddell Bros.*, supra.
2. *Marshall v. Naginchand*, (1916) 18 Bom. L.R. 915.
3. *Nissim I. Bekhor v. Haji Sultanalli Shustary*, supra.
4. *Steel Bros. v. Dayal*, A.I.R. 1934 Bom. 247 : 87 I.C. 67 : 47 Bom. 924 : (1923) 25 Bom. L.R. 1063 citing in re Den-

- bigh, *Atcherley In re*, (1921) 90 L.J. K.B. 836. A summary of the important English cases on c.i.f. contracts is given in the judgment ; but see *Mohanlal v. Krishna* (1928) 30 Bom. L.R. 415, at p. 420.
5. *Steel Bros. v. Dayal*, supra.
6. *Halsbury, Laws of England*, 2nd Edn., Vol. 29, p. 220. See now *ibid*, 3rd Edn., Vol. 34, p. 185.



**Contract for sale of goods to be delivered in two instalments—Wrongful refusal by buyer to take delivery of first instalment—Right to seller to cancel contract and claim damages.**

In deciding whether there has been a repudiation of the contract, regard must be had to the ratio quantitatively which the breach bears to the contract and the degree of probability or improbability that the breach will be repeated. When there is a contract for the sale of goods to be delivered in two equal instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him.<sup>1</sup>

### **Freight, insurance and wharfage.**

In a c.i.f. contract the seller as between himself and the buyer is chargeable with the amount of the freight and the insurance charges, and the buyer, if he has paid either of those charges, may take credit therefor.<sup>2</sup> In *Acme Wood Co. v. Sutherland*,<sup>3</sup> goods were sold "cost freight and insurance to Buyer's Wharf, Victoria Dock, London," and the goods were discharged in London elsewhere than at Buyer's Wharf, and under the "London Clause" in the bill of lading certain charges were paid. It was held that these London charges fell upon the seller, and not upon the buyer. Of course, the seller fulfills his contract when he puts the goods on board the ship, and hands to the consignee shipping documents and a policy of insurance in conformity with the contract, and in such a case, the consignee would be liable to pay any charges in the nature of wharfage charges on the goods.

In *The Pantanassa*, (1970) 1 All E.R. 848, according to the contract, the freight was payable in cash upon arrival of the vessel. It was held: (i) if the ship did not arrive at the destination under the terms of the contract, the freight was not payable, (ii) under this c. i. f. contract the buyer's obligation to pay freight was conditional on the arrival of the goods, and (iii) the payment of freight was the payment of the bill of lading freight to the ship against delivery, and not payment to the charterers, or the charterers' bank.<sup>4</sup>

### **Passing of property.**

In the case of a c. i. f. contract the question whether the property in the goods has passed from the seller to the buyer depends entirely on the question whether the seller has parted with the control over the disposal of the goods. When an agreement is made for the sale of specific goods in a deliverable state on "c. i. f." terms, it is not an unconditional contract because the commercial meaning of "c. i. f." imports an undertaking by the seller to do something more, namely, to put the goods on a ship and this postpones the passing of the property until the goods are shipped by the seller.<sup>5</sup> But the presumption that the property passes upon

1. *Shah Moolchand Kesarimull v. Associated Agencies*, 1941 M.W.N. 769 : 54 L. W. 217.

2. *Ireland v. Livingston* (1872) L.R.H.L. 393, at p. 406 ; *Wanke v. Wingren* (1850) 58 L.J.Q.B. 519 ; *Houlder v. Public Works Commissioners*, (1908) A.C. 276, 290 (P.C.)

3. (1904) 9 Com. Cas. 170.

4. See also *Tradax International S.A. v. R. Pagnan & Fratelli*, (1968) 1 Lloyd's Rep. 244—On facts of the case demurrage was not payable by the buyer.

5. *Biddell Brothers v. Clemens Horst and Co.*, (1911) 1 K.B. 934, C.A.



shipment is a presumption as to the intention of the parties, and may be excluded either by the express terms of the contract or by other circumstances.<sup>1</sup> In particular it is rebutted where, as is generally the case in a c.i.f. contract, the seller reserves the right of disposal of the goods until certain conditions laid down at the contract or appropriation are fulfilled.<sup>2</sup> In such a case the property does not fall until fulfilment of the conditions. It may also be rebutted where the facts of the case show that the seller never intended the mere act of shipment to operate as an appropriation of the goods to the contract either conditionally or at all.<sup>3</sup>

Since upon shipment the goods pass out of the physical possession of the seller, his intention to reserve the right of disposal is usually evidenced by his dealing with the bill of lading. He is *prima facie* deemed to reserve the right of disposal when he takes the bill of lading to his own order or to that of his agent,<sup>4</sup> but this inference being *prima facie* only, may be excluded by other circumstances.<sup>5</sup> If the seller endorses the bill of lading in blank and hands it over to his agent for delivery with his instructions that they shall not hand it over until the goods are paid for, then the seller has shown his intention to retain the disposal of the goods under his control.<sup>6</sup>

When the seller claims to retain the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until then property in goods does not pass to the buyer.<sup>7</sup>

Where goods are shipped on "c.i.f.c.i" (the last two letters standing for commission and interest) terms and documents are sent to a Bank to be delivered on acceptance of the draft, the property in the goods does not pass to the buyer until the draft is accepted.<sup>8</sup> In such a case the consignee is not entitled to include in the amount of the bank draft amounts which have no relation to the contract, or which the consignor is not entitled to charge.<sup>9</sup>

In *Tregellis v. Sewell*,<sup>10</sup> the plaintiff bought of the defendant 300 tons old Aridge rails at £5 14s. 6d. per ton, "delivery at Harburgh, cost freight and insurance; payment net cash in London less freight upon handing bill of lading and policy of insurance." It was *held* that according to the true construction of the contract the defendant did not under-

1. See Sec. 19(3) of the Act.

2. See Sec. 25 of the Act.

3. Cf. *Wait v. Baker*, (1848) 2 Exch. 1, *Gabarron v. Kreeft*, (1875) L.R. 10 Exch. 274.

4. Halsbury, *Laws of England*, 3rd Edn., Vol. 34, p. 181; *The Prinz Adalbert*, (1917) A.C. 586, P.C.

5. Halsbury, *Laws of England*, 3rd Edn., Vol. 34, pages 181, 182; *The Parchim* (1918) A.C. 157, P.C. at pp. 170, 171; cf. *East Wood & Holt v. Studer*, (1926) 31 Com. Cas. 215, per Roche J. at p. 225.

6. *Bank of Morvi Ltd. v. Baerlein Brothers*, (1924) 26 Bom. L.R. 155:

A.I.R. 1924 Bom. 325.

7. *Gulab Rai Sagar v. Nirbhe Ram Nagar*, A.I.R. 1924 Lah. 239: 4 Lah. 423: 79 I.C. 194; see also *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Ex. D. 164, 172; *Ford Automobiles v. Delhi Motor Co.*, (1922) 24 Bom. L.R. 1140.

8. *Mehta v. Heureux*, A.I.R. 1924 Bom. 422: 26 Bom. L.R. 382: 83 I.C. 766. See also *Mohanlal v. Krishna*, (1928) 30 Bom. L.R. 415.

9. *Ibid.*

10. (1862) 7 H. & N. 574; 126 R.R. 518 Affd. (1863) 7 H. & N. 584, Ex. Ch.



take to deliver the iron at Harburgh, but when he put it on board a ship bound for that place and handed to the plaintiff the policy of insurance and other shipping documents, the property in the goods passed to the purchaser.

Even where the bill of lading is made out to the buyer's order, if the seller retains possession of it until tender of the price, this also may be some evidence of an intention to reserve the right of disposal.<sup>1</sup>

"If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract. This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract."<sup>2</sup>

### Passing of the risk.

In a c. i. .f. contract the incidence of the risk is separate from the passing of the property. Under this contract the buyer is in effect the insurer and the risk *prima facie* attaches to him as and after shipment.<sup>3</sup> This is, of course, subject to the seller's obligation, which is a condition precedent to tender such shipping documents (including a policy of insurance) as are contemplated by the contract as are usual.<sup>4</sup>

In a c.i.f. contract there is no warranty by the seller that at the time of tender of the documents the goods are not lost.<sup>5</sup> Even where the seller knows at the time of the tender that the goods are already lost, the buyer is still under an obligation to pay for them.<sup>6</sup> He has his remedy either under the contract of affreightment against the ship-owners or under the policy of insurance against the insurers, and this under the c. i. f. contract, was what he bargained to get.

The seller is not bound to insure against war risks even if war is imminent when the contract is entered into,<sup>7</sup> and, if he pays extra premium for insurance against such risks he cannot recover it from the buyer.<sup>8</sup>

1. *The Kronprinsessan Margareta. The Parana*, (1921) 1 A.C. 486, at p. 511; see *Arnold Karberg & Co. v. Blythe*, (1915) 2 K.B. 379, at p. 387.
2. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 182 and authorities cited thereunder.
3. *Biddell Bros v. E. Clemens Horst & Co.*, (1911) 1 K.B. 934 C.A.; *Wancke v. Wingren*, (1889) 58 L.J. Q.B. 519; *Tregells, v. Sewell*, *supra*.

4. *Groom v. Barber*, (1915) 1 K.B. 316; *Karberg v. Blythe*, (1916) 1 K.B. 465.
5. *Groom v. Barber*, *supra*; *Re Weis & Co. Ltd. & Credit Colonial et Commercial, Antwerp*, (1916) 1 K.B. 346.
6. *Manbre Saccharine Co. v. Corn Products Co.*, (1919) 1 K.B. 198.
7. *Law & Bonar v. British American Tobacco Co.*, (1916) 2 K.B. 605.
8. *Nissim I. Bekhor v. Haji Sultanalli Shustary*, (1915) 17 Bom. L.R. 249.



### Remedies of the buyer—Right of rejection.

If under the ordinary c. i. f. contract the goods do not arrive at their destination, the consignee, having received the shipping documents and the policy of insurance has his remedy either against the ship-owner or on the policy.<sup>1</sup>

The buyer by acceptance of the documents does not thereby lose his right to reject the goods on actual delivery, if the goods are not in accordance with the contract.<sup>2</sup> The place of delivery is *prima facie* the proper place for inspection<sup>3</sup> but the circumstances of the case may show that some other and later stage is the appropriate place. In particular, where the goods to the knowledge of the seller are purchased by the buyer for delivery to a further destination, and the nature of the goods and the way in which they are packed makes it unreasonable to inspect immediately on delivery, the right to reject will be extended to the later date.<sup>4</sup> The right to reject is lost by unreasonable delay in rejecting, or by the buyer doing an act in relation to the goods inconsistent with the ownership of the seller. Re-sale of the goods before inspection, e.g. by transfer of the bill of lading to a third party is such an act but it would seem that the mere pledge of the documents of title would not be such an act.<sup>5</sup>

Where the buyer claims damages for non-delivery and there is an available market price for the goods, the measure of damage is *prima facie* the difference between the contract price and the market price of similar goods on c. i. f. terms at the time at which the document ought to have been delivered.<sup>6</sup> The date at which the goods themselves should have been delivered is irrelevant.<sup>7</sup>

It has been held under the English law that in an ordinary c. i. f. contract for sale of unascertained goods the buyer's remedy of specific performance will seldom be granted by the Court. The unpaid seller of goods under a c. i. f. contract possesses the normal rights reserved by the Act, namely, the right to withhold delivery, the unpaid seller's lien, and the right of stoppage *in transitu*. Generally under a c. i. f. contract the position of the unpaid seller is safeguarded by his ability to withhold delivery so long as he retains the shipping documents; after that as the goods themselves are not in his possession but in the possession of the ship-owner, he is normally thrown back on his right of stoppage *in transitu* if the buyer becomes insolvent.<sup>8</sup>

### Interpretation of C.I.F. contract.

If the typewritten and printed portions of a contract can be read together, effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the typewritten portion, the typewritten portion must prevail.<sup>9</sup>

1. *Acme Wood Flooring Co. v. Sutherland*, (1904) 9 Com. Cas. 170.
2. *Polenghi Bros. v. Dried Milk Co. Ltd.*, (1904) 10 Com. Cas. 42.
3. *Heilbutt v. Hickson*, (1872) L.R. 7 C. P. 438; *Saunt v. Belcher and Gibbons*, (1920) 26 Com. Cas. 115.
4. *Van den Hurk v. Martens* (1920) 1 K.B. 850; *Hardy & Co. v. Hillerns*, (1923) 1 K.B. 958.
5. *Halsbury, Laws of England*, 3rd Edn.,

- Vol. 34, pages 174, 175; *Hardy & Co. v. Hillerns*, *supra*.
6. *Sharpe (C.) & Co. v. Nosawa & Co.*, (1927) 2 K.B. 814.
7. *Ibid.*
8. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 175 and authorities cited thereunder.
9. *Sha Moolchand Kesarimull v. Associated Agencies*, 1941 M.W.N. 769; 54 L.W. 217.



*Miscellaneous cases*

(i) In a c. i. f. contract the purchaser is bound to accept the documents which represent the goods and honour the draft and is not entitled to raise at that stage any question as to whether the goods are in accordance with the contract or not. If after taking delivery of the goods, it is found that they are not in accordance with the contract, then of course the purchaser has a right to reject the goods and to pursue his remedies against the seller. The plea that the goods were not in accordance with the contract is not admissible as a defence to an action for damages for wrongful refusal to accept the documents and to honour the drafts. In refusing to accept the documents and honour the hundis the purchaser committed a breach of contract and is therefore liable to seller in damages. A claim for damages for loss of goods while they were stocked in wharfage is inadmissible. No interest can be allowed on a claim for damages. [*Gulam Ali Abdul Husain & Co. v. Muhammad Yousuff and Brother*, A.I.R. 1954 Mad. 268].

(ii) In a contract of sale c. i. f., which contained a common form appropriation clause, a further clause was inserted providing that all notices had to be sent to the buyer's agents in a certain place, and that documents also had to be sent there for payment. Such notices were in fact sent to the buyers personally in another place. It was contended that compliance with the provisions of the added clause was a condition precedent to the right to enforce the contract. It was held that the added clause was a contract, strict performance of which was required. It was a stipulation going to the root of the contract, and therefore, overrode the appropriation clause [*Luis De Ridder Ltd. v. Andre and Cie, S.A. (Lausanne)*, (1941) 1 All E.R. 380].

(iii) The characteristics generally required by the common law to exist in a bill of lading if it is to be a good tender under c. i. f. contract are so required only because it is the general custom of merchants that such a bill of lading shall possess those characteristics. If in any particular trade there is a custom that bill of lading should have other characteristics in addition to a substitution for those generally required by the custom of merchants then in that trade bills of lading to be good tender need only conform to that custom [*N.V. Arnold Otto Meyer v. Aune* (1939) 3 All E.R. 168].

(iv) In *Aruna Mills Ltd. v. Dhanrajmal Gobindram*, (1968) 1 All E.R. 113 : (1968) 1 Q.B. 655, a contract for the sale of cotton c. i. f. Bombay, was subject to English Law. It provided for a variation in price should the prevailing rate of exchange vary between the contract date and the date when the price was paid. In breach of contract the vendors failed to ship the cotton until June 27, i.e. after the last date permitted, namely, May 31, 1966. The rupee was devalued on June 6, but the buyers accepted the goods, paid the enhanced price due to devaluation, and sought to recover that additional price by way of damages for the late shipment. It was held : In the circumstances loss following from the devaluation was not too remote, for the parties had contemplated it as liable to result from late shipment. The case would be remitted to the arbitrators for the vital finding of fact whether if shipment had been made on or before May 31, the documents would in ordinary course of events have been tendered to the buyers on or before June 5.



### "F.O.B." contracts.

"F. O. B." means free on board. Under an ordinary f. o. b. contract the seller must deliver the goods on board the ship at his own expense for carriage to the buyer. Thereupon the seller's contractual liability ceases, delivery is complete, and the property and risk in goods pass to the buyer. Normally the terms of the contract either specify the ship or lien upon which the goods are to be loaded or entitle the buyer to give subsequent instructions to the seller in regard to shipment. The contract of carriage may be made by the buyer himself or it may be made by the seller on the buyer's behalf, and the buyer is liable for the freight and all subsequent charges.<sup>1</sup> If the "f. o. b." contract does not require the seller to mark the contract of carriage or is silent as to who shall make it, the duty of the seller is then to give up possession of the goods to the ship upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. The seller having paid the charges of shipment gives up possession of goods to the ship upon terms of a reasonable and ordinary bill of lading or other contract of carriage. "There his contractual liability as seller ceases and delivery to the buyer is complete so far as he is concerned"<sup>2</sup> The goods are then at the risk of the buyer; he is responsible for freight, and subject to the seller reserving the right of disposal the property passes to the buyer,<sup>3</sup> and even if, as sometimes happens, the goods are not specific or ascertained when put on board as when they form part of a large quantity, and price being payable against the bill of lading, they are still at the risk of the buyer and he has an insurable interest in them, and must pay the price on presentment of the bill of lading even if the goods have been lost.<sup>4</sup>

It is also the seller's duty to give such notice to the buyer as may enable him to insure the goods during their sea transit.<sup>5</sup> It has, however, been doubted if section 39 (3) of the Act applies to a *f. o. b.* contract.<sup>6</sup> The signed contract of sale "*f. o. b.*" normally contains sufficient information to enable the buyer to insure the goods under an open policy without any additional notice from the seller of actual shipment, and in such circumstances the seller is under no duty to give a further notice.<sup>7</sup> "*F. o. b.*" contracts also frequently contain a clause instructing the seller to effect the insurance as agent for the buyer, and add the premium to the price.

1. *Stock v. Inglis*, (1884) 12 Q.B.D. 664 C.A.; on appeal, sub nom *Inglis v. Stock*, (1885) 10 App. Cas. 263.
2. *Wimble v. Rosenberg*, (1903) 3 K.B. 743, C.A. per Hamilton L.J. See also *Cunningham Ltd. v. Robert A. Munro & Co. Ltd.*, (1922) 28 Com. Cas. 42, 45. The seller, therefore, is under no obligation to obtain a licence to export the goods if such a licence be necessary. *H.C. Brandt & Co. v. H.N. Morris & Co.*, (1917) 2 K.B. 784, C.A.
3. *Browne v. Hare*, (1858) 3 H. & N. 484, 4 H. & N. 822; 117 R.R. 811; 118 R.R. 786; Ex.Ch. *Alexander v. Gardner*, (1885) Bing. N.C. 671, 41 R.R. 651.

In this case the price was to be paid by bill at two months from the landing of the goods, but this was held not to be a condition of payment but merely a provision fixing the time of payment which therefore was two months after the goods ought in the ordinary course to have arrived; cf. *Fragano v. Long*, (1825) 4 B. & C. 219, 28 R.R. 226.

4. *Stock v. Inglis*, (1889) 12 Q.B.D. 564, C.A.
5. S. 39 (3) of the Act; see also *Wimble v. Rosenberg*, supra; *Northern Steel and Hardware Co. v. Batt (John) & Co.*, (1917) 33 T.L.R. 516, C.A.
6. See notes on pages 597 to 599.
7. *Ibid.*



The risk passes to the buyer upon shipment<sup>1</sup> although the passing of the property may have been postponed.

*Prima facie* the property passes to the buyer upon shipment<sup>2</sup> but as in a "c. i. f." contract the inference may be rebutted and the moment of the passing of the property postponed, as for instance, where the seller deals the bill of lading in such a manner as to show that he did not intend to appropriate goods to the contract, or that he has reserved a right of disposal until performance of the contract terms of payment, whether they be payment in cash or by acceptance of a bill of exchange.<sup>3</sup> In that event the goods will be the responsibility of the buyers notwithstanding that they are not entitled to possession.<sup>4</sup>

Although, if nothing is said, payment is due upon delivery of the goods by the seller to the ship,<sup>5</sup> in ordinary practice the "f. o. b." contract contains special terms for payment analogous to those common in c. i. f. contract, and payment is frequently made by "cash against documents" or by the acceptance by the buyer's agent at the port of loading of a bill of exchange against tender of the bill of lading. Where special terms of this kind are made with respect to payment, the effect is often an agreement that the property shall not pass upon shipment but only performance by the buyer of some other condition, such as acceptance of the bill of exchange tendered with the bill of lading.<sup>6</sup>

The delivery contemplated by a "f. o. b." contract is delivery on board the ship. The buyer is not entitled to demand delivery in any other manner than on board the ship,<sup>7</sup> and conversely, if the buyer fails to name a ship, the seller's only remedy is to sue for damages for breach of contract; he cannot sue for the price.<sup>8</sup> Or, in other words, the condition that the goods should be put on board is a condition which operates in favour of both parties and cannot be waived by either as if it were a condition inserted for his benefit only. If a party is named, the same rule applies.<sup>9</sup>

Where the ship on which delivery is to be made by the seller is not expressly specified in the contract, it is the duty of the buyer to name an effective ship<sup>10</sup> in time for the seller to ship the goods *i.e.*, to bring the goods alongside and perform the shipper's part of the operations of

1. Stock v. Inglis, *supra*.

2. Ibid; Browne v. Hare, (1859) 4 H. & N. 822.

3. See Halsbury, Laws of England, 3rd Edn., Vol. 34, pp. 176, 177.

4. Frebold v. Circle Products, Ltd., (1970) 1 Lloyd's Rep. 499, C.A.—As the price is sufficiently secured by retaining possession of the goods, special circumstances would seem to be required to rebut the *prima facie* inference that the parties intend the title to the goods to pass on shipment (See Chalmers, Sale of Goods Act, 16th Edn., p. 34.)

5. See Sec. 32 of the Act.

6. See Halsbury, Laws of England, 3rd Edn., Vol. 34, p. 177.

7. Wackerbarth v. Masson (1812) 3 Camp. 270; Maine Spinning Co. v. Sutcliffe & Co. (1917) 25 Com. Cas. 216.

8. Colley v. Overseas Exporters (1921) 3 K.B. 303. See also notes under S. 55.

9. Dayton Price & Co. v. Rohomotollah, A.I.R. 1925 Cal. 609; 86 I.C. 571.

10. Inglis v. Stock, (1885) 10 App. Cas. 263; Brandt & Co. v. Morris, (1917) 2 K.B. 784, C.A.



loading, so as to enable the buyer to receive them within the contract time<sup>1</sup> where, as usual, the property does not pass until the goods are loaded even although his inability to load was caused by the buyer's failure to name an effective ship.<sup>2</sup> In such a case his remedy is in damages.

The price quoted in a "*f. o. b.*" contract covers all expenses up to and including delivery on board the named ship. There-  
**Price.** after all further expenses fall upon the buyer. These expenses include freight, the cost of export duties and of import duties and of obtaining, where necessary, a licence to export.<sup>3</sup>

The buyer is not, in the absence of a special term or usage, under any duty to inspect the goods before shipment, and  
**Right of rejection.** there is no general law that the place of shipment is the place of inspection,<sup>4</sup> although the buyer is entitled to reject even before shipment if he inspects the goods then and finds them not up to contract.<sup>5</sup> The appropriate place for inspection by the buyer is a question of fact depending upon the circumstances of the case. It is normally the place of delivery of the goods in the buyer's country, but if the goods are bought for re-sale and are of a kind which cannot without injury be opened and reclosed, the proper place may be the premises of the final buyer.<sup>6</sup>

It seems from *Harlow and Jones v. Panex (International) Ltd.*, (1967) 2 Lloyd's Rep. 509, that where a buyer in "*f. o. b.*"  
**Non-acceptance by buyer of "f.o.b." contract.** contract does waive a stipulation, he cannot afterwards treat the non-performance of that stipulation as giving him the right to rescind the contract. In this case, the only necessary stipulation was that the seller would notify the buyer when the seller expected to load and then the buyer would be under the normal duty under "*f. o. b.*" contract to provide the vessel at that time, which the buyer did not do in this case. It was further held that the measure of damages was governed by S. 50 (2) of the Sale of Goods Act, 1893.

### "Ex-ship" contracts.

Under the ordinary "ex-ship" contract the seller undertakes to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein which is usual for delivery of goods of the kind in question. The seller has to pay the freight or otherwise to release the ship-owner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods. Neither the risk nor the property passes to the buyer until the goods are over the ship's sail at the port of delivery. Other wise this form of contract does not differ in its incidents from an ordinary

1. *Cunningham v. Munro & Co. Ltd.*, (1922) 28 Com. Cas. 42 at p. 45.
2. *Colley v. Overseas Exporters*, (1921) 3 K.B. 303. Where the contract expressly or by implication through the existence of a trade usage authorises the seller to deliver to the ship's agent on land in exchange for a "received for shipment" bill of lading the above rules will apply *mutatis mutandis*.

3. *Halsbury, Laws of England*, 3rd Edn., Vol. 34, p. 227.
4. *Boks & Co. v. Rayner & Co.*, (1921) 37 T.L.R. 800, C.A.
5. *Conningham Ltd. v. Munro & Co. Ltd.* (1922) 20 Com. Cas. 42.
6. *Saunt v. Belcher and Gibbons Ltd.*, (1920) 26 Com. Cas. 115; *Van den Hurk v. Martens*, (1920) 1 K.B. 850; *Molling & Co. v. Dean & Son Ltd.*, (1901) 18 T.L.R. 217.



inland contract of sale of goods providing for a particular place of delivery.<sup>1</sup>

In *Yangtze Insurance Association, Ltd. v. Luckmanjee*,<sup>2</sup> the contract was for the sale of "200 tons of Indian first class teak squares at Rs. 175 per ton ex-ship. Shipment November-December at the rate of 100 tons monthly. Payment cash against document." 144 logs out of 382 shipped on board at Colombo constituted the first instalment of this contract but after being discharged over the side of the ship were lost in a gale. It was common ground that at that time they had been paid for and were the property of the buyers.

The seller had insured the whole parcel of 382 pieces "as well as in his or their own name for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all," and the policy covered "all risk of craft and, or raft from land to land." The buyer claimed the right to sue on this policy, and in holding that he had no such right the Court said :

"Two suggestions were made in argument : one was that 'against documents' means in the language of commerce against a policy of insurance and sundry other documents ; the other, that an obligation binding the seller to insure on the buyer's behalf, might be inferred because the effect of the contract was to require payment not merely against goods delivered ex-ship in a state corresponding to the contract description but also against documents representing the goods even though, through sea perils, they were no longer in a state corresponding to the contract description.

"The first point fails because there is no evidence to show that the word 'documents' in such a connection includes a policy of insurance. A contract of sale, at a price c.f. and i., is so well understood that no proof is needed that one of the documents which it contemplates is a policy. It may be that, detached from any context, the mere expression 'shipping documents', would suggest that one of them is a policy. When, however, the expression is found in a contract, it must be construed as meaning such documents as are appropriate to the contract. In the case of sale 'ex-ship' the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery of goods of the kind in question. The seller has therefore to pay the freight or otherwise to release the ship-owner's lien and to furnish the buyer with an effectual direction to the ship to delivery. Till this is done the buyer is not bound to pay for the goods. Till this is done he may have an insurable interest in profits, but none that can correctly be described as an interest upon goods, nor any interest which the seller, as seller, is bound to insure for him. If the seller insures, he does so for his own purpose and for his own motion.

"Again, the mere documents do not take the place of the goods under such a contract. They are not the subject-matter of the sale. If an endorsed bill of lading is delivered to the buyer, it is given as a delivery order and not with any intention of making him a party liable upon it, or of vesting him with the property in the goods by the mere delivery of the

1. Halsbury, *Laws of England*, 3rd Edn, Vol. 34, pp. 178, 179, 2. (1918) A.C. 585, P.C.



document. As the goods are not at the buyer's risk during the voyage, there is nothing from which to infer an obligation on the seller, and therefore, an intention on his part, to effect an insurance on the buyer's behalf.

"It was said that 'cash against documents,' first of all implied some document other than a delivery order because of the use of the plural and secondly, must have reference to the risks of the voyage so as to make the contract analogous to a c.f. and i. sale since if 'documents' only meant 'delivery' of the goods, this would be implied by law. The answer seems to be on the first point, that the plural 'documents' would be satisfied either by two delivery orders, one for each shipment, or by two documents, a delivery order and a receipt for the freight, in the case of each shipment. On the second point there is nothing surprising if such a contract is found to express something which the law would imply, and certainly there is nothing in it to compel a Court to give simple and well-known words a meaning which does not belong to them, and which does belong to other words or letters equally well-known though not so simple. In truth, however, 'cash against documents,' does carry the matter beyond 'cash on delivery,' that is, delivery, of the goods, for it imports a convenient mercantile way of effecting the same object without the inconvenience of a payment at or contemporaneous with the discharge overside. It was admitted that payment could not be demanded, even 'against documents' till the ship had arrived with the goods. The provision enables payment to be made in the counting-house, and in the ordinary course of business, without reference to the precise stage which the process of tumbling the logs into the water may happen to have reached."

## APPENDIX G

### THE INDIAN COINAGE ACT, 1906<sup>1</sup>

(Ref. page 243 ante)

**6. Denominations, dimensions, designs and composition of coins** :—Coins may be coined at the mint for issue under the authority of the Central Government of such denominations not higher than one hundred rupees, of such dimensions and designs, and of such metals or of mixed metals of such composition as the Central Government may, by notification in the Official Gazette, determine.

**13. Coin when a legal tender** :—(1) The coins issued under the authority of Section 6 shall be a legal tender in payment or on account,—

- (a) in the case of a coin of any denomination not lower than a rupee for any sum ;
- (b) in the case of a half-rupee coin, for any sum not exceeding ten rupees ;
- (c) in the case of any other coin, for any sum not exceeding one rupee :

1. The text of the provisions of the Act here is as on 1-5-1969.



Provided that the coin has not been defaced and has not lost weight so as to be less than such weight as may be prescribed in its case.

(2) All silver coins issued under this Act after the 10th day of March, 1940 and before the commencement of the Indian Coinage (Amendment) Act, 1947<sup>1</sup> shall continue as before to be a legal tender in payment or on account:—

- (a) in the case of a rupee coin, for any sum ;
- (b) in the case of a half-rupee coin, for any sum not exceeding ten rupees ;
- (c) in the case of a quarter-rupee, for any sum not exceeding one rupee :

Provided that the coin has not been defaced and has not lost weight so as to be less than

- (i) 176.4 grains Troy in the case of a rupee coin, or
- (ii) 88.2 grains Troy in the case of a half-rupee coin, or
- (iii) such weight as may be prescribed in the case of a quarter-rupee coin.

(3) All nickel copper and bronze coins which may have been issued under this Act before the 24th day of January, 1942 shall continue as before to be a legal tender in payment or on account for any sum not exceeding one rupee.

(4) All new coins in the naya paisa series, designated as such under the notification of the Government of India in the Ministry of Finance, Department of Economic Affairs, No. S. R. O. 1120, dated 11th May, 1956 which may have been issued under this Act prior to the commencement of the Indian Coinage (Amendment) Act, 1964, shall continue to be a legal tender in payment or on account,—

- (a) in the case of a half-rupee of fifty naya paise coin, for any sum not exceeding ten rupees :
- (b) in the case of any other coin, for any sum not exceeding one rupee.



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